

**The London School of Economics and Political Science**

# **Justice in Conflict: The ICC in Libya and Northern Uganda**

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A thesis submitted to the Department of International Relations of the London School of Economics for the degree of Doctor of Philosophy, London.

8 September 2014.

## **Declaration**

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## Abstract

The thesis examines the effects of interventions by the International Criminal Court (ICC) on peace, justice and conflict processes in northern Uganda and Libya. The 'peace versus justice' debate, wherein it is argued that the ICC has either positive or negative effects on 'peace', has spawned in response to the Court's interventions into active and ongoing conflicts. The thesis is a response to and engagement with this debate. Despite often seeming persuasive, claims within the 'peace versus justice' debate have failed to set out a coherent research agenda on how to study the effects of the ICC's interventions on 'peace'. Drawing on theoretical and analytical insights from the fields of conflict and peace studies, conflict resolution and negotiation theory, the thesis develops a novel and nuanced analytical framework to study the Court's effects on peace, justice and conflict processes. This framework is applied to two specific cases: the ICC's interventions in Libya and in northern Uganda. The core of the thesis examines the empirical effects of the ICC on each case. Approximately 80 interviews were conducted with key figures in Libya, Uganda and at the ICC. In its comparative analysis, the thesis examines *why* the ICC has the effects that it does, delineating the relationship between the interests of states that refer situations to the ICC and the ICC's self-interests and arguing the negotiation of these interests determines who / which side of a conflict the ICC targets and thus its effects on peace, justice and conflict processes. While the effects of the ICC's interventions are ultimately mixed, the thesis aims to contribute to a more refined way to study the effects of the ICC and to further our understanding of why the ICC has the effects that it does.

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### **List of Acronyms**

**AU** – African Union  
**CAR** – Central African Republic  
**DDR** – Disarmament, Demobilization and Reintegration  
**DRC** – Democratic Republic of Congo  
**GNC** – General National Congress  
**GoS** – Government of Sudan  
**GoSS** – Government of South Sudan  
**GoU** – Government of Uganda  
**HRW** – Human Rights Watch  
**HSM** – Holy Spirit Movement  
**ICC** – International Criminal Court  
**ICD** – International Crimes Division (of the Ugandan High Court)  
**ICTR** – International Criminal Tribunal for Rwanda  
**ICTY** – International Criminal Tribunal for the Former Yugoslavia  
**LIFG** – Libyan Islamic Fighting Group  
**LRA** – Lord's Resistance Army  
**LRM** – Lord's Resistance Movement  
**NATO** – North Atlantic Treaty Organization  
**NRA/M** – National Resistance Army / Movement  
**NTC** – National Transitional Council  
**OPCD** – Office of Public Counsel for the Defence  
**OTP** – Office of the Prosecutor  
**SCSL** – Special Court for Sierra Leone  
**SPLA/M** – Sudan People's Liberation Army / Movement  
**STL** – Special Tribunal for Lebanon  
**TJ** – Transitional Justice  
**UK** – United Kingdom  
**UN** – United Nations  
**UNSMIL** – United Nations Support Mission in Libya  
**UPDA** – Uganda People's Defence Army  
**UPDF** – Uganda People's Defence Forces  
**US** – United States

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## **Chapter 1: Justice in Conflict**

*The great call for the truth about the past, for filling in the blanks and unmasking falsehoods is, to a great extent, based on the conviction that the truth will disclose the guilt of those who we hate or condemn and will put laurels on the heads of those that we love or approve of, and we will be seen the way we see ourselves. – Krystyna Kersten (1986)*

### **Introduction**

Twenty-five years after the war in northern Uganda broke out, a diminutive former commander of the Lord's Resistance Army (LRA) was escorted by local police officers into a courtroom in Gulu. On 11 July 2011, as a marching band played triumphant music outside of the courthouse, a throng of journalists, curious observers and relatives gathered to watch as a shackled Thomas Kwoyelo became the first LRA commander brought before judges to face war crimes charges. In the stifling heat of the overcrowded courtroom Kwoyelo's trial began.

Simultaneously, some 2,500 miles northwest of Gulu, the forty-year rule of Muammar Gaddafi was crumbling. Just a few months earlier, Libyan citizens had taken to the streets to protest the Gaddafi regime. Their demonstrations quickly escalated into calls for regime change. By summer 2011, the country was mired in a see-sawing civil war. There was no clear indication that the conflict would end anytime soon, even with a NATO intervention supporting the Libyan opposition. A military stalemate loomed, prodding the parties to the war to consider whether a political solution to the conflict might be reached.

With the exception of their shared temporal relationship, these events might at first appear unconnected and disparate. They aren't. The conflict in northern Uganda between the LRA and the Government of Uganda as well as the uprising and civil war in Libya between the Gaddafi regime and the Libyan opposition were targets for intervention by the International Criminal Court (ICC). In both northern Uganda and Libya, proponents of international criminal justice hailed the involvement of the ICC. In both conflicts, others decried it. Both cases emerged as focal points for the so-called "peace versus justice" debate.

Are interventions by the International Criminal Court conducive to peace? Broadly, there are two viewpoints in this continuing debate: on the one hand, proponents maintain that the ICC is necessary for peace and can yield net positive effects on conflict resolution. There are no costs, they insist, to pursuing both peace and justice simultaneously. On the other, skeptics and critics maintain that interventions by the ICC are ultimately deleterious and risk undermining attempts to resolve conflict peacefully. If anything peace must come first. The dichotomous nature of the debate is

unsatisfactory. It isn't sufficient to simply conclude that some believe there is no peace without justice while others will argue that there is no justice without peace. Yet this dominant framing continues to define debates regarding actual and potential ICC interventions. Where there is a potential for the ICC to intervene in an ongoing and active conflict, invocations of the arguments that characterize the “peace versus justice” debate are soon to follow. But as the ICC matures as an institution, a more sophisticated and nuanced understanding of the ICC impact on the complex dynamics of peace, conflict and justice processes is needed. Contributing to this aim is the ultimate goal of this thesis.

This introductory chapter proceeds as follows. In the first section, the chapter offers a brief outline of the emergence and development of the “peace versus justice” debate, arguing that the debate has become the dominant framing of ICC interventions into ongoing conflicts. The chapter demonstrates how the ICC was made – and is predisposed – to intervene in active and ongoing conflicts and has been directed to by individual states and the UN Security Council. The third section addresses the thesis' research questions and research design. In the fourth section, the subsequent chapters of the thesis are outlined. The chapter concludes with a discussion of the overall findings of the thesis.

## **I. The ICC and the Emergence of the Peace-Justice Debate**

The project of international criminal justice was revived with great enthusiasm and productivity in the mid-1990s. The International Criminal Tribunal for the Former Yugoslavia (ICTY) was created as a response to the Balkan conflict in the 1990s and the International Criminal Tribunal for Rwanda (ICTR) was set up in the wake of the 1994 Genocide. Both were established via the UN Security Council's Chapter VII powers and sought to prosecute individuals deemed criminally responsible for atrocities. Later, so-called 'hybrid tribunals' in Sierra Leone (SCSL), Cambodia (ECCC) and Lebanon (STL) were added to a growing cohort of international institutions mandated to investigate and bring individuals responsible for international crimes to justice. In 1998, negotiators met in Rome to negotiate the Rome Statute of the International Criminal Court (ICC), creating the first-ever permanent institution of international criminal justice. With the sixtieth ratification of the Statute in July 2002, the Court became a functioning entity. The establishment of this diverse array of institutions, all of which share the goal of bringing to account individual perpetrators of mass atrocities, had been resuscitated from its alleged Cold War coma; the legacy of the Nuremberg Tribunal, where senior Nazi officials were tried following WWII, had seemingly and finally been fulfilled.

But this new era of international criminal justice is distinct from the Nuremberg model. The Nuremberg and Tokyo International Military Tribunals were set up to prosecute and punish individuals *following* the Allied powers' victory in WWII. Since the 1990s, however, the practices of war, conflict resolution and international criminal justice have collided and the ICC is the pinnacle of this collision. As elaborated below, the ICC is an institution predisposed to intervening while conflicts are ongoing.

At the same time, since the end of the Cold War, civil wars have increasingly been resolved through negotiations rather than military victory (see Licklider 1993; Zartman 2005, 2; Wallenstein 2007; Sisk 2008, 195; Toft 2010, 1). The introduction of international criminal justice into the dynamics of political conflict and conflict resolution has created new dilemmas and challenges for actors seeking to resolve war through negotiated settlement. To be absolutely clear: the ICC has complicated conflict resolution. What is not clear is how it has done so and whether this is ultimately a help or hindrance to the establishment of peace.

The dilemma of pursuing criminal accountability in the context of ongoing and active conflict has been captured in the so-called "peace versus justice" debate. It should be noted that the debate did not first emerge with the creation of the ICC. Its essence was apparent during the Cold War. As early as 1961, the German scholar Otto Kirchheimer contemplated whether justice may "backfire... if it induced the leaders of a future war to fight to the bitter end rather than surrender and face the possible future of

war criminals.” (See Elster 2006, 49). Scholars of international relations also wrestled with the theoretical relationship between peace and justice (see, e.g. Bull 2002) whilst the political transitions in South America were characterized by a balancing act between the prerogatives of justice and the desire for stability and order (see e.g., Jelin 1994; Nino 1996; Lutz and Sikkink 2000; Crenzel 2008). Despite the fact that the scales of peace and justice generally balanced heavily in favour of peace as order and stability (Banks 1987, 261-265) the pursuit of international justice and accountability in conflict and transitional states *prior* to the end of the Cold War was instrumental in the development of the global human rights movement and in the subsequent creation of the ad hoc tribunals for Rwanda and the former Yugoslavia – and the ICC (see Peskin and Boduszynski 2003, 1121; see also Kerr and Mobekk 2007; Akhavan 2009).

The creation of the ICTR and ICTY fundamentally altered the functional relationship between peace and justice. Both ad hoc tribunals were established by the United Nations under Chapter VII of the UN Charter (1945) which pertains to “Actions with Respect to Threats to the Peace, Breaches of the Peace, and Acts of Aggression”. In particular, the ICTY was created to provide justice as well as contribute to the restoration of peace and security in the former Yugoslavia.<sup>1</sup> This indicated a significant change in how justice would be pursued. From the Nuremberg trials to the trials of Argentina's military junta, justice had been pursued *after* the conclusion of violence. The ICTY, however, was to contribute to bringing justice and resolving an *ongoing* conflict. As Simon Chesterman (2001, 149) notes, “[t]he decision to commence prosecutions while the conflict continued was a substantial departure from the Nuremberg mold.” The tribunal, and by extension international criminal law, surfaced as a central feature of conflict resolution efforts.

Predictably, the question and controversy of peace versus justice embroiled the tribunal from its inception (Akhavan 2009). The quandary was clear: how could the international community seek a negotiated settlement to the Bosnian war when those with whom they sought to negotiate were precisely the actors who were under investigation by the Tribunal? (See Bass 2000, 211; William and Scharf 2002, 23). For some, a tribunal that was initially perceived as “little more than a public relations device” (Holbrooke 1999, 189-190) became a tool that could play a key role in complementing efforts to establish peace. For others, it emerged as an institution which potentially conflicted with and obstructed efforts to end the war. The stakes – and the expectations – were high. In 1995, then ICTY Prosecutor Richard Goldstone (1996, 486) wrote that what brings peace and justice together are decisions to confront the past which “may be crucial to the prospects for future peace and prosperity.

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<sup>1</sup> See Statute (1993)

The stability of an emerging democracy, and perhaps even the outcome of a war that is still being waged, may depend on the wisdom behind such a policy decision.”

While other tribunals, notably the Special Court for Sierra Leone, have also inspired debates on the relationship between peace and justice (see Hayner 2007, Moghalu 2008, 104-125), it was the creation of the International Criminal Court (ICC) which made permanent a debate which was until then sporadic, context-specific and ad hoc.

## II. The Politics of ICC Interventions in Ongoing and Active Conflicts

The ICC has emerged as a potential actor in ongoing conflicts in which war crimes, crimes against humanity and genocide have been perpetrated and where the Court has – or has been granted – jurisdiction. This “potential to shift the delivery of post-conflict justice towards in-conflict justice” is a defining feature of the Court and a result of its permanence (Kastner 2011, 14). As Mahnoush H. Arsanjani and W. Michael Reisman (2005, 385) write, “[t]he ICC is the archetypal *ex ante* tribunal”, courts which are “established *before* an international security problem has been resolved or even manifested itself, or are established *in the midst* of the conflict in which the alleged crimes occurred.” (See also Sriram 2007, 579).

Given the combination of its limitless, forward-looking temporal jurisdiction in those states where it has jurisdiction to investigate crimes and the fact that it can only investigate situations after 1 July 2002, the Court is predisposed to intervening in active conflicts (see also Waddell and Clark 2008a, 8). Where the Court has jurisdiction, there is nothing to preclude the Prosecutor from intervening before a conflict has ended. Debates on potential interventions in Syria (Jose 2013; Cronin-Furman 2014), Palestine (Falk 2014; Human Rights Watch 2014), and Ukraine (Agence France-Press 2014; Phillips 2014; Whiting 2014) illustrate that the ICC is *expected* to be amongst the first-responders when atrocities occur in the context of violent conflict and unrest. As Rebecca Hamilton (2014) recently observed: “Popular sentiment points to the International Criminal Court (ICC) as the obvious venue for any crisis that makes world headlines.” Moreover, the widespread claims, as explored in Chapter 2, that international criminal law can deter potential perpetrators and that there is “no peace without justice” suggest that, for proponents, it is *necessary* that the Court intervene in ongoing conflicts – and that it does so regularly in order to affirm the utility of justice as a means to resolve conflict and bolster peace.

**Table 1.1:** ICC Interventions to Date

State (Date of ICC Intervention)	Trigger Type	Primary Focus of ICC Investigation at time of Intervention	Status of Conflict as of June 2014
Uganda (2003)	Self-Referral	Ongoing Conflict	Active
Democratic Republic of Congo (2004)	Self-Referral	Ongoing Conflict(s)	Active
Central African Republic (2004)	Self-Referral	Ongoing Conflict	Active
Darfur / Sudan (2005)	UNSC Referral	Ongoing Conflict	Active

Kenya (2010)	Proprio Motu	2007/08 Post-Election Violence	Concluded (2008)
Ivory Coast (2011)	Proprio Motu	2010/11 Post-Election Violence and Ongoing Conflict	Concluded (April 2011)
Libya (2011)	UNSC Referral	Revolution and Ongoing Conflict	Concluded (October 2011)
Mali (2012)	Self-Referral	Ongoing Conflict	Active

The proclivity of the ICC to intervene in active wars (see Table 1) is central to the “peace versus justice debate”. Indeed, the “conceptual challenge” at the core of the peace-justice debate is a product of the ICC being “the first permanent international war crimes tribunal... which will regularly be active during ongoing conflict.” (Papenfuß 2008, 1). But *how* has the ICC intervened in ongoing and active conflicts? Interventions into ongoing conflict do not derive from some Archimedean nowhere devoid of politics and political interest. The aim of this section is to demonstrate *how* and by *whom* the ICC has been requested to intervene in ongoing wars.

There are three ways in which the ICC's jurisdiction can be triggered, as mandated by Article 13 of the Rome Statute (1998): where a situation is referred by a state party; where a situation is referred to the ICC by the United Nations Security Council, acting under Chapter VII of the UN Charter; or upon the Prosecutor's own volition, via the Prosecutor's *proprio motu* powers. To date, the ICC has opened eight official investigations – four by self-referral (northern Uganda, Democratic Republic of Congo, Central African Republic, and Mali), two in response to UN Security Council referrals (Darfur and Libya), and two via the Prosecutor's 'proprio motu' powers (Kenya and Ivory Coast). The former two referral types – self-referrals and UN Security Council referrals – have guided the ICC into intervening in ongoing and active conflicts (see Table 1 above). These two referral types are thus the focus of this thesis.

#### *(i) Self-Referring Governments and the ICC*

The early years of the ICC's existence were marked by a certain level of institutional insecurity. The creation of the Court in 1998 was an unprecedented achievement. It promised to transcend the traditional realpolitik of international relations and offer independent justice and accountability in the name of humanity and liberal cosmopolitanism (see Ainley 2008; Franceschet 2008; Kersten 2014a). But serious questions faced the institution, the answers to which would determine whether it became a permanent feature of international relations: Would the international community support the ICC

sufficiently for it to survive? Could an independent Prosecutor stand up to major powers? How would it get its first cases and where would it get them from? How would states react to an international tribunal intervening in their sovereign, domestic affairs? Judge Sang-Hyun Song (2010), the Court's current President, has conceded that “even the judges first appointed in 2003 were unsure that the Court could survive the scepticism and hostilities. Privately some judges suggested that it could collapse within a couple of years.” In order to avoid such a fate, the Court and the Office of the Prosecutor in particular, needed a politically sensitive – and cautious – strategy.

The issue that dominated the Court's first years was its tumultuous relationship with the United States. The administration of George W. Bush pursued policies to actively undermine and isolate the Court.<sup>2</sup> If the ICC was to survive, it would need to demonstrate that it did not pose a threat to the US. As David Bosco (2014) has shown, in its first years, the ICC's policy towards the US, and major powers more broadly, was one of accommodation. This is demonstrated if not by an admission by the Prosecutor than through his decision-making and the Court's record. As Bosco (ibid., 19) writes: “By focusing on those areas of the world where major powers support the court's involvement – or at least do not oppose it – the prosecutor may be able to convince even skeptical countries that the court poses little danger to their interests”. This could be achieved by opening investigations in states where US interests were few and by demonstrating that the Court would not play roughshod with the principle of sovereignty. The Court focused primarily on accepting invitations from ICC member-states to investigate conflicts taking place on their territories. This came as somewhat of a surprise to Court observers. The idea behind state referrals as a trigger mechanism was that states would refer *each other* and not *themselves* to the Court (Schabas 2007, 145). But these 'self-referrals' were useful for the new Court and the Office of the Prosecutor (OTP) recognized their potential political utility. As Benjamin N. Schiff (2008, 225) writes, “the OTP shifted emphasis from a legalistic approach to a somewhat more political-diplomatic one” in an attempt to actively negotiate self-referrals from states. As of 2014, the Court has opened four investigations into situations following the receipt of a self-referral: northern Uganda (2003), the Democratic Republic of Congo (2004), the Central African Republic (2004) and Mali (2012). Each situation constituted an ongoing and active conflict at the time of referral. They are also notable for the fact that none have major power's vested interests at stake and all are situations in which the UN had been heavily involved prior to the ICC's intervention (Bosco 2014, 89; see also

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<sup>2</sup> For analyses of the relationship between the US and the ICC see Schabas (2004); Ralph (2007); Feinstein and Lindberg (2009) .

Sachs 2008, 6; Schabas 2010, 548).

*(ii) The Security Council Referrals and the ICC*

The relationship between the UN Security Council and the ICC played a dominant – and contentious – role at the Rome Statute negotiations (Glasius 2006, 47-60; Schabas 2012, 90-91). Proponents of the ICC were concerned that giving the UN Security Council too much influence over the functioning of the Court would deeply politicize the ICC's work and place international criminal justice at the whim of the UN Security Council's five permanent members. This was precisely the politico-judicial relationship they had sought to avoid and believed could be transcended.<sup>3</sup> Proponents consequently sought a Court that would be independent of the Council and centered on an independent Chief Prosecutor. Security Council members – especially the United States, Russia and China – opposed an independent Prosecutor who, they felt, could handcuff the Council in its role of maintaining and restoring international peace and security (Glasius 2006, 56). Ultimately, a compromise position was reached in an attempt to assuage the concerns of all sides (Glasius 2006, 51). The so-called “Singaporean compromise” was reflected in Article 16 of the Rome Statute (1998), which allows the Security Council to defer any ICC investigation or prosecution deemed to be a threat to international peace and security for up to 12 months (renewable yearly). Crucially, under Article 13b of the Rome Statute (1998), the Council is also able to refer non-member states to the Court under Chapter VII of the UN Charter. To date, it has done so on two occasions – in the case of Darfur in 2005 and in the case of Libya in 2011. Both were ongoing and active conflicts at the time of referral.

In 2005, the ICC received a referral of the situation in Darfur from the UN Security Council. This required an abstention from the US (as well as non-ICC member states Russia and China) during the vote on Resolution 1593 (United Nations Security Council 2005). The Office of the Prosecutor readily accepted the referral when it was made.<sup>4</sup> Since then, five warrants have been issued including,

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<sup>3</sup> For more on the ICC-Security Council relationship, see Kaye (2013).

<sup>4</sup> It is arguable that the Prosecutor does not have much of a choice in accepting UNSC referrals. If the OTP were to reject such a referral (claiming, for example, that accepting a referral was not in the “interests of justice”), the Office would be required to justify its decision to the ICC's Pre-Trial Chamber. It is not a given that the Pre-Trial Chamber would accept the OTP's decision. If the Pre-Trial Chamber was not convinced, it could request that the OTP “reconsider” its decision. This may have the effect of the OTP privileging UNSC referrals. This is detailed in Article 53 of the Rome Statute.

most dramatically the indictments for Sudanese President Omar al-Bashir on the grounds that he is responsible for the commission of war crimes, crimes against humanity and genocide in Darfur.<sup>5</sup>

In February 2011, the UN Security Council once again invited the ICC to investigate an ongoing and active conflict, this time with a unanimous referral of Libya to the Court. At the time, India's Ambassador to the UN, sitting on the Security Council, exclaimed his belief that “the referral of the situation to the International Criminal Court would help to bring about the end of violence.” (See Security Council 2011). Richard Dicker of Human Rights Watch (2011a) praised the Security Council, stating that: “The United Nations is showing concerted international resolve to pressure Gaddafi and his henchmen to end their murderous attacks on the Libyan population.” What both statements made clear was the conviction that when the Security Council refers situations to the ICC, the role of the Court is to contribute to a cessation of violence in the context of an active political conflict.

As a permanent institution with a mandate to 'end impunity', the ICC is tailored to intervene in ongoing wars. It has done so at the request of member-states and the UN Security Council. It is the effects of the Court's interventions that the “peace versus justice” debate – and this thesis – seeks to establish.

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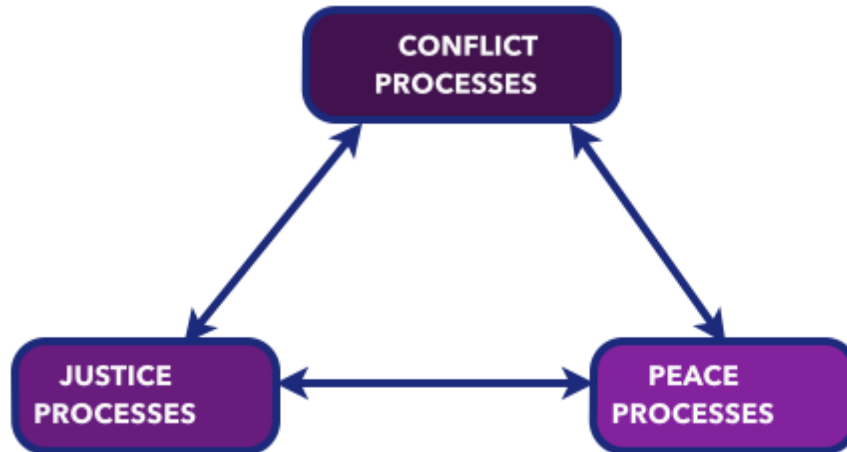
<sup>5</sup> A warrant of arrest was initially issued in 2008 after Bashir was charged with war crimes and crimes against humanity. At the time, the Judges deemed the evidence insufficient to also include a charge of genocide. However, in 2010, the ICC issued an additional arrest warrant, this time charging Bashir with genocide.

### III. Research Questions and Aims

This thesis is a study of the effects of the ICC's intervention on peace, justice and conflict processes – and not just on 'peace'. The narratives, practices and processes of peace, conflict and justice cannot be disentangled. They are inter-dependent and feed into one another (see Chart 1.1).

**Chart 1.1:** Peace, Justice and Conflict Processes

The thesis is guided by three separate but related research questions:



- (i) *How* should we study the effects of the ICC on the conflicts in which it intervenes?
- (ii) *What* are the effects of the ICC on peace, justice and conflict processes in northern Uganda and Libya?
- (iii) *Why* does the ICC have these effects on peace, justice and conflict processes?

*(i) How should we study the effects of the ICC interventions?*

As shown in detail in Chapter 2, the arguments which claim that the pursuit of international criminal justice produces positive effects on 'peace' (ending impunity; deterring future crimes; marginalizing perpetrators; and building legacies conducive to peace) and claims which insist that justice makes attaining peace more difficult (instigating violence; undermining peace negotiations; being too divorced from local realities; and being no substitute for more concerted, coercive action) are all problematic. They have entrenched a binary, dichotomous vision of the relationship between peace and international criminal justice. It is hoped that this thesis can contribute a clearer research design for identifying and assessing the Court's impacts on the situations in which it intervenes.

In order to answer the question: How should we study the ICC's impacts?, the thesis employs

insights from the fields of conflict resolution, negotiation theory and conflict and peace studies in order to develop a novel analytical framework which can provide a rigorous and nuanced framework to identify and assess the effects of the ICC on peace, conflict and justice processes. The analytical framework uses neither wholly deductive nor inductive reasoning, but rather abductive (see Dubois and Gadde 2002; Kolko 2010; Thomas 2010). In developing the framework, a broad review was conducted of conflict and peace studies, conflict resolution and negotiation literature as well as literature on the effects of the international criminal justice on peace processes in order to identify key theories relevant to peace, justice and conflict processes. The analytical framework was, in the first instance, derived from this review. Second, the framework was used as a means to measure the effects of the ICC on interventions in two cases, Libya and northern Uganda. Data from secondary and primary sources was collected and 'fed into' the analytical framework (see below). As additional data was received, the framework was revised and, in turn, more relevant data was sought. In other words, these phases of research were interrelated rather than separate. In their analysis of abductive logic, Dubois and Gadde (2002, 555) refer to this process as “systemic combining” and observe that:

The preliminary analytical framework consists of articulated ‘preconceptions’. Over time, it is developed according to what is discovered through the empirical fieldwork, as well as through analysis and interpretation. This stems from the fact that theory cannot be understood without empirical observation and vice versa.

The thesis, as elaborated in greater detail below, rests on case study research. Such research requires the development of “theoretical frameworks during the course of the research which inform and make sense of the data and which can be systematically examined during the case study for plausibility” (Hartley 2005, 324). Again, the processes of generating the analytical framework and generating empirical data were never entirely divorced. They worked in symbiosis, each refining the other as research progressed. Importantly, this approach is dynamic and does not portend to provide rigid conclusions or generalizations regarding the ICC's effects on peace, conflict or justice processes (Schvaneveldt and Cohen 2010).

Ultimately, the development of this analytical framework is intended to challenge the binary conclusions regarding the effects of ICC interventions on conflicts and to expose the fact that the Court has complex, diverse effects through time, within and between cases, as well as on different elements of any given peace process. The framework allows for a novel and nuanced way in which to employ structured and rigorous research to study the ICC and its impacts on ongoing and active conflicts.

As suggested above, the framework was used as a roadmap to examine and assess the effects of

ICC interventions in northern Uganda and Libya. As a result, a case-study approach is employed (Yin 2003, 4-11). The benefit of case-study analysis is that it fosters both theoretical and empirical contributions. As Jean Hartley (2005, 323) writes, the aim of case-study research “is to provide an analysis of the context and processes which illuminate the theoretical issues being studied.” Hartley (Ibid.) reminds us that “[a] case study is not a method but a research strategy.” In line with such a strategy, the research draws on multiple sources of evidence (Eisenhardt 1989, 534; Yin 2003, 11): semi-structured interviews, relevant reports and documents, and secondary source literature. In addition, the thesis benefited from “opportunistic” data collection (see Hartley 2005, 324) in the form of diaries from a former LRA commander. Wherever possible, data collected through fieldwork was cross-validated and triangulated with secondary sources and documents (Wolcott 1988, 192; Stake 1995, 107-8). Approximately sixty-five interviews were conducted with individuals who had intimate knowledge of the conflicts in northern Uganda and Libya.<sup>6</sup> They included political figures involved in negotiations, senior combatants, civil society leaders, journalists, and staff from international organizations. Given the diversity of actors interviewed, a semi-structured approach to conducting interviews was employed.

Three months were spent based at the Refugee Law Project in Kampala and Gulu, northern Uganda. During this period, approximately forty interviews were conducted. Gathering primary data proved much more difficult with regards to Libya. Over a year was spent at the London-based Lawyers for Justice in Libya (LFJL) with the aspiration of traveling with LFJL to Libya to conduct interviews. However, as time passed and the security situation deteriorated this became unfeasible. As a result, between May 2013 and January 2014, interviews were conducted with approximately 20 individuals with first-hand knowledge of Libya and the civil war via Skype and telephone.

## *(ii) What are the Effects of ICC Interventions in northern Uganda and Libya?*

Chapter 2 of this thesis outlines the key arguments made for (ending impunity, marginalization, and deterrence / prevention) and against (instigating violence, undermining peace negotiations and acting as a moral hazard) the pursuit of international criminal justice in the context of ongoing and active conflicts. What becomes clear in this review is that the views expressed within the “peace versus justice” debate remain polarized (Crocker 2004, 2; Sriram 2004, 6; Freeman 2009, 25; Clark 2011). The core of this thesis, Chapters 4-7, shows that claims within the “peace versus justice” debate were applied to the ICC's intervention in both northern Uganda and Libya, but that they do not represent an

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<sup>6</sup> A list of interviewees can be found in the appendix of this thesis.

accurate picture of the actual effects of the ICC on peace, justice and conflict processes in either case.

These two cases have never been studied in relation to each other, but were chosen for their points of comparison. The ICC intervened in northern Uganda after the situation was referred to the Court by the Government of Uganda in 2004. The self-referral produced the Court's first-ever investigation. In 2005, the Court issued five arrest warrants for senior commanders of the Lord's Resistance Army (LRA). While the conflict in the region has seen very little international military engagement, official peace negotiations were held between the Government and the LRA in Juba from 2006-2008. In contrast, the situation in Libya was referred to the ICC by the UN Security Council in 2011. The Court subsequently issued arrest warrants for government leaders, including Muammar Gaddafi, at the behest of the UN Security Council and in combination with a military engagement led by NATO. No official peace negotiations took place and the Gaddafi regime is no longer in power. The divergence in referral-type, the targets of ICC indictments and the existence of official negotiations provide valuable differences and possible comparative insights into the effects of the ICC across these two cases.

*(iii) Why does the ICC have the effects that it does?*

Rather than solely identifying and assessing the effects of the ICC on the conflicts in which it intervenes, this thesis takes an extra step in asking *why* the Court has the effects on peace, justice and conflict processes that it does. This can only be answered, it is argued, by looking behind the veil of ICC decision-making. There is a risk of viewing the Court as an institution that produces effects via its prosecutorial decisions and judicial rulings. It is argued that what goes on *within* the Court and how the specific decisions made in the ICC and, in particular, the Office of the Prosecutor (OTP), shapes the effects of the Court on the situations in which it intervenes.

In order to answer why the ICC has the effects that it does, it was necessary to conduct interviews with staff members at the Court. In 2013 and in the subsequent months, interviews were conducted with current and former senior ICC staff. These semi-structured interviews were conducted in The Hague as well as over Skype and were aimed at ascertaining the link between the OTP's decision-making and the effects the Court ultimately has on peace, conflict and justice processes.

#### IV. Thesis Outline

The pursuits and practices of conflict resolution and international criminal justice have become increasingly intertwined. The Court is predisposed to intervening in ongoing wars: out of the eight situations in which the ICC has issued arrest warrants, six constitute active violent political conflicts at the time of the Court's intervention (see Table 1 above). The Court has the potential to shape efforts to resolve conflict through peaceful means and a debate about the relationship between 'peace' and 'justice' will continue to capture the imagination of scholars and observers. But what insights has this debate generated thus far – and are they sufficient in identifying and assessing the effects of the ICC on peace, justice and conflict processes?

The short answer is: 'no'. Chapter 2 provides a comprehensive and critical examination of key arguments put forward in the “peace versus justice” debate. The core of the chapter outlines and assesses the arguments that have been proffered for and against the role of international criminal justice in the context of ongoing and active conflicts. The arguments in favour of pursuing international criminal justice trials as means to positively affect peace examined in this chapter are: ending impunity; the potential deterrence effect of criminal prosecutions; and the marginalization of perpetrators. The arguments examined against the pursuit of accountability in the context of ongoing conflict are: that trials instigate and prolong violence; that international criminal justice undermines peace negotiations; and that accountability is no substitute for more concerted action to end war. It is demonstrated that neither proponents nor critics are able to conclusively show that there is “no peace without justice” or “no justice without peace.” But should the ICC be judged on its capacity to influence 'peace'? Using claims made by senior figures at the Court, the chapter argues that it can and it should. However, given that the claims made to date – on either side of the debate – are unsatisfactory, there is a need to rethink *how* to study the effects of the ICC in a way that allows for a more nuanced assessment of the effects of the Court on peace, justice and conflict processes.

A more nuanced examination and treatment of the effects of the ICC can be achieved by embracing key insights from scholarship on peace negotiations, conflict resolution, and conflict and peace studies. This is the aim of Chapter 3. Drawing on theoretical insights from the aforementioned fields, the chapter develops an analytical framework that parses out key phases, dynamics and issues that are widely recognized as relevant to the success and failure of peace processes (see Chart 3.1).

It is argued that the primary effect of ICC interventions on ongoing conflicts is on the conflict narrative – the dominant understanding and discourse of the causes and dynamics of the war, and on the attitudes and incentives of warring parties towards committing to a peace process. The effect of the

ICC on these two issues subsequently affects the three distinct stages of a peace process: the pre-negotiation, negotiation and post-negotiation phases. Key constitutive elements of these phases of a peace process are delineated and the possible effects of the ICC on each are discussed. In the pre-negotiation phase, these are: the timing of negotiations; the location of peace negotiations; and the mediation strategies employed to get the parties to the negotiation table. In the peace negotiation phase, the potential effects of the ICC on the composition of delegations at peace talks and the agenda of the negotiations are outlined. In the post-negotiation phase, the framework questions whether a given peace process was actually about peace or was susceptible to spoilers, as well as the potential effects of the Court on the creation and implementation of post-conflict justice and accountability mechanisms. This framework provides the roadmap that is subsequently employed to assess the two case studies at the heart of the thesis, namely the ICC's interventions into northern Uganda and Libya.

In 2003, the Government of Uganda (GoU) requested that the ICC intervene and investigate the situation in northern Uganda where the GoU had been engaged in a long-standing and brutal conflict with the Lord's Resistance Army (LRA). In 2005, the Court issued five arrest warrants for members of the LRA's senior command, including leader Joseph Kony. The Court's intervention and its issuance of indictments against LRA commanders instigated a polarizing debate on the role and impact of international criminal justice in northern Uganda. Many openly feared that the ICC's intervention would undermine any potential peace process. But three years after Uganda's self-referral – and just one year after the warrants were issued – the GoU and the LRA entered into what was widely recognized as the best opportunity to negotiate a comprehensive solution to the war. So how did the parties get to the negotiation table and what, if any, role did the ICC play?

Chapter 4 begins by contextualizing the conflict between the Lord's Resistance Army (LRA) and the Government of Uganda (GoU), focusing on the causes and dynamics of the war. The chapter then examines the effects of the ICC on the conflict narrative, the attitudes and incentives of parties to committing to the Juba peace process as well as the pre-negotiation phase of the Juba peace process. It is argued that: the ICC's intervention has contributed to an obfuscation of the political causes of the war and the political nature of the violence waged against northern Ugandans – by both the LRA and the GoU; it has bolstered the narrative of a 'good', just and legitimate government fighting an 'evil', mad, criminal rebel group; and the ICC has reaffirmed and entrenched a conflict narrative that has focused primarily on the role and responsibility of the LRA and Kony, in particular, in propagating violence. However, rather than providing a disincentive for Kony and the LRA to negotiate, it is argued that the ICC's intervention and the conflict narrative it helped entrench actually contributed positively to the

LRA's decision to commit to engaging in peace talks. There is little evidence that it directly contributed to the GoU's commitment to do likewise.

The chapter subsequently explores how these effects shaped the pre-negotiation stage of the Juba Peace Process and, in particular, the timing of negotiations, the location of the peace talks and the mediation strategies employed to get the warring parties to the negotiation table. With regards to the timing of the Juba negotiations, it is concluded that the ICC may have played a role but that it did so in combination with a variety of other factors, including the Comprehensive Peace Agreement reached between Sudan and South Sudan in 2005. The peace talks took place in Juba, the capital of South Sudan, a country which was eager to eliminate the LRA from its territory. Importantly, South Sudan is not a member of the ICC. It is argued that this reality played a role in the decision-making on where to hold peace talks between the LRA and GoU. Lastly, dealing with the ICC warrants head-on formed a key element of the mediation strategies employed by South Sudan's Vice President, Riek Machar, to get the LRA to the negotiation table. Given the LRA's interest in dealing with the arrest warrants and challenging the dominant conflict narrative of the war, this was to be expected. Overall, despite oft-stated fears that the ICC would preclude negotiations from moving forward, the Court's intervention in northern Uganda appears to have contributed positively or, in some instances, negligibly to the onset of negotiations between the LRA and GoU.

Chapter 5 examines the effects of the ICC on the 2006-2008 peace negotiations between the LRA and GoU, as well as the effects of the ICC on post-Juba peace and justice in northern Uganda. The chapter first considers the Court's effects on the composition of the delegations at Juba and the agenda of the peace talks. It is argued that the ICC had a significant impact on the composition of the LRA's delegation at Juba. The indictments prevented senior LRA commanders, notably Joseph Kony and second-in-command, Vincent Otti, from attending the peace talks. This undermined the negotiations, as the LRA delegation that was sent to Juba was unrepresentative of the LRA high command and, as a consequence, LRA delegates pursued narrow, personal interests. With regards to the talks' agenda, the ICC had the effect of ensuring that justice and accountability would be central to the negotiations, something that had not occurred in previous peace talks between the LRA and GoU. No suitable approach to dealing with the arrest warrants was ultimately identified and, in the end, the talks collapsed.

The fact that the LRA and GoU decided to enter peace negotiations should not be equated with a commitment on the part of either to see them through. The chapter assesses whether the Juba peace talks were genuinely about achieving peace, demonstrating that there is compelling evidence that

neither the LRA nor the GoU were fully committed to a comprehensive peace and that both saw their engagement in peace talks as strategically beneficial. It is thus concluded that the ICC cannot bear responsibility for failure of the Juba peace negotiations.

In the last section, the chapter examines the effects of the ICC on post-conflict peace and justice in northern Uganda. Post-Juba, the ICC has had no known negative effects on the level of stability and security in northern Uganda, suggesting that northern Ugandans are no longer concerned with an issue which has not affected the current stability that they enjoy. The chapter then examines the creation of the International Crimes Division (ICD) of the High Court of Uganda, a judicial body that was negotiated at the Juba peace talks as an institution that could prosecute individuals responsible for committing crimes during the war and which could be employed to challenge admissibility of the ICC in northern Uganda. The focus of this section of the chapter is on Uganda's first-ever war crimes trial, that of former LRA commander Thomas Kwoyelo. It is argued that the ICD is ultimately an institution created to selectively prosecute LRA combatants and, as such, risks entrenching rather than challenging the conflict narrative in northern Uganda.

Chapters 6 and 7 turn to the case of the ICC's intervention in Libya. In February 2011, the United Nations Security Council unanimously referred the deteriorating situation in Libya to the ICC. The Court subsequently – and with unprecedented speed – opened an official investigation into the civil unrest in the country. Just four months later, three arrest warrants were issued, for Libyan leader Muammar Gaddafi, his son Saif al-Islam Gaddafi and his security and intelligence chief, Abdullah al-Senussi. In response, many commentators wondered whether the ICC's intervention would help or hinder attempts to resolve the Libyan civil war. Most commentators simply recycled the language of the “peace versus justice” debate but their judgements are not based on detailed knowledge of the realities on the ground.

Chapter 6 begins with an overview of the causes and dynamics of the Libyan Revolution and civil war between the Gaddafi regime and the Libyan opposition, arguing that the uprising in Libya was initially about bringing forward and addressing socio-economic and political grievances – and not necessarily about regime change. The core of the chapter examines the empirical effects of the ICC on the conflict and attempts to initiate direct peace negotiations between the regime and the Libyan opposition's political wing, the National Transitional Council (NTC). The effects of the Court's intervention on four issues in particular are examined: the conflict narrative and dominant understanding of the Libyan conflict; the attitudes and incentives of the actors involved in the war towards negotiations; the mediation strategies employed to encourage the rebels and the Gaddafi

regime to negotiate and, particularly, determine the fate of Gaddafi; and the potential emergence of a ripe moment for a negotiated settlement to the civil war.

The clearest effect of the ICC's intervention in Libya was its impact on shaping a narrative and understanding of the Libyan war that painted the regime as beyond the pale and the opposition as 'good' and just. In doing so, it helped justify the goal of regime change and obfuscated both the causes of the conflict as well as the Western-led political rehabilitation of the Gaddafi regime in the years preceding the war. These effects on the conflict's narrative, in turn, had implications on other important dynamics. The conflict narrative emboldened the rebels to commit to a military victory and bolstered the resolve of their claim that Gaddafi's departure from power was a necessary precondition to any potential negotiated settlement. As a result, the ICC may have contributed to preventing the emergence of a mutually hurtful stalemate and created a ripe moment conducive to peace talks. However, this conclusion should be qualified. It is not clear that official peace talks between the NTC and the Gaddafi regime were ever a feasible way to end the war – for reasons other than the ICC intervention.

The Chapter ends with an analysis of whether any of the actors that intimated an interest in negotiating a settlement between the regime and the opposition forces could have successfully done so. Five actors are considered here: the African Union; the intervening NATO forces; Saif al-Islam Gaddafi; the NTC Libya's opposition; and Muammar Gaddafi himself. It is concluded that the necessary commitment and compromises required to get to the negotiation table never existed amongst the various actors participating in the conflict. Ultimate responsibility for any failed peace process cannot be laid at the feet of the ICC.

Chapter 7 turns to an empirical examination of the effects of the ICC on post-Gaddafi Libya and the country's approach to post-conflict justice. It is argued that the ICC's ability to positively affect peace and justice in post-conflict Libya has been limited. The first section of the Chapter examines the debate regarding who should try the two surviving ICC indictees – Saif al-Islam Gaddafi and Abdullah al-Senussi. It delves into where they should be tried, focusing on the OTP's support of Tripoli's intentions to prosecute Saif and Senussi in Libya by Libyans and the failure of the Prosecutor to explore options beyond that or a trial by the ICC in The Hague. The second section assesses non-investigated international crimes committed by Libya's opposition forces, focusing on the cleansing of Tawergha and the killing of Gaddafi, both alleged international crimes. The final section examines two 'transitional justice' mechanisms implemented by Libya: a blanket amnesty for revolutionaries and the Political Isolation Law. Each of these sections exposes the limitations of the ICC to positively affect post-conflict justice and peace in Libya.

Chapter 8 seeks to answer the question: *why* does the ICC have the effects that it does on peace, justice and conflict processes? This penultimate chapter outlines the relationship between the ways in which the ICC is requested to intervene in ongoing conflicts, the subsequent decision-making of the OTP in deciding which parties to target for prosecution, and the consequent effects of the ICC on peace, conflict and justice processes. The central argument here is that the ICC is guided by a negotiation between its own institutional interests and the interests of the political actors upon which the Court depends. This negotiation of interests has led the OTP to investigate and prosecute parties to a conflict selectively, generally only focusing on one side of the war whilst neglecting the other. Ultimately, the selective prosecution of non-state actors or state actors determines how the Court has affected peace processes in Libya, northern Uganda, and beyond.

The chapter proceeds in three sections. In section one, it is demonstrated that self-referrals lead the Court to prosecute non-state actors whilst Security Council referrals lead the OTP to primarily target seek government officials. In the second section, the ICC's decision-making is analyzed in order to show that the OTP selects who to target as a result of a negotiation between the Court's institutional interests and the interests of the political actors upon which its effectiveness and continued existence depend. Three institutional interests are outlined: cooperation to build cases; cooperation leading to the enforcement of arrest warrants; and recognition of the ICC as a relevant and effective institution in international politics. In the final section, the two cases at the heart of this thesis, northern Uganda and Libya are revisited. It is shown that the processes of decision-making, negotiation of interests and selectivity were instrumental in determining the ICC's effects on peace, justice and conflict processes in both cases.

The final chapter revisits the overall aims of the thesis. It offers concluding reflections, both specific to the cases of northern Uganda and Libya as well as generally on the effects of the ICC on ongoing and active conflicts. Whilst reflecting on what can be learned from the two cases, it is observed that ICC interventions amplify the importance of some issues and dynamics in a peace process. It is also reiterated that decision-making within the ICC and, in particular, the OTP with regards to which side of a conflict is targeted for prosecution has a significant determinant impact on the ICC's effects on peace, justice and conflict processes. The heart of the conclusion reflects on the ICC's effects on each of the issues and dynamics that constitute the thesis' analytical framework, identifying where further research is needed as well as providing some suggestions for practitioners engaged in the projects of international criminal justice and conflict resolution.

## **V. Conclusion – Overall Contributions**

The thesis makes three overall contributions. First, through the development of a novel analytical framework, the thesis establishes a more nuanced and rigorous way of studying, researching and critically assessing the effects of the ICC on peace, conflict and justice processes. Importantly, the framework is not intended to be rigid or unchangeable. Rather, as described in the conclusion of the thesis, it is hoped that it can be continuously developed, improved, adapted and applied to new cases.

Second, the thesis contributes novel empirical insights into the effects of the ICC's interventions in both northern Uganda and Libya. Given the paucity of literature on the subject, this is easier to achieve in the latter case than the former. As shown in Chapters 4 and 5, the “peace versus justice” debate in northern Uganda has received significant scholarly attention. With regards to northern Uganda, the thesis attempts to bring together a vast amount of literature and primary research in order to provide a detailed account of the effects of the ICC's intervention on the Juba peace process and its aftermath. In a number of instances, the thesis confirms arguments made by scholars, but does so through the novelty and nuance of the analytical framework, demonstrating the utility of the framework not only in dispelling arguments but also verifying them. In contrast, there are only a handful of analyses which deal with the ICC's intervention into Libya and, as will be seen in Chapters 6 and 7, many treatments of the Libyan Revolution and civil war ignore the Court's intervention altogether. Again, the analytical framework is deployed to structure the analysis of primary and secondary resources in order to generate novel insights and conclusions.

Third, as illustrated in Chapter 8, analyses of the specific decision-making and discretion of actors at the Court is often neglected. Through primary interview-based research, the thesis sheds light on how decision-making at the ICC, specifically in the Office of the Prosecutor, shapes the Court's effects on peace, justice and conflict processes.

## **Chapter 2: Peace and / or / with / versus Justice**

### **Introduction**

While there is a recognition, illustrated by the volume of works published on the subject, that understanding the relationship between peace and justice is an important goal, agreement on what that relationship is or the appropriate parameters of the debate remains elusive. But the lack of consensus within the peace-justice debate should not be confused with a lack of genuine engagement and rich empirical and theoretical insights that those engaged with the debate have been able to generate.

The core aim of this chapter is to outline the engagement of scholars with the peace-justice debate to date and, in so doing, to demonstrate that the study of the ICC's effects on ongoing and active conflicts needs to be re-imagined. The first two sections of the chapter outline the primary arguments in support of and against the pursuit of international criminal justice as a means to contribute to establishing peace. For each of these positions, the chapter also presents counter-arguments in order to expose the limitations and weaknesses of each argument.. It is made clear that no single argument or combination of arguments within the peace-justice debate is immune from persuasive contestation; none conclusively show that justice is a help or hindrance to peace. Given this, is it even worth appraising the effects of the ICC on peace? Section three of this chapter argues that it can and should be evaluated in order to highlight the variable geometry of its impact. The chapter concludes by arguing that there is a need not only to rethink *what* the impacts of ICC interventions are on ongoing conflicts, but to reimagine *how* to study its effects.

## I. No Peace Without Justice

Do ICC interventions promote peace? This section explores the key arguments made with reference to peace in support of prosecuting those responsible for atrocities: ending impunity; marginalizing perpetrators; and deterring and preventing future crimes.<sup>7</sup> While they are treated in turn, advocates tend

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<sup>7</sup> There are at least three additional arguments advanced in favour of international criminal justice, which should be acknowledged. First, some suggest there exists a right to truth, especially amongst victims of atrocities (see Joinet 1997; Doak 2008). It is claimed that denying truth poses a barrier to reconciliation and makes a return – or continuation – of conflict more likely (Goldstone 1996, 486). Trials can be a cathartic experience for victims (Williams and Scharf 2002, 125) and, by producing an accurate historical record, they create a “shrinking space of denial” (Orentlicher 2008; see also Ignatieff 1999, 184; Coughlan 2011). However, the concept of 'truth' is not unproblematic – conceptually or in practice (see Crocker 2004, 9; Mendeloff 2004; Lanegran 2005). 'Truth' “defies strict definition” (Quinn 2001, 387) and there is no consensus on what *kind* of truth trials create, let alone how it would contribute to peace (see Quinn 2001, 387-8; Kerr and Mobekk 2007, 133-4).

A second argument suggests that there exists a legal and moral obligation to prosecute. It has been contended that we have witnessed a “a revolution” in accountability (Sirram 2005; Thakur 2006, 113) and a transformative change in international relations from *whether* to face past human rights violations to *how* to face them (Seils and Weir 2005, 13; Cryer 2006, 221; Freeman 2009, 18). Most advocates of an obligation to prosecute international crimes rely on interpretations of human rights treaties and customary law (see Orentlicher 1991; Scharf 1996; Roht-Arriaza and Gibson 1998; Gavron 2002; Cryer 2005, 101-117; Lutz 2007; Laplante 2009; Freeman 2009, 36-55). However, despite evidence that a “general obligation to ensure individual criminal accountability” exists (Freeman 2009, 36), an obligation on states to prohibit the use of amnesty laws is far from crystalized (see Cryer 2005, 107; Schabas 2007, 41; Vinjamuri and Boesenecker 2007; Freeman 2009; Mallinder 2010; Olsen et. al. 2010; The Belfast Guidelines 2013). Moreover, the ICC's Rome Statute of the ICC is notably silent on the issue of amnesties (see Scharf 1999; Gavron 2002, 109; Stahn 2005, 698-9).

Third, a claim which generally pertains to the *maintenance* of peace rather than its creation, is that the ICC can contribute to rebuilding the rule of law by galvanizing the capacity of domestic tribunals to address crimes (Wigglesworth 2008, 827; Stahn 2009, 10). The belief that the Court should instigate domestic prosecutions is so fervent that Moreno-Ocampo (2003, 2) famously declared that is “the absence of trials before this Court, as a consequence of the regular functioning of national institutions would be a major success.” Moreover, positive complementarity has been placed at the core

to view these goals as complementary and mutually reinforcing (Leebaw 2008). So strong is their conviction that many declare, as Ellis (2006, 113) has, that “[t]here can be no lasting peace without justice, and justice cannot exist without accountability.” For proponents of international criminal justice, tribunals are “the major policy innovation of the late twentieth century designed to diminish human rights violations” (Hunjoon and Sikkink 2010, 1). And, they claim, justice is not simply a sufficient condition for peace; it is necessary.

(i) *Ending impunity*: Ending impunity is the primary aim of international criminal justice and is regularly invoked as necessary for the establishment of peace. Moreover, there is value, advocates argue, in the acknowledgement that crimes took place: “When the past is pushed aside before it has been clarified, discussed and dealt with, sooner or later it will invade a nation's political life, forcing governments to face it, though not always under the most favourable conditions” (Aguilar 2007, 22). In other words, impunity is a threat to stability and peace. If impunity is not ended, argues Ellen Lutz (2006, 327), unmet expectations “will cast a long shadow across the political landscape that will not go away until they are realized” (see also Goldstone 1996, 492; Kritz 1997, 127). Ignatieff (1999, 184) adds that, while it is necessary to remain modest about what war crimes trials can achieve, “leaving war crimes unpunished is worse: the cycle of impunity remains unbroken, societies remain free to indulge their fantasies.”

Ending impunity goes to the heart of the ICC's mandate. As Fatou Bensouda (2013b), the Court's Chief Prosecutor, recently declared to the UN Security Council with regards to individuals indicted for their role in the violence in Darfur: “as long as they enjoy impunity for the crimes they commit, they will continue to represent a threat to international peace and security.” Bensouda's predecessor, Luis Moreno-Ocampo (2007b, 220), has similarly conflated ending impunity with

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of the ICC's 2009-2012 Prosecutorial Strategy (OTP 2010, 5). But the notion that the ICC and other international criminal tribunals can and should alter domestic political and judicial landscapes is an enormous expectation. The Court is not a panacea for the institutional sources of state collapse or inter-state conflict. The expectation that ICC interventions will lead to (re)building the rule of law, ending impunity and thus peace, is a tall order – if not simply overzealous. As Viviane Dittrich (2013, 198) writes: “High and conflicting expectations exist regarding what the legacies are and should be in the areas of law, justice, peace and reconciliation, given different legacy concepts.” The expectations on the ICC may simply be too high and every time they are unmet, the Court is vulnerable to new waves of criticism.

promoting peace, arguing that: “The [Rome] Statute ensures that the law will guarantee lasting peace, and that impunity for the worst perpetrators is no longer an option.” In 2008, he was even more unequivocal in stressing the centrality of ending impunity to the Court's ability to spread peace. Quoting a European Union representative at the Rome Negotiations, Moreno-Ocampo insisted that the creation of the ICC would make the world:

More just, because perpetrators of atrocities will not go unpunished; safer, because it will deter those who might otherwise act with impunity; and more peaceful, because the knowledge that justice is being done may help the victims to put the past behind them and encourage all the parties to participate in a process of reconciliation (Moreno-Ocampo 2008, 1).

For proponents, the goal of ending impunity, in and of itself, is key to producing 'peace'. Advocates of international criminal accountability are motivated by the belief that if societies do not seek to confront and account for past atrocities, they “leave in place the seeds of future conflict...[which] perpetuates a culture of impunity that can only encourage future abuses” (Kritz 1997, 127). Judicial mechanisms signal a warning to potential perpetrators that crimes will not be tolerated, will result in criminal prosecution and potentially a prison sentence. Impunity encourages continued abuses domestically while simultaneously emboldening perpetrators elsewhere (ibid., 129). It is also argued that, by acknowledging criminal violations through trials, the systemic, institutionalized nature of human rights violations can be identified and dismantled, thus deterring future crimes (Goldstone 1996, 490; see Akhavan 1998). In other words, international criminal justice helps to identify the systems and structures which perpetuate atrocities and thus can contribute to their eradication and replacement.

Few would attempt to argue against the need to end impunity. The debate, rather, is *how*, *when* and at *what* cost to end impunity. Critics, as seen below, suggest that seeking to end impunity under the wrong conditions may hinder efforts to establish and maintain peace.

(ii) *Marginalization / Stigmatization*: According to proponents of war crimes trials, targets of ICC prosecution will be marginalized – both domestically and internationally (see HRW 2009, 18-34; Thakur 2006, 119; Mendes 2010, 11-12). This argument, which “is claimed to be a primary mechanism through which justice can help deliver peace” (Vinjamuri 2013), relies on the assumption that political figures will not associate with individuals accused of committing atrocities. Perpetrators are thus likely to be stigmatized by their former allies, their political constituents, as well as sections of the 'international community', leaving them with few resources (financial or other) with which to wage war or commit crimes. This process of marginalization fits within the notion, developed by Stephen

Stedman (1997, 5) that peace is better assured if “spoilers” – those “leaders and parties who believe that peace emerging from negotiations threatens their power, worldview, and interests, and use violence to undermine attempts to achieve it” – are isolated. While expectations of international criminal justice should be kept in check, according to Wippman (2006, 120), “at a minimum, international criminal prosecutions may help marginalize or incapacitate extremists, paving the way for moderate political leaders to take power.” Thus investigations and prosecutions can isolate actors who might otherwise be inclined to undermine or derail a peace process. In some cases, the argument is made that certain actors *must* be cut out for any meaningful peace negotiation to take place (see e.g. de Waal and Stanton 2009, 338). Indeed, this is often claimed as a key accomplishment of the ICTY, as well as the Special Court for Sierra Leone.<sup>8</sup>

Domestically, marginalization may be the result of political cost-benefit calculations on the part of domestic political actors. It may simply be too costly for such actors to continue being affiliated with perpetrators. The issuance of an indictment or arrest warrant may also be seen as an indication of weakness on the part of the indicted individual and therefore an opportunity for domestic competitors to challenge their power. Internationally, states and state-based actors face the existence of a global civil society and their own domestic human rights constituencies which often refuse to tolerate public cooperation between government officials and alleged perpetrators. This explains, for example, the recalcitrance on the part of the US to allow indicted Sudanese President Omar al-Bashir to speak at the United Nations General Assembly (see Gladstone and Kushkush 2013; Prendergast and Ismail 2013). In both domestic and international contexts, it may simply be too costly to be seen with alleged perpetrators of mass atrocities. Isolating prosecuted pariahs, it is argued, is good for peace.

But the marginalization hypothesis suffers from a host of problems. First, retributive criminal justice may induce an *increased* desire on the part of a potential target to partake in a peace process. In other words, international prosecution may *raise* the need for the targeted individual(s) to partake in a peace process rather than isolate them. Moreno-Ocampo (2007a) has, for example, suggested that the ICC does not damage peace processes because “arrest warrants have brought parties to the negotiating table”. This is also a common refrain in the context of northern Uganda (see Chapter 4 and 5). But

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<sup>8</sup> That the ICTY managed to isolate key spoilers, particularly Radovan Karadžić and Ratko Mladić, is claimed by many authors. See e.g., Akhavan (2001), Wippman (2006, 123). Not all agree. Vinjamuri (2013, 3-4) suggests that the ICTY was not responsible for marginalizing of Karadžić and Mladić at the Dayton peace talks. On the SCSL, see e.g., HRW (2009, 4).

proponents claim both that it is good for peace if targets are marginalized and that it is good for peace that they respond to arrest warrants by taking a peace process more seriously. Second, when the targets of marginalization are state leaders or heads of state, marginalization may become indistinguishable from an agenda of regime change (see also Mendeloff 2014, 14-17). This may or may not be problematic but proponents should be more forthright about the relationship between international criminal justice and regime change. Third, as most dramatically demonstrated by Bashir's travel to ICC member-states, the record regarding marginalization is limited (see Barnes 2011; McCormick 2012). Fourth, the removal of targeted individuals from a peace process is treated as a good in and of itself. The assumption is that those who replace the indicted individual will be 'moderate' and necessarily contribute positively to peace (Vinjamuri 2010, 195). But what precludes the 'next generation' of state or non-state leaders from being just as, or perhaps even more, violent, brutal and repressive? No evidence has been produced that regime change in Khartoum or the demise of Joseph Kony would lead to a Sudanese government or a Lord's Resistance Army that seek peace. Lastly, and perhaps the most potent criticism of marginalization, is that warrants can shame actors who respond by lashing out against civilians and/or seeking to consolidate their power through violent means (see below).

*(iii) Deterrence and Prevention:* The deterrence capacity of international criminal justice is, for many, their most important justification and goal (Wippman 1999/2000, 474). Deterrence requires “the deliberate attempt to manipulate the behavior of others through the enunciation of conditional threats” (Dawood 2011, 2; see also Freedman 2005). It may be specific – aimed at a specific individual who has committed atrocities, or general – consisting of a signal to the wider community that crimes will not be tolerated (see Akhavan 1998). It is thus intended to have a broader prevention effect on current and future conflicts but also affect a cessation of the commission of atrocities and thus contribute to conflict termination.

Perhaps the most innovative element of international criminal law is its focus on individual, rather than collective, guilt (see Goldstone 1996; Simpson 2007, 54-78). According to Kritz, holding individuals, rather than groups, responsible “rejects the dangerous culture of collective guilt and retribution that often produces further cycles of resentment and violence” (Kritz 1997, 128; see Minow 1999/2000, 430). The individualization of guilt is thus seen to directly contribute to the prevention capacity of justice by diminishing collective rage and disincentivizing collective revenge. Tribunals may also deter violence by presenting an alternative to the vengeance that fuels the characteristic “downward spiral of violence” of violent political conflicts (Minow 1998, 11; see also Lie et al 2006,

7). The thirst for vengeance is apparently quenched through legal recourse rather than through violence; the potential for retributive violence is displaced by the pursuit of retributive justice.

For advocates, the capacity of trials to prevent crimes is among the most important consequences of international criminal law. Yet the deterrence argument remains problematic and continues to suffer from a lack of rigorous empirical analysis. As Kate Cronin-Furman (2013, 1) observes, scholars of international criminal justice's deterrence capacity have produced claims which “rely on undertheorized assumptions about both the operation of deterrence and the commission of mass atrocity.” Cronin-Furman (Ibid. 21) concludes that the empirical record of deterrence is ultimately mixed and that “the cost-benefit calculations of commanders who affirmatively order mass atrocity are likely already to involve overriding benefits for and strong disincentives against the commission of atrocity crimes. Thus, the risk of prosecution and punishment is not likely to change their decision-making calculus.” Illustrative of the difficulties in assessing the deterrence and preventive capacity of ICC decision-making, Michael Broache (2014) has shown that the stages of the Court's intervention in the DRC had divergent effects through time: the arrest warrant against Bosco Ntaganda produced *no* changes in levels of violence; the conviction of Thomas Lubanga instigated an *increase* in violence against civilians; and Ntaganda's surrender contributed to a *decrease* in violence. Rather than concluding that the ICC thus deters or does not deter atrocities, Broache (2014, 34) rightly concludes that “scholars and practitioners should be more attuned to the possibility of heterogeneity in the effects of ICC action.”

The deterrence argument neglects the differences and possible interactions between collective and individual sources of deterrence. Whether the target of deterrence is a leader of a well-organized political bureaucracy or a government or group makes a difference. Likewise, we should expect different outcomes if the source of deterrence is a permanent, uncompromising arrest warrant issued by the ICC versus a potentially temporary, coercive measure that can be reversed in order to 'reward' changed behaviour (see Mendeloff 2014). Fluctuating commitment to international criminal justice is also relevant. Within the field of conflict studies, a consensus has begun to emerge that, in the context of negotiated settlements to civil wars, it is the credibility of international guarantees to punish or reward negotiating parties that determine the success of negotiated agreements (see Walter 1997; Walter 2001; Kerr 2005; Toft 2010). In parallel to this conclusion, perhaps the greatest challenge for proponents of international criminal justice is state cooperation and enforcement (see Pankhurst 1999, 249; Peskin 2008; see also Chapter 9). The relationship between credible commitment to enforce warrants and deterrence /prevention remains unclear. However, as Layla Dawood (2011, 2) argues,

there is a recognition that “it is imperative that the one who carries out the threat has the means of force to inflict the damage that he/she promises to cause on his/her opponent.” Threats to prosecute must be backed up by the legitimate possibility of an alleged perpetrator finding him or herself in front of judges defending his or her actions. In other words, the effectiveness of tribunals and courts has been tethered to state-cooperation. As Madeleine Albright and Richard Williamson (2013, 19) write, “champions of the ICC can fairly argue that the likelihood of future atrocities is diminished every time a perpetrator is successfully prosecuted.” But what if targets – like Uganda's Joseph Kony or Sudan's Omar al-Bashir – and those outside of the ICC's remit – like Syria's Bashar al-Assad or North Korea's Kim Jong-un – remain free? Does this create an 'anti-deterrent' effect? The point here is that the potential deterrence capacity of international criminal prosecutions may be more the result of the commitment and resolve of international actors rather than the inherent nature of criminal prosecution itself. This is particularly relevant for the ICC as the interest of powerful states in supporting the Court's mandate has fluctuated over time rather than remained constant (Bosco 2014). However, there may also be other issues affecting the ICC's deterrence and preventive capacity.

Novel research on deterrence suggests that the capacity of the ICC to act as a coercive mechanism to end or prevent violence is “highly tenuous” (Mendeloff 2014, 5). This is not, David Mendeloff (2014) argues, because the Court's warrants aren't enforced but because of the degree to which the Court is politically independent. Crucially, “for coercive threats to be effective they must be accompanied by credible assurances that the threat will be removed in the face of compliance.” However, ICC warrants are non-negotiable. Aside from delaying prosecutions for 12 months under Article 16, “[t]his is not something over which states have control, and which the Court itself is structurally and ideologically unable to do” (Ibid., 5). Mendeloff (ibid.) also finds that the coercive capacity of ICC warrants is further limited in the context of ongoing conflict and that warrants are likely to be less effective against high-level perpetrators – precisely the kind of actors the ICC targets.

As a number of scholars have pointed out, the deterrence thesis also assumes that actors in a conflict are rational and make decisions on the basis of a cost-benefit analysis (Wippman 1999/2000, 476; Lie et al 2006, 2; Stahn 2009, 5). It remains unclear which costs are prioritized by alleged perpetrators targeted by tribunals and whether it is appropriate to assume similar calculations between different actors and across different cases. The assumption that actors in conflict are rational “is often a fiction, in light of the underlying political context of the conflict” (Stahn 2009, 5). The rational-choice foundation of deterrence literature may also occlude the emotional responses of those that international criminal law seeks to deter. Emotions such as humiliation, embarrassment and fear may result from

investigations and arrest warrants and may affect any potential for international criminal justice to prevent crimes (see Lupovici 2011).

Some scholars have argued that the individualization of guilt in this context is not a strength, but a weakness of international criminal justice. During the Nuremberg Trials of senior Nazi officials, Chief Prosecutor Robert Jackson noted that “[o]ne of the dangers ever present in this Trial may be protracted by details of particular wrongs and that we [may] become lost in a ‘wilderness of single instances’” (see Leebaw 2008, 104). Fletcher (2002) argues that the focus on individual guilt reflects a liberal bias. More scathing critiques argue that the focus of individualizing guilt ignores the very *social* nature of crimes (Fletcher 2002; see also Mamdani 1997; Chapter 3). Minow (1999-2000, 431) acknowledges that rather than capturing the social complexity of crimes, the individualization of responsibility presents individuals as “larger-than-life characters, who stand in for all the numerous others who could not be found, or who could not feasibly be tried.” The ICC's interest and ability to prosecute only those individuals “most responsible” for crimes may be seen as half-way impunity because so many are left unaccountable and the collective nature of crimes neglected (Ainley 2008). The question that remains, then, is whether lower-level perpetrators can be deterred by international criminal justice and whether there is an expected ‘trickle-down’ effect wherein the potential deterrence of high-level perpetrators filters down to lower-level combatants. Again, the deterrence literature is silent on this subject.

Lastly, perhaps the most significant problem with the claim that trials and tribunals have a deterrence capacity may be the conceptual difficulty in measuring deterrence itself (see Cobban 2006b). How can we know whether a trial prevents an individual from committing crimes when, by extension of not having committed the abuses, there is no evidence that the individual would have committed them in the first place? Indeed, unless there is a precipitous decline in all violations of international criminal law, the question of deterrence may be fundamentally slanted against proponents of trials because, as William Schabas (2007, 57) explains, “while we can readily point to those who are not deterred, it is nearly impossible to identify those who are.”

Proponents argue that, by ending impunity, marginalizing real and potential international criminals, as well as preventing and deterring mass atrocities, the pursuit of international criminal justice in the context of ongoing and active conflict can have a net positive effect on the establishment and maintenance of peace. But the claims of proponents have severe weaknesses and limitations. It cannot be concluded that pursuing justice is necessarily good for peace – at least not for the reasons

proponents suggest. Of course, this does not mean that the opposite is true, that the pursuit of justice will ultimately have negative effects on peace.

## II. Peace First, Justice Later

It may be, as historian Norman Goda suggests, that the nature of war crimes trials means that “international trials cannot help but spawn scepticism” (Goda 2007, 8). It should thus come as no surprise that critics have developed their own set of arguments against pursuing international criminal justice interventions in the context of ongoing conflict: that international criminal justice can instigate and prolong violence; that trials may undermine peace negotiations; and that justice is no substitute for more concerted, coercive action.<sup>9</sup>

Critics disagree with the sweeping claim that there can be “no peace without justice” and argue, instead, that there can be “no justice without peace” (Chesterman 2001). Some doubt that the use of law can fundamentally transform a society while establishing and sustaining order and stability. On the contrary, as Martti Koskieniemmi (2001, 224) retorts: “the role of judicialism in poking the flames of conflicts should not be underestimated.”

(i) *Instigating Violence*: Rather than marginalizing potential and real perpetrators, critics of war crimes trials argue international criminal justice can cause targets to (re)commit to violence. Perpetrators may be shamed, stigmatized and embarrassed as a result of being targets of judicial interventions. Shame can lead to continued violence and the entrenchment of power. This claim rests on the influence of shame on the causes of violence, explored by sociologists such as James Gilligan (2003) and applied to

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<sup>9</sup> Another argument that has been put forward against the pursuit of international criminal justice but one which does not relate directly to 'peace' is that they are too expensive. Between the ICC, the ICTY, the ICTR, the SCSL and the Extraordinary Chambers in the Courts of Cambodia (ECCC), the estimated costs of their work between 1993 and 2015 is \$US 6.3 billion (see Ford 2010). This cost does not seem exorbitant in relation to other expenses such as the hundreds of billions of dollars spent on the Iraq war, the \$US 6 billion cost of the 2012 US Presidential Election or the \$15 US billion paid to host the 2012 London Olympics (see McLaughlin 2013, 77). However, for critics of trials, the 'amount' of justice bought at this price is simply too little.

Other critics insist that war crimes trials are too divorced from local realities and thus are not context-sensitive (for discussion see Simpson 2007, 30-53). International criminal justice is also seen as an inappropriate foreign imposition against weak states (see e.g. Branch 2010b). Parallel to, and as an extension of these arguments runs the belief that the ICC runs roughshod with local approaches to justice and accountability. This was evident in the context of northern Uganda (see, for example, Allen 2006, 128-138; see also Sriram 2007, 588-590).

violent political conflict by scholars like David Keen (2008).

Leebaw (2008, 101) argues that the prosecution of political violence is likely to be destabilizing because it constitutes “a process that condemns as shameful actions that may previously have been championed as a matter of duty to a particular political community.” In order for peace to be established and maintained, respect is essential. Respect is necessary for any legitimate and successful attempt at altering the behaviour of a regime or individual. Without respect, the patterns that precipitate violence and antipathy towards peace processes may become increasingly entrenched. Shaming leaders provides them with the justification for uncompromising and continued violence, since such individuals are disqualified as legitimate negotiating partners. Fabrice Weissman (2010) of Médecins Sans Frontières goes so far as to declare that “‘no peace without justice’ is not a peacemaking slogan, but a call to war.”

Critics worry that pursuing accountability for key actors in a conflict, particularly those who wield a significant level of power (which, it should be noted, is likely to be those deemed “most responsible” by tribunals like the ICC), will lash out against civilians. Nowhere has this been more evident than in the reaction of critics to the arrest warrants issued by the ICC against Sudanese President Omar al-Bashir for crimes against humanity, war crimes and genocide in Darfur.<sup>10</sup> Following the arrest warrant, al-Bashir retaliated by expelling thirteen humanitarian aid agencies from Sudan. Alex de Waal (2010), a vociferous opponent of the Court's work in Sudan, claimed that “a campaign of shaming that is relentless, escalating and personalized,” and “the liberal use of the word 'evil' to describe the Sudan Government...runs the risk of fuelling a vicious cycle of escalating acrimony.”

Importantly, the utility of shaming and marginalization is not easily discerned. Like deterrence, it may depend on *who* precisely is being shamed/marginalized as much as the act of shaming/marginalization itself. There is an ever-present danger in assuming similar responses to investigations and indictments across cases. Actors who respond to arrest warrants with violence in differing contexts may appear to be making similar calculations but, in fact, are driven by a divergent set of contextual factors and incentives. These calculations will, however, undoubtedly affect the willingness and interests of parties towards peace negotiations.

(ii) *Undermining Peace Negotiations*: It has been demonstrated that violent political conflicts

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<sup>10</sup> Charges of crimes against humanity and war crimes were levelled against Bashir in 2008 while the charge of genocide, initially rejected by the Court, was added in 2010.

increasingly end via negotiated settlement (see Wallensteen 2007; Sisk 2008, 195). Conflicts which are not exhausted by the complete victory of one side and the complete demise of the other, it is argued, require negotiated agreements (Zartman 2005, 2; Toft 2010, 1). Critics, however, argue that seeking to prosecute key actors involved in a negotiated settlement is disruptive to the peace process and makes an agreement less likely. International criminal justice interventions can thus prolong conflict and increase deadly violence (Goldsmith and Krasner 2003, 51).

Conflicts which end in negotiated agreements rather than military victory by one party, tend to include provisions for power-sharing between the conflicting parties, an increasingly common tool for negotiators seeking to mediate the end of wars (Sisk 2008, 195). Power-sharing solutions seek to create “social contracts between two or more peoples, or between two or more territorial governments” (O’Leary 2005, xxii). They also act to reassure previously conflicting parties about key issues concerning the control of, and access to, economic resources, political power and security (Vandeginste and Sriram 2011, 9). It is argued that power-sharing is particularly necessary where the social fabric of a society has particularly sharp ethnic, religious, regional, or other, tensions (ibid., 10).

Vandeginste and Sriram (ibid.) argue that the paradigms of post-conflict power-sharing and accountability clash. Where conflicts have included mass atrocities, the typical response has been to grant amnesties or offer exile to perpetrators as an incentive to continue the process of negotiating peace (Lie et al 2006, 2). A problem consequently arises when attempting to provide a place for justice in power-sharing agreements. The problem is exacerbated because, as Michael Scharf (1999, 509) notes, it is unrealistic to believe that a party would cease hostilities if “they would find themselves or their close associates facing life imprisonment.”<sup>11</sup> This has been echoed by individuals indicted by the ICC. Vincent Otti, a senior official of the Lord’s Resistance Army who was indicted by the ICC in 2005, vowed that he would “only sign an agreement that brings peace, not one that leads me to the International Criminal Court” (Ojwee 2007). This reflects the rather uncomfortable reality that perpetrators of atrocities may be “indispensable allies” in the pursuit of peace (Snyder and Vinjamuri 2004, 12).

Importantly, critics do not argue that justice can *never* be achieved, but believe that pursuing justice *before* or *during* attempts to establish peace are detrimental. Justice delayed for critics is not

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<sup>11</sup> Snyder and Vinjamuri (2004, 13) write that “Efforts to prosecute individuals for crimes must also be sensitive to the impact of these efforts on relations between dominant groups in a future governing coalition.”

justice denied, but rather justice made possible. The sequence should be “first to consolidate peace, and only later to pursue justice” (Thoms et al 2008, 3), or as Snyder and Vinjamuri (2004, 6) declare. “Justice does not lead; it follows.” This does not mean, as Moses Chrispus Okello (2007, 2) writes, that justice is accorded lesser priority to peace but that the order in which each is pursued is important. It may simply be, as some argue, that “some form of negotiated settlement is simply the price that must be paid to ensure stability in the short term” (Koskenniemi 2001, 217). Pursuing international criminal justice in the context of ongoing and active conflicts, on the contrary, illustrates that accountability is prioritized over peace (Dugard 2002).

For critics of war crime trials, amnesties for those responsible for mass atrocities remain an essential tool for bringing warring parties to the negotiating table as well as providing them with the incentive to both agree to, and implement, a peace agreement (see Snyder and Vinjamuri 2003/2004; Cobban 2006a). This is particularly pertinent when neither side in a conflict is able to achieve total victory. For those who face a choice between survival and justice, amnesty may be viewed as the “least-worst option” (Freeman 2009, 23). Mark Freeman (*ibid*, 7) maintains that people may be repulsed by impunity but their “repulsion for war and tyranny is greater.” As negotiating tools, Christine Bell adds: “If the choice is between an imperfect peace and a perfect war, imperfect peace may be worth a gamble” (Bell 2006, 1-2).

The effect of pursuing justice on negotiating peace is perhaps the most prominent issue within the peace-justice debate. While the argument that no one will sign an agreement that results in a prison sentence is logical and intuitive, the increased demand for justice, particularly by victims, may suggest that peace agreements that exclude accountability entirely are no longer seen as credible or legitimate. This lack of credibility and legitimacy may continue to fuel resentment and the cycle of vengeance that proponents of trials argue is satisfied through retributive justice. There is no easy or obvious way forward: an agreement that does not satisfy calls for justice may fail, but an agreement that does may never be agreed to in the first place. Addressing this dilemma, Jon Elster (2010, 13) pondered “whether there exists a degree of punishment that is severe enough to satisfy the population and mild enough to satisfy the wrongdoers.”

With regards to the employment of amnesty laws for perpetrators of atrocities, their effects remain unclear. Recent studies by Louise Mallinder (2007, 2008, 2009) and Freeman (2009) have helped problematize and unpack monolithic conceptions of amnesties. An empirical study by Olsen et al (2009) has illustrated that amnesties for past human rights violations, when combined with trials, are positively correlated to human rights and democracy. It has also been argued that not all amnesties are

the same and not all may be morally and legally objectionable (Bell 2006, 83-84; Hayner 2008, 330). Mallinder (2008), for example, distinguishes amnesties on the basis of who is covered by them, which crimes are covered and whether they are conditional. While the effects of divergent types of amnesty laws on peace processes require greater scrutiny, it remains “[p]remature to assert that an amnesty is no longer worth the paper it is written on” (Freeman 2009, 29). If their utility has not expired, then they may remain useful in the pursuit of peace.

Another weakness of the argument that justice necessarily frustrates negotiations, and indeed the corollary that it helps peace negotiations, is its mixed record. The following chapters deal with evidence on whether or not the ICC's interventions helped or hindered peace processes in northern Uganda and Libya where the record is *mixed* and it is unclear that a negotiated settlement to either conflict was feasible. In other instances, there is evidence that judicial interventions bolstered peace negotiations. Priscilla Hayner (2008, 335) argues that the pursuit of accountability against Charles Taylor may have positively contributed to peace negotiations in Liberia, while, in Sierra Leone, it was only with the arrest of Foday Sankoh “that the peace implementation process began to take hold.” In short, the question of how the pursuit of justice has been treated at the negotiation table and how it has affected peace negotiations remains unclear and the empirical record remains murky.

At the center of the debate about whether international justice can guarantee peace is a common feature in international criminal justice: unrealistic expectations. Mark Osiel (2000, 119) has written about the inherent limitations of international law in prosecuting “offenders in a manner consistent with existing law and its moral premise” (see also Malamud-Goti 1996, 167-198; Goda 2007, 8). In the wake of WWII and amidst the trials of senior Nazi officials at the Nuremberg tribunal, Hannah Arendt (1946, 54) wondered whether some crimes “explode the limits of law...[and w]e are simply not equipped to deal on a human, political level, with a guilt that is beyond crime and an innocence that is beyond goodness or virtue.” Indeed, law is finite (Goda 2007, 8). As Kerr and Mobekk rightly argue, trials “need to be carefully assessed in light of what the tribunals *can* do, rather than what some have argued they *should* do” (Kerr and Mobekk 2007, 31). With regards to the ICC, Kirsten Ainley (2011, 309), concurs, noting that “the expectation that it can bring peace as well as justice is unrealistic.” When setting and measuring the expectations of what international criminal tribunals can achieve, especially in the midst of conflict, it is important to remain modest (see Ignatieff 1999, 184). Indeed, with regards to the peace-justice debate, there is a need to recognize the inconvenient reality that no perfect solution exists. As Martha Minow (1998, 8) explained:

*no response can ever be adequate when your son has been killed by police ordered to shoot at a crowd of children; when you have been dragged out of your home,*

interrogated, and raped in a wave of 'ethnic cleansing'; or when your brother who struggled against a repressive government has disappeared and left only a secret police file, bearing no clue to his final resting place. Closure is not possible...Legal responses are inevitably frail and insufficient...[there is an] incompleteness and inescapable inadequacy of each possible response to collective atrocities.

Lastly, the argument that international criminal justice should be sequenced is theoretically and practically problematic. Sequencing suggests that, while accountability and peace aren't *necessarily* in tension, in order to maximize the benefits of their relationship, the pursuit of justice should follow the establishment of peace. In other words, “peace first, justice later” (Refugee Law Project 2005). The sequencing argument is attractive because it represents an attempt to move beyond the “false polarisation of peace and justice” (Okello 2007). On the ground, the sequencing argument requires achieving a cessation of violence, followed by the warring parties entering inclusive peace negotiations to achieve peace. Warring parties discontinue active conflict in exchange for an official or de facto amnesty from prosecution. Once stability is assured and the time for accountability is ripe, those amnesties can be revoked and the leaders of the conflict can be brought to account. This is, broadly speaking, the lesson that has been drawn from the experience of Latin American transitions from dictatorship to democracy. As Sikkink (2011, 161) writes, Latin American states “have not had to choose between truth or justice, peace or justice, or between prosecutions and democracy. Instead, they have faced more complex issues, such as... what sequencing or combination of transitional justice mechanisms can help build democracy and resolve conflicts.” Moreover, Lyandro Komakech (2011) of the Refugee Law Project invoked the example of Argentina as an ideal example of sequencing peace and justice in order means to circumvent the tensions between peace and justice. He explained:

I don't see it as a debate. It is common sense that in situations of what we have been experiencing, strategically we should be sequencing these issues, prioritizing and looking at what is best in the short-term and what is best in the long-term...It is very legitimate in any process that we must create an enabling environment that can guarantee justice can be done...If you start asking for justice even before you create that enabling environment, it is not even a debate, it is foolery...We must sequence them. (Komakech 2011).

The problem with the sequencing theory, however, is that it cannot be premeditated. It is difficult, if not impossible to imagine a dictator, tyrant or rebel leader accepting an amnesty that he or she knew would subsequently be revoked. Indeed, premeditated sequencing has never been done. At the same time, the sequencing argument disregards that power-sharing agreements can reward leaders (and potential perpetrators) not only with protection from prosecution, but with powerful economic and political

positions. These positions may allow them to gain rather than lose the ability to forcefully retaliate when their impunity is subsequently challenged and justice can finally be pursued. Sequencing may pose hidden dangers.

Justice is not an easy issue to negotiate. The effects of ICC interventions on negotiations – and peace, conflict and justice processes more generally – are the very focus of this thesis. As one scholar put it, “the relationship between criminal trials and peace remains empirically under-explored and thus constitutes a critical area for future research” (Clark 2011, 544). This research is necessitated by the continued lack of understanding of these effects, despite a rich array of theories.

*(iii) No Substitute for Military Commitment:* Are tribunals set up as a means to detract from 'real' action to resolve conflict? Some observers believe that justice can be instrumentalized by international actors in order to demonstrate that they are 'doing something' or, as Chesterman (2001, 8) puts it, achieving “through law what the international community was not prepared to achieve through force.” (See also Wippman 1999, 473; Thakur 2006, 119; Peskin 2008, 36). Some fear that international criminal justice is only pursued when the will or capacity to intervene militarily is absent, lending but a hollow impression of concerted action. Even ardent proponents admit that tribunals have been set up as “alibis for no action [rather than] indicators of toughening new standards of international judicial accountability” (Ibid.). Yet some worry that international criminal justice actually castrates the international community's capacity to militarily intervene to end human rights abuses. Thomas W. Smith (2002, 177) has argued that the ICC creates a “moral hazard”<sup>12</sup>:

if international actors feel confident that human rights criminals will eventually be brought to justice, either in their own countries or before the ICC, they may be less inclined to intervene to stop human rights crimes while they are happening, something international actors have been reluctant to do in any case.

Smith (ibid., 177-178) further argued that numerous factors, including shifting public opinion away from coercion and intervention and towards international law and tribunals, unease over humanitarian intervention, as well as the ICC's inability to prosecute aggression, may inadvertently contribute to the ICC becoming “a virtuous excuse for states to turn a blind eye to atrocities, a moral free ride on the coattails of humanitarian law.”

If such a moral hazard exists, it would have profound implications on the possibility of the ICC

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<sup>12</sup> The concept of moral hazard in international relations has been primarily applied to the subject and practice of humanitarian intervention. See the work of Alan J. Kuperman (e.g. 2008; 2009).

contributing to peace. Indeed, international criminal justice would *prolong* and potentially *exacerbate* conflict by providing a veneer for inaction. Importantly, such an approach would also constitute a threat to tribunals and courts by leaving these institutions to stand alone with the burden of expectations about their capacity to prevent violence and establish peace.

Eric Neumayer (2009, 3) asks whether “the ICC is a form of organized hypocrisy behind which states hide who cannot or do not want to take real action?” But there is a need to be cautious about what the ICC can achieve. Justice is not a panacea for peace. The question is whether it should be part of the peacemaking equation. In this context, Neumayer provides evidence that suggests cautious optimism: “on the whole the fact that the ICC is primarily supported by states, which have been active in the past, suggests that it will function as a complement to, not a substitute for action” (2009, 20). Moreover, the support of states for international criminal justice is likely to be determined by the specific case and not a broader intention to use international institutions as a veneer to demonstrate that 'some' action is being taken. And here the record is mixed. For example, in Libya, the UN Security Council approved both a referral of the situation to the ICC and a military intervention by NATO. But, after endorsing the ICC's intervention, the Security Council subsequently lost interest in supporting the Court's mandate (see Chapter 6). Still, it is difficult to say that the Security Council used the ICC as a means to show it was doing 'something' rather than taking concerted, military action.

Critics claim that judicial interventions by international courts can instigate or prolong violence, undermine peace negotiations, and represent an excuse for avoiding actions which are more likely to resolve conflict. However, each of these assertions suffers from weaknesses and limitations. They do not demonstrate that international criminal justice is inherently deleterious to peace. Where does this leave us? Is it possible that tribunals like the ICC shouldn't be assessed by their impact on peace at all?

### III. “Peace versus Justice” - An Unfair Judgement of the ICC?

As an institution mandated and concerned with international criminal law and not with conflict resolution, one could argue that the ICC should not be judged for its effects on anything but its ability to achieve international criminal justice. The ICC isn't responsible for peace and it could be argued that measuring its impact on peace is unfair. In line with this thinking, the ICC's Office of Prosecutor (2007) released a policy paper distinguishing the “interests of justice” and the “interests of peace”. While the OTP acknowledged that the Court “was created on the premise that justice is an essential component of a stable peace” (Office of the Prosecutor, 2007, 8), it delineated a division of labour wherein matters of peace and conflict resolution were beyond the ICC's remit:

there is a difference between the concepts of the interests of justice and the interests of peace and that the latter falls within the mandate of institutions other than the Office of the Prosecutor... the broader matter of international peace and security is not the responsibility of the Prosecutor; it falls within the mandate of other institutions (Ibid. 1, 9).

Similarly, current ICC Chief Prosecutor Fatou Bensouda (2013) reiterated this view: “As the I.C.C. is an independent and judicial institution, it cannot take into consideration the interests of peace, which is the mandate of other institutions, such as the United Nations Security Council.” These remarks should not simply be taken as an inclination on the part of the OTP to separate peace and justice, but to separate law from politics.

Politics is seen as anathema to the purpose and mandate of the ICC. The term politics here is generally assumed to mean the *realpolitik* of international relations (see Chapter 8). The Court, in the eyes of its champions, is intended to transcend such politics. As Cherif Bassiouni (2003, 191; see also Rodman 2009, 125) wrote:

The human rights arena is defined by a constant tension between the attraction of *realpolitik* and the demand for accountability. *Realpolitik* involves the pursuit of political settlements unencumbered by moral and ethical limitations. As such, this approach often runs directly counter to the interests of justice...

There is an apparent need amongst certain figures within the Court to espouse a separation between politics and the ICC's mandate. Moreno-Ocampo (2007b, 224) insisted that politics has no bearing on the Prosecutor's work: “The Prosecutor’s duty is to apply the law without bowing to political considerations, and I will not adjust my practices to political considerations. It is time for political actors to adjust to the law.”

But few endeavours are as political as conflict resolution. Indeed, the political nature of mass atrocities is central to those who argue that international criminal justice is inimical to efforts to

establish peace. For example, former South African President Thabo Mbeki and Mahmood Mamdani (2014) have argued that because “mass violence is more a political than a criminal matter”, societies attempting to overcome periods of conflict characterized by mass violence and atrocities need “a *political* process driven by a firm conviction that there can be no winners and no losers, only survivors.”

At the same time, senior figures within the ICC have consistently asserted that the Court is conducive to peace and a necessary ingredient in conflict resolution. The same 2007 policy paper stated that:

a new legal framework has emerged and this framework necessarily impacts on conflict management efforts. The issue is no longer about whether we agree or disagree with the pursuit of justice in moral or practical terms: it is the law. Any political or security initiative must be compatible with the new legal framework insofar as it involves parties bound by the Rome Statute (Office of the Prosecutor 2007, 4).

What follows from this position is that the ICC *must* be held to account for its effects on conflict resolution because it is indelibly part of *any* initiative to resolve conflicts in which international crimes have taken place. Indeed, in a speech on the relationship between peace and justice, former ICC Prosecutor Moreno-Ocampo (2007a) maintained that the entire practice of peace negotiations had not only been re-calibrated but had been *replaced* by international criminal justice:

For centuries, conflicts were resolved through negotiations without legal constraints. In Rome in 1998, a new and entirely different approach was adopted. Lasting peace requires justice-- this was the decision taken in Rome by 120 States... It is essential on the contrary to ensure that any conflict resolution initiative be compatible with the Rome Statute, so that peace and justice work effectively together.

The ICC cannot escape the fact that its work affects conflict resolution. But the Court maintains a contradictory position on the subject. While it insists, as noted above, that the pursuits of peace and international criminal justice are separate endeavours, it also holds that its effects on peace are positive. In the same article referenced above, Bensouda (2013) argues that “justice can have a positive impact on peace and security... if anything, the 'shadow of the Court' has helped to isolate individuals wanted by the I.C.C., or to kick-start negotiations.” Thus, whilst maintaining that the ICC does not take the politics of peace into account, the Prosecutor is simultaneously eager to take credit for the Court's effects on peace processes – so long as they are positive. Such proclamations open the Court's actual effects on peace, justice and conflict processes up to scrutiny.

Additionally, the Court's increasingly close relationship to the UN Security Council, the primary international body responsible for assuring international peace and security, signals the ICC's

interest in being *used* as a *tool* of conflict resolution. Indeed, Bensouda (2012) has declared that the ICC should be seen as a “tool” in the “toolbox” of the Responsibility to Protect – a doctrine which can only be legally invoked by the Security Council. More brazenly, former ICC Chief Prosecutor Luis Moreno-Ocampo (2013) recently insisted that the ICC is “a new power for the Security Council”.

While the ICC may maintain the veneer that the pursuit of justice and conflict resolution are separate endeavours, it also insists that that peace and justice are inseparable. Moreover, if the Court is to maintain a reputation as a useful institution in international relations, it needs to demonstrate that it won't ruin peace processes (see Chapter 8). It is thus not only fair but necessary to judge the ICC on the basis of its impact on peace.

#### **IV. Conclusion: Re-Imagining the Peace-Justice Debate**

As Chandra Lekha Sriram (2009, 5) notes, “[a]n obvious lesson that has emerged, and one that cannot be stressed enough, is that the peace versus justice dilemma is grossly oversimplified...there is a persistent belief in the sharp dichotomy between peace and justice that needs to be continually challenged.” (see also Chesterman 2001). There is a widespread assumption that there are only two choices for societies in transition: forgetting the past and sacrificing justice through amnesty or achieving justice through criminal prosecution (Crocker 2004, 2; Sriram 2004, 6; Freeman 2009, 25). This is far too reductionist to be satisfactory and is symptomatic of a field that remains in “urgent need for more sustained, systematic, comparative analyses, and for greater attention to fact-based rather than faith-based claims.” (Thoms et al 2010, 26).

This chapter has sought to show that neither the arguments in favour or against of ICC interventions in the context of ongoing and active conflicts are compelling or conclusive. This leaves us with two possibilities: either international criminal justice should not be judged by its effects on peace or the study of the impact of the ICC needs to be re-imagined. The chapter has shown that the ICC can and should be judged by its effects on peace. Therefore, a rethinking of how to *study* ICC interventions is needed to understand these effects. It is to this task that the thesis now turns.

### **Chapter 3: An Agenda for 'Peace' in the 'Peace versus Justice' Debate**

*We all repeat the mantra that there can be no lasting peace without justice; and that's true enough. But I don't think that we have yet resolved the inevitable tensions between the two in a workable fashion – Louise Arbour (2013).*

#### **Introduction**

Despite a raft of sophisticated arguments regarding the potential positive and negative impacts of the International Criminal Court on the conflicts in which it intervenes, the peace-justice debate has proven insufficient in elucidating a clear and rigorous framework for how to study the Court's effects. Again, there is no doubt that the ICC has complicated conflict resolution. This is not in dispute. But the arguments within the peace-justice debate, as currently constructed, have not provided a sufficient means to identify and analyze *how* conflicts are shaped by interventions by the Court and what impact this has on potential peace, justice and conflict processes. As a result, despite a desire to move beyond the rigid and dichotomous nature of the debate, a way to do so remains elusive.

Given the amount of time and energy spent on the 'peace versus justice' debate, why has a more rigorous research agenda on the effects of international criminal justice on peace processes not emerged? Part of the reason is that the key issues, phases and dynamics that affect and constitute a potential peace process have been neglected. This chapter seeks to fill this lacuna by offering an analytical framework with which to assess and analyze the effects of ICC interventions on ongoing and active conflicts.

#### *Peace in the "Peace versus Justice" Debate*

In assessments of the effects of international criminal justice on peace, peace has generally been held as a constant, defined in its negative variant – the cessation of large-scale, direct forms of physical violence (see, e.g., Lie et al 2006). This is unsurprising. As a concise variable, the reliance on negative peace is “understandable given methodological concerns.” (Höglund and Kovacs 2010, 369). In this context, in order for the ICC to have a positive effect on peace, the work of the Court must be associated with a decrease in, or cessation of, direct, physical violence. Conversely, the effects of the ICC on peace are negative if the Court's intervention precipitates continued conflict or intensified violence. A recent example of this approach is a study conducted by Courtney Hillebrecht (2011), who has measured changes in the incidence of conflict interactions (violence) in Libya against key moments in the ICC's investigation into the Gaddafi regime.

Peace can also be considered in its positive variant, implying something 'greater' than negative

peace – social justice and the lack of structural violence (see Galtung 1969, 167-191). Here, the effects of the ICC would be positive if they contributed to the achievement of 'reconciliation'<sup>13</sup>, and social cohesion in the states in which the Court intervened. The ICC would have negative effects if it prevented such goals from being achieved by, for example, contributing to the entrenchment of social divisions.

Both approaches are problematic. While any finding that the ICC leads actors to respond violently would be important, focusing on negative peace requires the attribution of causality to the ICC for changes in levels of violence. However, by assuming that there is a clear correlation between patterns in violence and the decision-making of the Court, analyses like Hillebrecht's risk decontextualizing political violence, attributing responsibility for increases and decreases in violence to the ICC without adequately considering simultaneous factors which also contribute to levels of violence. They also do not tell us *why* particular actors may respond to the ICC's activities with increased or decreased levels of violence. Moreover, an approach focused myopically on violence neglects empirical findings that increases in violence may, however counterintuitively, have positive effects on the potential resolution of a given conflict (see Greig and Diehl 2012, 108-112). In short, such studies cannot adequately demonstrate the complexity of issues and dynamics which affect levels of violent behaviour.

Focusing on positive peace is even more problematic. The achievement of positive peace is undoubtedly a noble and worthy aspiration. However, it is a distant, long-term and sometimes conceptually 'fuzzy' goal whose ultimate achievability is unclear. It may be the distant end to which societies aspire but never reach. Moreover, it isn't clear how the ICC, as a judicial institution, could or should contribute to a society's pursuit of social justice or the eradication structural violence.

More importantly for the purposes of this thesis, both approaches neglect that peace is often a product of a *peace process* – “a political process in which conflicts are resolved by peaceful means” and founded upon a “mixture of politics, diplomacy, changing relationships, negotiation, mediation, and dialogue in both official and unofficial arenas.” (Saunders 2011, 483; See also Burgess 2004). The distinct factors and facets critical to a peace process are subsumed under the banner of 'peace'. Little, if any, attention is paid to what a peace process entails and the possibility of a complicated mix of effects on the distinct issues, phases and dynamics that constitute it. Even less attention is paid to the possibility that increases and decreases in violence or even failed negotiations are the consequence not of the ICC but of an altogether separate mix of factors, behaviours and interventions. Seeking to

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<sup>13</sup> For difficulties in finding consensus on what constitutes 'reconciliation', see Graybill (2004).

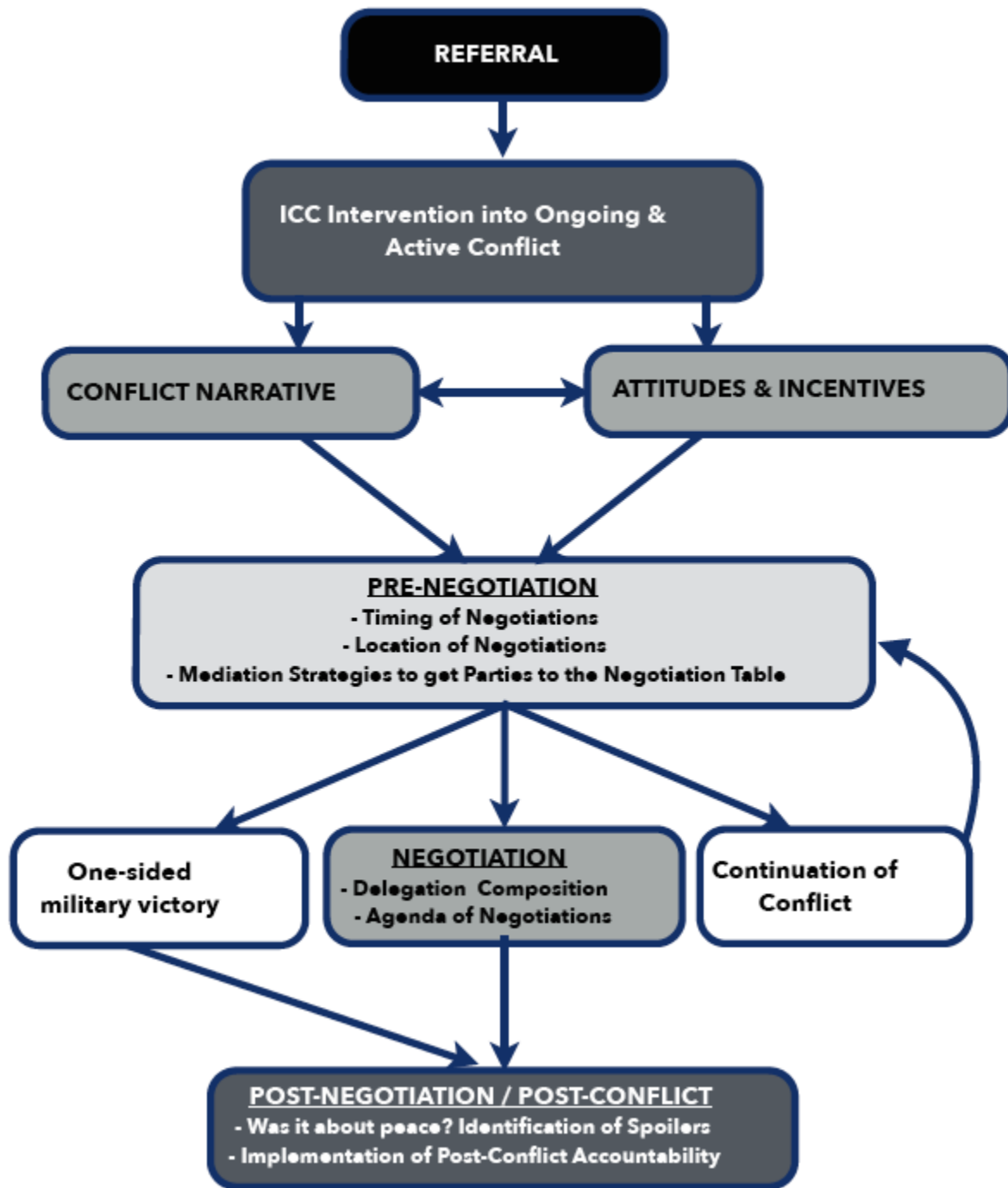
ascertain whether international criminal justice is “good *or* bad” or “helps *or* hinders” obfuscates how international criminal justice may impact these particular phases, dynamics and issues of peace processes – and *how*. As a result, approaches to analyzing the peace-justice debate have proved insufficient in understanding the effects of the ICC on ongoing conflicts and, in particular, its effects on moving peace processes forward. Gradually, this is changing.

Despite “limited attention, among conflict researchers, directed toward how states attempt to deal with their past history of violence and how this can eventually affect the prospects for long-term peace and stability” (Lie et al 2006, 1), there is a slow but welcome acknowledgement that international criminal justice should be studied through the lens of peacebuilding (see Sriram 2007; Newman et al 2009; Campbell et al 2011; Ramsbotham et al 2011; Sriram et al 2013). This chapter, the analytical core of the thesis, seeks to add to this growing body of research by proposing a novel framework for studying the effects of international criminal justice on conflict resolution and peace processes. This is achieved by bringing key elements pertaining to peace processes into the peace-justice debate.

Our first task is to identify how an ICC intervention may impact the understanding or narrative of a conflict as well as the incentives and attitudes of the parties towards the prospect of entering negotiations. The chapter posits that the conflict narrative – the overarching framing or understanding of a conflict's causes and dynamics – along with the attitudes and incentives of the warring parties towards entering a potential peace process will affect all other issues, phases and dynamics of any potential peace process. How the ICC shapes these two issue areas will ultimately determine whether and how a given peace process moves forward.

Our second task is to identify the dynamics and phases that are required to move parties towards a peaceful settlement and how the ICC may affect them. There is a general recognition within conflict and peace studies that a peace process consists of three key stages: pre-negotiation, negotiation and post-negotiation (see, e.g., Höglund 2008, 15; Greig and Diehl 2012, 16). Others consider additional phases (See, e.g., Guelke 2008, 63-77; Kriegsberg 1998, 280-284), but the inclusion of these three phases is uncontroversial. Moreover, each phase in a peace process is itself made up of different issues and dynamics. How the ICC affects these dynamics will affect the potential for a peace process to move towards the ultimate aim of conflict resolution. Taking the above, a framework to study and analyze the effects of the ICC on conflict and peace processes begins to take shape (see Chart 3.1).

**Chart 3.1:** The Effects of ICC Intervention on Peace Processes



Of course, not all conflicts will follow the same trajectory. Peace and conflict processes are rarely, if ever, linear. Importantly, and as illustrated in the framework, some conflicts will never reach a negotiation phase but instead end through the military victory of one side (such as in the case of Sri Lanka) or return to a state of conflict (such as the Central African Republic). Indeed, the former situation is especially relevant to the analysis offered in this thesis as Libya is an example of a one-

sided military victory of the opposition over the regime of Muammar Gaddafi. But even in such instances, we should expect that the new government and transitional state will make decisions regarding matters of international criminal justice and accountability – even if that decision is to ignore the matter altogether. Moreover, and as elaborated below, we should expect that the manner in which a conflict ends will shape and determine the new government's approach to confronting past atrocities.

## **I. Conflict Narratives: From Causes and Dynamics to Good and Evil**

How conflicts are understood will invariably affect many, if not all, the stages of a peace process. This section is concerned with the over-arching narrative of a conflict and how it may be affected by ICC interventions into ongoing and active conflicts. A conflict narrative can be understood as the dominant lens or, as Sverker Finnström (2009, 100) describes it, the “official discourse” enacted to make sense of the conflict. The particular focus here is on how a conflict is perceived in terms of its causes and dynamics. Debates about the causes and dynamics of conflict represent efforts not only to understand the persistence of political violence but to understand the very nature of a conflict.

Understandings of what causes and fuels violence ultimately shape the dominant narrative of a conflict. It is generally accepted that the causes of violence need to be distinguished from the dynamics of war and that addressing *both* is critical to any successful peace process (Azar 1986, 31; Burton 1986a, 29).<sup>14</sup> A number of theories have been put forward to explain why political violence is chosen as the expression of conflict and why it persists in civil wars. The 'greed versus grievance' debate attempts to tackle precisely this question (see Berdal and Malone 2000). On the one hand, authors such as Collier and Hoeffler (2000) argue that, as rational agents, parties to a conflict will pursue violence primarily as a result of economic dispositions and cost-benefit analyses (see Collier and Hoeffler 2000; Reno 2000, 43-68; Collier and Hoeffler 2004, 563-595). On the other hand, numerous authors have suggested that it is the political *grievances* of the parties, and not economic greed, that is at the root cause and driving motivation of violence. Disagreements over issues such as identity, ethnicity, religious affiliation, or social class are the ultimate causes and drivers of violence (see also Azar 1986, 29; Burton 1986b, 99). Others suggest that greed versus grievance is a false debate. The reality is that no conflict can easily be grouped as purely greed-based or grievance-based and “we really need to understand how 'greed' and grievance *interact*.” (Emphasis in original) (Keen 2008, 30; see also Dolan 2009, 255). Nevertheless, the debate demonstrates the extent to which understandings of the causes of violence play a role in how conflict resolution is approached. Even those who are altogether skeptical of the utility of identifying “root causes” accept that the identification of the causes and dynamics of a conflict has largely determined approaches to resolving violence (see Woodward 2007).

A second feature that plays out in narratives of conflicts is the demonization and vilification of belligerents. It is common in violent political conflicts for each side to demonize the other in an attempt

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<sup>14</sup> Not all agree, however. Susan Woodward (2007, 164) posits that a focus on root causes can be deleterious, observing that “there are some very good reasons and some not so good why the ‘root causes’ do not matter in successfully ending a civil war.”

to undermine the legitimacy of their adversary's positions and aims while elevating the legitimacy of their own. This rhetoric frames the cause of the conflict as the particular attributes and 'evil' of an adversary and establishes a 'good' versus 'evil' account where one side of the war is dehumanized and viewed as illogical and barbaric (Mazurana 2005, 30). As explored below, the process of vilification can impinge on the possibility of a negotiated settlement.

How might the ICC affect the dominant narrative of a conflict and, more specifically, understandings of the causes and dynamics of violence? First, the ICC is likely to bolster a 'good' versus 'evil' account of the conflict into which it intervenes. As Gerry Simpson (2007, 157) writes: “War crimes trials describe a world of bad men doing evil deeds.” Through its investigations and issuance of arrest warrants, the ICC has a labelling function which can have profound effects on understandings of a conflict. This is not to say that the ICC itself *creates* 'good' versus 'evil' narratives. As a familiar feature of violent conflict, such a framing of a conflict will likely pre-date any ICC intervention. However, the ICC may contribute to entrenching this understanding of the war. After all, few things are more effective at demonizing a party to a conflict than accusations that they have committed the most egregious violations against 'humanity' – war crimes, crimes against humanity and genocide. Importantly, once an arrest warrant has been issued, the warrant and its effects on stigmatizing the indicted party are likely to be permanent. Some groups that have previously been politically rehabilitated, such as Sinn Féin or the Palestine Liberation Organization, did not have the stigma of criminal arrest warrants hanging over them. In the case of an ICC-indictee, a warrant is 'live' until the individual is either tried or deceased. Indictees may thus carry their stigma indefinitely. For example, while Sudanese President Omar al-Bashir agreed to allow South Sudan to peacefully separate from Sudan, he remains permanently stigmatized as a perpetrator of genocide in Darfur, in large part because of the ICC's arrest warrant against him.<sup>15</sup>

Second, and relatedly, the intervention of the ICC may produce a narrative that is, above all, about particular *individuals*. As discussed in Chapter 2, the ICC functions to individualize guilt and responsibility for the crimes under its jurisdiction. A by-product of pursuing individual responsibility for atrocities is the ascription of responsibility of a conflict to specific individuals. There is a risk that the ICC places the “entire blame for violence on a few particularly 'savage' Africans – whether Omar al-Bashir or Kony – by misrepresenting situations and reducing the wide set of actors and structures

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<sup>15</sup> Bashir was charged in March 2009 with crimes against humanity in genocide. In July 2010 charges of genocide were added. As noted in Chapter 2, his stigmatization has not prevented him from traveling on diplomatic missions, including to ICC member-states.

involved in violence to just a few individuals.” (Branch 2011, 213). Moreover, as Keen (2008, 3) points out, “[w]here atrocities are seen as a kind of moral collapse, they are usually portrayed as the work of particularly bad (or evil) individuals.” Individuals indicted by the ICC are likely to receive this label and be consequently delegitimized as belligerents in the conflict and, possibly, as negotiation partners.

For the ICC, social and socio-economic causes and dynamics are irrelevant. After all, only individuals can end up in the dock at The Hague. Thus, where the ICC intervenes, we should expect to see those individuals it investigates and indicts take a prominent, even dominant, role in the narrative of the conflict. The individual perpetrator wanted by the ICC, in this context, may be seen as the very *cause* of the conflict itself. Bringing such individuals to justice, then, is likely to be seen as being a form of conflict resolution in and of itself. The trope that there can be “no peace without justice” here suggests that conflict resolution is not possible unless those guilty of atrocities are brought to account. This certainly has been the case with Joseph Kony, Omar al-Bashir and Muammar Gaddafi, figures who have assumed 'larger-than-life' roles during the wars in northern Uganda, Darfur, and Libya, respectively. Their stigmatization has inspired and entrenched views that resolving the wars necessitates their 'removal'.

Third, the ICC is a fundamentally dynamics-focused institution; it is largely irrelevant *why* crimes were committed and the political context in which atrocities occur is not intended to have any bearing on the Court's investigations or prosecutions. “Greed or grievance?” is not a question one is likely to hear in an ICC courtroom.<sup>16</sup> What matters is *that* atrocities occur and that *when* they do, a legal and moral framework exists to punish those 'most responsible'. As Louise Arbour (2012) observes: “Humanitarian or judicial objectives address only the *manner* in which the conflict unfolds” (emphasis added). This has been a point of contention for some observers. Mahmood Mamdani (2009, 272), for example, has decried the decision by the ICC to charge Bashir with genocide in Darfur, insisting that it has decontextualized the conflict in favour of a view whereby “all deaths, 'direct' or 'indirect,' are the result of a single cause – violence – coming from a single source: the government of Sudan.” Mamdani (Ibid., 273) adds that the ICC's “mono-causal and one-dimensional version of history” amounted to “demonization masquerading as justice.” In contexts where the ICC intervenes, the Court will thus likely contribute to a narrative of the war that is based on the dynamics of violence and atrocity (by 'evil' forces or individuals), neglecting the causes underlying violence.

Importantly, the neglect of a conflict's causes, as well as some of its dynamics, is likely to be

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<sup>16</sup> Interestingly, however, there have been calls to address economic greed within the ICC. See, for example, Clarke (2013).

exacerbated in cases where the Court intervenes in conflicts whose roots lie beyond the jurisdiction of the ICC. The Court has a limited temporal jurisdiction and can only investigate atrocities which occur after 1 July 2002. Moreover, the Court's temporal jurisdiction can be restricted by the UN Security Council when it refers a situation to the Court, as it did in the case of Libya (see Chapters 6 and 8). The effects of a tribunal's temporal jurisdiction on a conflict are important. The decision to intervene in conflicts whose causes precede the temporal jurisdiction of the ICC may affect who is investigated and prosecuted. Moreover, the temporal jurisdiction of the ICC may also obfuscate the role and responsibility of other actors in contributing to or even creating the conditions under which atrocities occur. For example, the temporal jurisdiction of the International Criminal Tribunal for Rwanda (ICTR) was restricted by the UN Security Council to the period of 1 January to 31 December 1994, despite Rwanda's demands that the tribunal be granted a broader mandate. As a result, the Tribunal has been unable to investigate the role of Belgian and French forces in fostering the conditions for the genocide (Lanegran 2004, 114), not to mention allegations that the Rwandan Patriotic Front subsequently conducted a counter-genocide in the Democratic Republic of Congo (see Office of the High Commissioner for Human Rights, 2010).

## **II. The Attitudes and Incentives of Warring Parties**

The attitudes and incentives of parties towards committing to a peace process are determined by whether the parties believe that their interests are better served by engaging in peace talks or by continuing to fight. The decision-making of the warring parties in this context will ultimately shape and determine the potential for a peace process to begin – and potentially succeed.

Giessman and Wils (2011, 190) suggest three motivations for parties to engage in mediated peace negotiations: negotiations may become the preferred strategic option for the parties as a result of a military stalemate, because of support within the party's constituency for negotiations, or as an attempt to use the negotiations as a cover to regain military strength; entering negotiations may be a communication strategy aimed at giving “a public signal of readiness to compromise” while increasing pressure on the other party to “react constructively;” or the parties entering into negotiations may seek to improve the “general conflict environment” by communicating to interested parties that the conflict can be transformed (Ibid., 190-191). At the core of all of these motivations is a desire of the parties to retain or rescue their sense of legitimacy.

It should come as no surprise that the framing of a conflict as good-versus-evil can shape the attitudes and incentives of parties towards peace talks. Greig and Diehl (2012, 124) argue that accounts which pit 'good' against 'evil' tend to make “negotiating with the other side difficult and settlement of the conflict virtually impossible.” In a similar vein, Bertram I. Spector (1998, 44-49) argues that demonization raises the costs of negotiation by giving the decision to negotiate the appearance of appeasement and any negotiator the potential label of hypocrites and collaborators in evil. Moreover,

One of the major consequences of villainization is the closing off of the negotiation option and the peaceful settlement of disputes...[and] often the immediate response of the villain is further rigidity in its position and an escalation of the conflict. (Ibid., 47).

Demonization may thus have the effect of reducing the space for peaceful approaches to conflict resolution by raising the costs of negotiations. International actors understand the utility (and danger) of labelling actors as criminal and 'evil' on the potential to initiate peace negotiations. For example, when it was suggested that Syrian President Bashar al-Assad be labelled a criminal for his role in the Syrian civil war, US Secretary of State responded by stating that “[b]ased on definitions of war criminal and crimes against humanity, there would be an argument to be made that he would fit into that category... But I also think that from long experience that can complicate a resolution of a difficult, complex situation because it limits options to persuade leaders perhaps to step down from power.” (See AFP 2012).

None of this is to say that negotiations with 'villains' cannot occur. Spector (1998, 45) cites numerous cases in which a previously identified 'villain' is negotiated with, including negotiations between the UK Government and the Sinn Féin as well as Israel's decision to negotiate with the Palestine Liberation Organization (PLO). However, this requires and a commitment to “overcome the very designation of the other party as a villain...Without this prenegotiation decision, real negotiation will never occur.” (Ibid.).

The decision of whether to negotiate with “extremists”, “terrorists”, or “international criminals” is as difficult as it is controversial (see Spector 1998, 43-59; Fisher et al 1999, 168-171; Zartman 2008a; Mnookin 2010; Zartman and Faure 2011). Negotiating with 'villains' is likely to “be morally, politically and legally sanctioned.” (Slim 2007, 10). The colouring of a conflict as 'good' and 'evil' has consequently created opportunities for parties to reject negotiating with an opponent on the basis of its perceived 'evil', a label often constructed and reproduced by the very same party that is unwilling to negotiate. In other words, a 'good' versus 'evil' narrative of the conflict can be 'tapped into' in order to justify the positions and decisions of the warring parties towards negotiations. For example, following overtures on the part of the Taliban to negotiate a 'truce' in Afghanistan with the United States, former US Vice President Dick Cheney responded: “We don't negotiate with terrorists.” Cheney then reaffirmed the country's commitment to a full military solution: “I think you have to destroy them...It's the only way to deal with them.” (See Fattah 2006). Cheney's statement demonstrated how the demonization of an entire group as “terrorists” could justify both a refusal to negotiate as well as a commitment to a military solution to the conflict.<sup>17</sup>

There are undoubtedly risks in negotiating with stigmatized individuals and groups, including that doing so bestows legitimacy to such actors and their causes. The decision of parties to negotiate with 'evil' thus presents a baseline moral dilemma for the field of conflict resolution and one whose stakes may be exacerbated by ICC interventions.

It is important to also consider the attitudes and incentives of actors who may not be direct participants in the conflict but play a role in fuelling the war. Ensuring the right parties play a productive role in the peace process is a critical task (See Zartman 1989, 248). This requires having an understanding of the drivers of conflict, some of which may be beyond the boundaries of the state or conflict theatre. In particular, it is not unusual for regional or neighbouring powers to have active

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<sup>17</sup> It should be noted that the US, under Barack Obama, subsequently engaged in negotiations with the Taliban (see, e.g. Brennan 2013; Roberts and Graham-Harrison 2013)

interests in the conflict that need to be addressed (Giessman and Wils 2011, 191).<sup>18</sup> Leaving key external parties outside of a peace process may doom attempts to find a sustainable solution to the conflict.

ICC investigations and arrest warrants may have numerous and diverse effects on the attitudes and incentives of conflict parties as well as their patrons. Firstly, individuals targeted by the ICC may respond to the Court's intervention violently. As outlined in Chapter 2, critics of international criminal justice's role in ongoing conflicts suggest that the ICC's targets will lose any incentives to peacefully resolve the conflict and thus will lash out. A re-commitment or outburst of violence may be a demonstration of strength in the face of the ICC on the part of the indicted individual. This is, for example, one way to interpret Bashir's expulsion of humanitarian groups from Darfur in the wake of his indictment by the ICC in 2009. However, violent responses may also be the result of an indicted individual being humiliated by the issuance of an arrest warrant. Emotions such as humiliation and embarrassment may result from investigations and indictments and subsequently impact the party's behaviour and attitudes towards peace. David Keen (2008, 50) has argued that humiliation can contribute to the ongoing production of violence (see also Gilligan 2000; 2003). In such cases, we may see actors entrench their commitment to violence. Crucially, however, attributing continued or escalated violence directly to the ICC requires evidence that the violence is linked to the Court's intervention and decision-making and *not* to other factors in the conflict. Continued violence may be a result of actors being 'locked-in' to a logic of violence or other factors, such as a military intervention by external parties.

It may not be the target(s) of the ICC who respond to the Court's intervention by renewing their commitment to violence. In cases where an ICC intervention is aimed at only one (or primarily at one) side of the conflict, such as in Uganda or Libya, the Court will shape and reaffirm a narrative of the conflict that ultimately benefits one side of the war, painting them as the legitimate and 'good' side by virtue of not being indicted. In contrast, the indicted party becomes 'criminal' and 'evil'. Non-targeted parties may believe that the Court's intervention signals a shift in the international community's perception of the conflict in their favour, bolstering their position in the war. In this way, the ICC's intervention may be seen not as a means to investigate a *situation*, but a way to investigate a particular party or group of adversaries. This is a widely held misconception. In his thorough and compelling

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<sup>18</sup> The work of Gérard Prunier (2004; 2009) on the regional dynamics of conflict in Eastern and Central Africa is testament to this fact.

analysis of the Libyan uprising, Ethan Chorin (2012, 201) makes this error in writing that the UN Security Council made a “referral of key *individuals* to the International Criminal Court” (emphasis added) and not the situation in Libya itself. Such an interpretation may inspire a (re)commitment to violence and embolden those belligerents that the ICC *doesn't* target to continue fighting in the belief that a military victory against their 'evil', 'criminal' adversaries is ultimately achievable. The non-targeted party may also tap into the 'good' versus 'evil' framing of the conflict in order to justify their recalcitrance or refusal to explore a negotiated settlement. The non-indicted party may thus argue that it cannot negotiate with 'evil' or with 'criminals' and 'terrorists'. Notably, a refusal to negotiate with individuals wanted by the ICC fits with the Court's view that certain actors, namely those wanted on allegations of international crimes, are not, and can never be, legitimate negotiation partners.

But it is important not to discount the possibility that neither party responds violently to an ICC intervention. Some indicted actors may attempt to rescue the sense of legitimacy they perceive as being threatened by the Court. If they feel that the narratives produced by the involvement of the ICC, as discussed above, misrepresent them but can be altered or reversed, they may seek to communicate their interest in a peace process and commit to negotiations, viewing it as a platform or pulpit from which to make their case. This is most likely to be true for non-state actors such as rebel groups who do not otherwise have significant means to communicate with the outside world (see Giessman and Wils 2011, 191). Engaging in the peace process may thus lend a degree of legitimacy to the indicted party. This is also likely to be heightened when only one side in the conflict is targeted by the ICC. Here, the indicted party may seek to use the peace process as a vehicle to communicate what they see as a more fair and accurate understanding of the conflict wherein *both* sides are seen as responsible for violence and human rights abuses.

An intervention by the ICC may also affect the perceived (in)security of a targeted party and cause them to retract. The ICC, in this context, may be seen as a direct threat to the viability of the targeted group and their security, particularly if they lose the support of external groups. Still, this does not necessarily mean that the targeted group will respond violently. Rather, they may take a defensive approach and even enter peace negotiations in order to bide their time. If insecurity and fear for safety is caused by the ICC's intervention, it is likely that the targeted group will seek guarantees against prosecution as a precondition to entering peace negotiations (see the case of the LRA in Chapter 4).

The attitudes and incentives of indicted parties may also be affected by the response of external parties and patrons with interests in the conflict to an ICC intervention. The Court's interventions may create an important disincentive for conflict patrons to continue supporting – financially or otherwise –

the investigated or indicted party, particularly where international scrutiny and the possibility of sanctions is high. This, in turn, may affect the indicted party's interest in entering negotiations. An indicted party may seek to fill the vacuum left by a departed patron by exploring the benefits of entering negotiations or by engaging in peace talks in order to 'buy time' to find new sources of support.

Similarly, it is possible that the ICC may encourage the defection of an ICC-indicted party's supporters and allies. Insofar as this weakens the indicted party, this too may have implications on the party's willingness to enter the peace process. Again, this does not tell us whether or not the party will seek negotiations because it views a peaceful settlement favourably or whether it does so in order to 'buy time', regroup and rearm. Additionally, there is a danger in ascribing defections in the midst of conflict directly to the ICC whilst other factors, including the level of violence, sanctions and offers from third parties, may be as, if not more, influential. Nevertheless, if indicted individuals are isolated internally or externally as a direct or indirect result of the ICC, this gives some credence to the claims that the ICC can marginalize and isolate indicted individuals.

Lastly, it is important to consider the possibility that the ICC does not affect the attitudes and incentives of actors targeted by the ICC in any measurable way. In such cases, there may be more pressing issues at hand, such as an intense period of warfare or an ongoing international military intervention which threatens the very survival of the indicted party. In such cases, we might expect that little attention is paid to the dropping of ICC warrants in relation to the dropping of bombs.

### **III. The ICC and Peace Processes**

The overarching narrative of a conflict and the attitudes and incentives of warring parties to enter peace talks are key factors which determine whether and how a potential peace process is initiated. Both factors filter through and affect the subsequent phases, issues and dynamics of any given peace process. This section 'explodes' peace processes into their constituent phases, issues and dynamics and suggests how the ICC can affect each.

Peace processes generally consist of at least three phases: a pre-negotiation phase, a negotiation phase, and a post-negotiation phase. Each of these stages is made up of additional issues and dynamics. This is not to suggest that all peace processes will pass through all three phases or that they will do so similarly. Some efforts to resolve and transform conflict may fail before they reach the negotiation phase. Others may fail during negotiations, resulting in a return to violence or a new round of mediated talks, while others may fail in the post-negotiation phase as parties de-rail the implementation of peace agreements. It should also be noted that the phases in a peace process – and the issues and dynamics within them – cannot be neatly packaged (Zartman 1989, 237). It may not always be clear where one phase ends and another begins – or vice versa. Issues and dynamics that affect one phase will often leak into and shape subsequent stages. In short, the packaging of a peace process into neatly delineated phases belies the complexity and dynamism of conflict resolution, where phases often blur and blend rather than begin and end. While it is essential to recognize this reality, the thesis nevertheless treats the phases under consideration as analytically distinct. Parsing them out provides a useful way to examine how international criminal justice affects the unique issues and dynamics within each stage of a peace process.

#### **III.I. Getting to the Table: The Pre-Negotiation Phase**

Studies of the pre-negotiation phase of peace talks are ultimately concerned with the distinct dynamics and decisions which affect the willingness of parties to 'get to the table'. Pre-negotiation is, as Janice Gross Stein (1989, 232) remarks, a process that is “analytically distinct and prior to the process of negotiation.” Zartman (1988, 240) concisely spells out the parameters of the pre-negotiation stage of a peace process:

Prenegotiation begins when one or more party considers negotiation as a policy option and communicates this intention to other parties. It ends when the parties agree to formal negotiations...or when one party abandons the consideration of negotiation as an option...In essential terms, prenegotiation is the span of time and activity in which the parties move from conflicting unilateral solutions for a mutual problem to a joint search for cooperative multilateral or joint solutions...[T]he nature of the activity lies not in

conducting the combined search for *a/the* solution but in arriving at and in convincing the other party to arrive at the conclusion that *some* joint solution is possible.

Critically, the pre-negotiation stage offers potential learning which may enable “the parties to reconceive their relationship” (Stein 1989, 232) and permit them “to move from conflicting perceptions and behaviours” to cooperative ones, thus creating a shift towards a “conciliatory mentality, believing the solution is to be found with, not against, the adversary.” (Zartman 1988, 243). Where pre-negotiations fail to move the peace process towards official negotiations, the parties will likely return to using violence as the dominant expression of conflict until the military victory of one party over the other or a renewed round of pre-negotiations.

At least three issues are of critical importance in the negotiation phase: the timing of the negotiations, the decision of where to hold peace talks, and the mediation strategies employed to get parties to the negotiation table.

*(i) Ripe Moments: The Timing of Peace Talks*

Few issues have garnered as much attention amongst scholars and practitioners of international conflict resolution as *when* negotiations should be initiated. “Parties resolve their conflict only when they are ready to do so” (Zartman 2003) and the success of a peace process depends on the “proper timing of and necessary conditions for the launching of an appropriate mediation process.” (Mitchell 1993, 156).

While many authors have written about the importance of identifying “ripe” moments in the peace process (See, e.g., Kriegsberg and Thorson 1991; Haass 1990), no one has so systematically explored the timing of negotiations as William Zartman (See Zartman 1989; Zartman 2000; Zartman 2008b, pg.232-244; Zartman 2008c). Ripe moments, according to Zartman (1989, 43), occur when parties experience a mutually hurting stalemate wherein the conflict presents itself to the warring parties as an endless, “flat, unpleasant terrain stretching into the future”. Faced with a decision to either continue fighting a war they cannot win and which is incurring high costs on the belligerents and few benefits, the parties will decide that an alternative approach to resolving the conflict is desirable. The parties may be spurred on by a “recent or impending catastrophe” which pushes them out of the violent deadlock towards negotiations (Zartman 2008c, 232). Ripeness thus pertains to both the ideal timing as well the right *conditions* for peace talks (Fisher 2011, 20). It reflects the reality, as Rubin (1991, 238) puts it, that conflicts have a life cycle which “consists of blips and bulges rather than a straight line...[and these] changes in intensity create opportunities for movement.” In short, this mutually hurting stalemate is a necessary (if insufficient) condition for a shift in strategic thinking away from

attempting to achieve military victory towards a consideration of resolving the conflict via peace negotiations. If the desire to negotiate is reciprocal, a “mutually enticing opportunity” to find a peaceful resolution may emerge between the parties.

Some have criticized or attempted to reformulate Zartman's ripeness theory. Kleiboer (1994 115-116) questioned whether ripeness is a “fruitful notion” and suggested that the concept of “willingness” to negotiate is more appropriate because willingness allows for the “possibility of conflict management at a much earlier stage” than ripeness. Lederach (2008, 38) also takes aim at the concept of ripeness, arguing that it assumes a linearity to conflict that is unlikely to exist and thus is “more like a rear-view mirror than a windshield” to understanding why parties enter a peace process when they do. Pruitt (2005, iv) treats Zartman's work more favourably but suggests an alternative theory in postulating “readiness theory” which posits that “an actor’s readiness for conflict resolution is a function of both motivation to end the conflict and optimism about the success of negotiation.” There is thus a general agreement that the timing of negotiations and the factors that bring parties to the table at a particular moment is critical – even if the details of when is right and how to identify the best time to negotiate remains contested. In short, timing matters. Not all moments in a conflict are best or ideal for mediation and negotiation.

The questions with regards to the ICC's effects are rather simple: does the Court's involvement affect the conditions which lead to peace negotiations at a particular time and, if so, how? Can an intervention by the ICC contribute to 'ripeness' and the emergence of a mutually hurting stalemate between the parties?

First, the ICC may inhibit a mutually hurting stalemate from emerging. It may, as many suggest (see, e.g. de Waal 2010; Weissman 2010; Mbeki and Mamdani 2014), embolden targeted parties to respond with renewed or heightened violence. Moreover, as suggested above, the labelling of actors as “evil” criminals may embolden the non-targeted party to continue fighting rather than enter negotiations, if it believes that the intervention of the ICC is part of a larger international agenda which can help it defeat its enemy. The non-targeted party may thus read the investigation or indictment of its adversary as a legitimization of its own position and its use of violence and consequently refuse to enter into any process which reconceives their adversary as a legitimate negotiation partner. In such instances we might expect the emergence of a ripe moment for negotiations to be frustrated by the ICC's intervention in favour of the non-targeted party committing to continued violence. This is true even if the ICC-targeted adversary is prepared to negotiate. As Greig and Diehl (2012, 109) write: “[a] one-sided hurting stalemate would leave a situation in which the unconstrained side may continue

fighting and reject any settlement attempts.”

Alternatively, the ICC may have the opposite effect, altering the strategic and tactical calculations of the parties involved and thus contributing positively to the emergence of a mutually hurting stalemate. This may occur directly or indirectly. Directly, a party may feel threatened by ICC investigations and arrest warrants and thus explore whether it is possible to enter negotiations, perhaps with the aim of negotiating the removal of indictments. Indirectly, patrons of a party under the microscope of the ICC may, as mentioned above, remove their support for fear of being associated with an investigated and indicted party or because of other international pressures. If the now marginalized party was highly dependent on the patron's support, this could move them closer towards a recognition that 'winning' the conflict is impossible; a negotiated settlement thus emerges as an attractive alternative. In other words, an investigation or indictment may create, or may be perceived by the party as, a “recent catastrophe”. However, as noted above, there remains the ever-present risk that negotiations may also be used as a means to buy time to re-organize and seek new patrons.

#### *(ii) Location of Negotiations*

The selection of a location for negotiations is never random. While the decision-making involved in choosing a location for peace talks has not received its scholarly significant attention, it is of critical importance (see Holbrooke 1998, 203-204; Giessmann and Wils, 2011, 183-206; Brown and Baer 2011, 190–200). As Salacuse and Rubin (1990, 5) explain:

Site selection, in fact, is always an important decision in negotiation... The reason for this concern is that disputants almost always assumed and with good reason--that the particular location in which they negotiate will have consequences for the ensuing process and, ultimately, its results.

Salacuse and Rubin (1990, 5-10) outline four possible locations to hold negotiations: in the territory of either of the warring parties, in a third-party's territory, or, as a result of technological advancements, in a virtual space. There exists considerable disagreement about which types of location are best suited to negotiate the termination of violent political conflict. Some view distant locations as most appropriate. According to Wallenstein (2007, 45), for example, a “needs-based approach” to conflict resolution views negotiations as best “held far from the scene.” Geissman and Wils (2011, 198), conversely, maintain that the preferences of the protagonists in a conflict will generally be inclined to hold negotiations within the conflict state or at least nearby. They further list key characteristics of an ideal location: safety and security for the parties, neutrality, and confidentiality (ibid., 199), but concede that, in protracted conflicts, finding neutral ground may require holding negotiations outside of the conflict

country. This may prove difficult for rebel groups which find it difficult to travel to other states for fear of being detained or attacked (ibid.). Importantly, Salacuse and Rubin (1990, 9) note that the presence of a third-party mediator is likely to be a determining factor: “one of the most important contributions that a third party can make as mediator or conciliator is to offer the disputants an acceptable place to negotiate.” This was the case, for example, with the Camp David and Dayton Accords (see Holbrooke 1998, 203-204), where the US offered both its mediation and its territory to the disputants. It might be added that some states take particular interest in gaining reputational benefits by offering their territory for negotiations. The tiny Middle Eastern country of Qatar, for example, has positioned itself as host to a multitude of international negotiations and dispute resolutions, including the Darfur peace talks and recent negotiations between the US and the Taliban (Hounshell 2012).

Does the ICC affect the location of peace negotiations and, if so, how? First, it would be expected that negotiations involving indicted individuals do not happen on the territory of a third-party state which is a member of the ICC. If negotiations were held in a member state of the ICC, there would likely be a significant outcry as well as pressure from the international community and international human rights groups for the host state to detain and surrender the ICC-indicted individual to the Court, creating an unwelcome distraction for the parties and mediators. In other words, states concerned about the domestic and reputational costs of hosting stigmatized actors are unlikely to offer their territory as a location for talks. Notably, Qatar is not a member-state of the ICC and thus caters as a suitable location for talks on the Darfuri conflict in which both members of the government of Sudan and rebel groups have been indicted by the ICC.

Second, it is expected that the indicted parties will seek to influence the decision on where to hold negotiations. As suggested above, security and safety concerns are likely to loom large in the selection of a setting for peace talks. Indicted individuals are thus unlikely to feel secure travelling to states where their apprehension is distinctly possible or probable. At the very least, we would expect them to seek guarantees that they will not be arrested. At times, this may require an offer or promise of amnesty (see below). However, this may not suffice in convincing the indicted party to be present at peace talks.

The choice of location will also be affected by *who* is indicted. Government parties are unlikely to fear using their territory as a location for negotiations, even if they are a member of the ICC. Rebels, on the other hand, are unlikely to feel secure negotiating on the government's territory or the territory of an ICC member-state where there is a risk of being arrested and extradited to The Hague.

While a debate remains as to what an ideal location for peace talks is, there is a general

agreement that location matters. Parties to a peace process have an interest in where talks are held and, at least in some cases, an ICC intervention will shape the decision-making and rationale of where peace negotiations are held.

*(iii) Mediation Strategies to Get Parties to the Negotiation Table*

There is no universally accepted definition of “mediation”. However, as Fisher (2011, 159) points out, all definitions share a few key characteristics. Mediation “is the intervention of a skilled and impartial intermediary working to facilitate a mutually acceptable negotiated settlement on the issues that are the substance of the dispute between the parties.” According to Greig and Diehl (2012, 2), it is also important to recognize that “mediation is voluntary on the part of disputants as well as the mediator.” Bercovitch and Gartner (2009, 20-21) add that “mediation is a rational, political process, representing a strategic engagement between parties and a mediator” that is most likely to be pursued in complex conflicts where other attempts to manage the conflict have failed, making the possibility of mediation more appealing to the protagonists. Fisher (2011, 173-174) concurs, adding that, “[s]adly, mediation efforts are typically initiated only after the parties' attempts have failed and coercion or violence has already taken place.” (See also Kleiboer 1994, 115).

Mediators may be individuals (e.g. former US President Jimmy Carter or former South African President Thabo Mbeki) although, by a rather significant margin, mediation is largely carried out by states or international organizations (Bercovitch and Rubin 1992, 10-14; Bercovitch and Gartner 2009, 22-26).<sup>19</sup> Mediators can also be 'official' – appointed to the position of professionally mediating a negotiation, or unofficial – individuals or groups are not officially appointed mediators but take on mediator-type roles. Further, mediators can take a multitude of forms and roles in the conflict resolution process (see Mitchell 1993, 141-148; Keashley and Fisher 1996, 241-242; Moore 2003).

Choosing a mediator remains an issue of much contention. The choice is highly context-dependent, reflecting the particular needs, interests and expectations of the parties involved (see Giessmann and Wils 2011, 196). There is little agreement on whether mediators should and can be impartial, disinterested and neutral. Fisher (1996, 161) argues that mediators, while not disinterested in the outcome of a dispute, should not have any “direct interest” in the conflict itself. Bercovitch and

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<sup>19</sup> Even in cases where organizations and states conduct mediation, according to Greig and Diehl (2012, 92) “[m]ediation is actually carried out not by states or organizations per se, but by their chosen individual agents.”

Houston (1996, 13) disagree, arguing that “[m]ediators may intervene to protect the parties or to promote their own interests.” It may simply be impossible for mediators not to not have a political predisposition regarding the conflict. As Zartman and Touval (1985, 32) write: “mediators are players in the plot of relations around the conflict with some interest in its outcome; otherwise they would not mediate.” Bercovitch and Rubin (1992, 6) suggest that “[m]ediators are not, and cannot be neutral”; they can be “impartial, or better still perceived as impartial, but they certainly can not be neutral.” (see also Groeneveld-Savisaar and Vuković 2011, 110). Bercovitch (1996, 5), moreover, adds that mediators “need to be seen as having access to resources and the ability to get the conflict parties out of a no-win situation. It is resources and the ability to effect a change, not the appearance of impartiality, that are the sine qua non of effective mediation.”

In general, there is broad agreement that the choice of mediator should “engender trust on the part of the parties”, have the “requisite knowledge and skill to properly fulfill their role,” (Fisher 2011, 8) and “be acceptable to both parties.” (Bercovitch 1996, 5).<sup>20</sup> Mediators cannot be overtly favourable to one side of the conflict. As Burton (1986b, 105) argues, “[t]hey are required to be, and to be seen to be, supportive of *all* parties.” (emphasis in original). Above all, they must be supportive of achieving peace. In short, it seems clear that the choice of mediator should be accepted by both sides of the conflict, be able to engender trust, and have adequate resources at their disposal. These characteristics are strategically employed to move the conflict towards peaceful resolution. Key amongst these strategies is the use of incentives.

Numerous authors have noted the importance of incentives in keeping protagonists committed to the peace process (see, e.g. Ramsbotham et al 2011). These might be divided into negative and positive incentives or “carrots and sticks”. Importantly, those third-party actors with the most leverage are not necessarily the best mediators. Hard power may actually undermine a mediator's reputation and credibility (Giessmann and Wils 2011, 197). However, along with putting pressure on the parties, the use of coercive and non-coercive incentives by mediators “can prove decisive” (Lake and Rothchild 1996, 21; see also Zartman 1995, 21).

There are a number questions regarding how the ICC may affect mediation: is the selection of the mediator affected by the ICC? How does the ICC affect the mediators' strategies in convincing the

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<sup>20</sup> There is, however, disagreement as to how much knowledge of the conflict the mediator should have. Burton (1986b, 105), for example, argues that it is better that the mediator “not have a specialized knowledge of the area and of parties involved...An 'expert is likely to know the answers before the parties have met!”

warring parties to come to the negotiating table? Does the mediator address the question of justice head-on or neglect it?

Because the mediator must engender trust in the parties that they will be fair and serve (at least some of) their interests, we might expect that mediators are rarely chosen from states or organizations closely associated with the ICC. Intuitively, this would be the case where the cost of negotiating with 'evil', in terms of public opinion, is especially high. For example, it would be unimaginable to see a high-ranking European diplomat serving in the role of mediator with Kony or al-Bashir. The problem of granting legitimacy to indicted parties may also prohibit certain international organizations from offering their mediation. For example, the United Nations has voiced a certain, albeit somewhat confusing, weariness towards mediators interacting with ICC indictees. In its 2012 *Mediation Guidelines*, the UN declared that mediators should “[l]imit contacts with actors that have been indicted by the International Criminal Court to what is necessary for the mediation process” and be clear that they “cannot endorse peace agreements that provide for amnesties for genocide, crimes against humanity, war crimes or gross violations of human rights.” (United Nations 2012). However, in some cases, ICC member-states and international organizations consisting of member-states actively offer mediation to the warring parties. The African Union (AU), for example, has provided mediation in situations where the ICC has intervened, including in Libya and Darfur. The AU may be able to achieve the trust of indicted parties as a result of its vocal criticism of the ICC's interventions into African states, particularly where the ICC seeks indictments for sitting heads of states (Mills 2012, 404-447) as well as its support for balancing the prerogatives of justice and peacemaking (see Akande et al 2010). A state or organization may also have long-standing relations with the indicted party, engendering its trust as a moderator. In short, mediators may decline to offer their services to warring parties as a result of an ICC intervention, especially if they will incur political and/or reputational costs for mediating with 'evil'. But this may not always be the case. The ability of the parties to have confidence in the mediator is ultimately of primary importance.

Once a mediator has been chosen, they may either address the issue of the ICC arrest warrants or strategically neglect it. It is possible that, in attempts to move the parties towards the negotiating table, the question of the ICC – and justice and accountability more generally – is rejected or ignored as an issue by the mediator. Other issues, especially in high-intensity conflicts, may be more pressing for the parties to negotiate or the question of justice may be relegated until other, more 'negotiable' issues are resolved. In such cases, we would expect a mediator to show little concern for any arrest warrant or ongoing investigation and press on with other issues which the mediator judges to be more likely to

move the conflict towards a negotiated settlement.

Alternatively, reflecting the central role and fate of the particular individuals indicted by the ICC to the peace process, the mediator may view the ICC's indictments as an issue which must be confronted head-on for the parties to get to the negotiating table. In such cases, the decision to confront indictments directly is likely to be a response to the indicted party's desire to address their sense of insecurity, something that, as noted above, arrest warrants may engender. In such cases, there are a number of strategies which may be employed.

The most likely avenue to evade arrest warrants is through the offer or promise of an amnesty to the indicted party. An amnesty's "primary function is to remove the prospect and consequences of criminal liability for designated individuals or classes of persons." (Freeman 2009, 13). Historically, amnesties have been granted as a key incentive for parties to negotiate, allowing the parties to escape accountability for human rights abuses and crimes committed during the conflict (See Snyder and Vinjamuri 2003/04, 5-44; Cobban 2006a; Mallinder 2007, 208-230; Vinjamuri and Boesenecker 2007; Freeman 2009). This stems from a logic that parties to a conflict would not enter negotiations if "they would find themselves or their close associates facing life imprisonment." (Scharf 1999, 508). Amnesties are seen, in this context, as "necessary evils" or a "least-worst option" (Freeman 2009, 23). As Christine Bell (2000, 1-2) writes, "[i]f the choice is between an imperfect peace and a perfect war, imperfect peace may be worth a gamble."

The use of amnesties goes to the heart of strategies available in negotiations. Numerous authors point to the importance of flexibility as a key quality of mediators (see, e.g. Giessmann and Wils 2011, 197; Bercovitch 1996, 4). In this context, the ICC, which is antithetical to the use of amnesties for "atrocities crimes" (Scheffer 2006), may reduce the flexibility of mediators and thus their ability to offer amnesties (or exile) as an incentive for the parties to come to the negotiating table. In short, amnesties for crimes under the jurisdiction of the ICC may be increasingly removed from the mediator's 'negotiation toolkit'.

Amnesties may also be offered in conjunction with offers of exile which, for all intents and purposes, constitute *de facto* amnesty.<sup>21</sup> Exile has often been used as an incentive to remove leaders from power. For example, in the wake of defections, mutinies and Tanzania's capture of Kampala in the Tanzania-Uganda war, Saudi Arabia offered Ugandan leader Idi Amin exile and paid him a generous allowance in exchange for not intervening in Uganda's political landscape. In Libya, offers of exile for Muammar Gaddafi were also explored, even after the ICC issued an arrest warrant against the Libyan

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<sup>21</sup> Exile may also be considered as "de facto" amnesty.

leader.

Additionally, mediators may consider the possibility of the United Nations Security Council deferring ICC investigations or prosecutions. Under Article 16 of the ICC's Rome Statute, the Security Council can defer any investigation or prosecution by the ICC for up to twelve months, renewable yearly, if the ICC's intervention is deemed to be a threat to peace and security. The invocation of Article 16 requires that no permanent member of the Security Council vote against a deferral.

These options – amnesty, exile and deferral – can be offered by mediators in an attempt to convince the parties that if they attend peace negotiations and come to a peaceful settlement, they will not be vulnerable to arrest and surrender to the ICC. Notably, each requires third parties to offer their territory for refuge or to respect the passage of any amnesty law. However, whether or not these mechanisms can truly convince indicted parties of their safety from arrest and detention is questionable. Article 16 deferrals are unstable measures because they are, by definition, temporary. They may not be particularly convincing to belligerents indicted by the ICC because little-to-nothing can guarantee that Article 16 deferral will be renewed by the Security Council yearly. In terms of amnesties and offers of exile, parties may reject an amnesty on the basis that these measures inherently confirm that the party is guilty of wrongdoing. They may also reject offers of exile because they have no interest in leaving their positions of influence or home territories, viewing early retirement in a foreign state as tantamount to defeat and surrender. Moreover, nothing can guarantee that amnesties and offers of exile will not be eventually reneged. The example of former Liberian leader, Charles Taylor, is indicative. Taylor, a key figure in the notoriously brutal conflict in Sierra Leone, was indicted by the Special Court for Sierra Leone (SCSL) in 2003, during peace negotiations in Ghana to end the civil war in Liberia. He consequently agreed to resign his presidency and fled to Nigeria, which granted him exile and immunity from prosecution and extradition. However, after two years, repeated requests from the President of Liberia, Ellen Johnson Sirleaf, and pressure from the United States, Nigeria agreed to send Taylor back to Liberia. He was subsequently flown to The Hague, was tried and, in 2012, convicted by the SCSL to a fifty-year sentence. In short, while a mediator may have numerous avenues for evading matters of justice and accountability, none are full-proof. It is notable that no amnesty, offer of exile or Article 16 deferral has ever been successfully used to bring belligerents to the negotiating table in a conflict where the ICC has intervened.

Lastly, it is worth noting that another important strategy may be affected by the ICC: enticing parties with a “power-sharing” agreement. Some authors have argued that such agreements are a necessary condition for successful negotiations (see, e.g. Walter 1997, 361). Conflicts that end in

negotiated agreements, rather than military victory by one party, tend to include some provisions for power-sharing between the conflicting parties (Sisk 2008, 195). Power-sharing agreements, which seek to create “social contracts between two or more peoples, or between two or more territorial governments,” (O’Leary 2005, xxii) have become an increasingly common tool for negotiators seeking to mediate the end of conflict. They act to reassure previously conflicting parties about key issues concerning the control of and access to economic resources, political power and security (Vandeginste and Sriram 2011, 9). It is argued that power-sharing is particularly necessary where the social fabric of a society has especially sharp ethnic, religious, regional, or other, tensions (Ibid., 10).

While power-sharing did not play a significant role in Libya or northern Uganda, it is important to note that the paradigms of post-conflict power-sharing and accountability may clash (Ibid.). The ICC, in this context, may make it more difficult for power-sharing agreements between belligerents to emerge. Parties intending to take part in a power-sharing agreement may not trust that they will not eventually be detained and surrendered to the ICC. Whether a result of external pressure or not, non-indicted parties may also feel that power-sharing with an indicted party is too costly and thus may undermine their own legitimacy and reputation. As de Waal (2013) observes, a “simplified moral positioning can lead western countries to cut themselves out of the picture.”

### **III.II. At the Table: The Negotiation Phase**

The negotiation phase of a peace process is the stage when the parties are at the negotiating table for “face-to-face diplomatic encounters” (Zartman 1989, 238). The Chapter does not delve into distinguishing or relating bargaining and facilitation approaches, despite the importance in doing so (see Hopmann 2001; Fisher and Keashley 1996). Instead, two issues and dynamics are considered in this section: the ICC’s effects on delegation composition and on the agenda of the peace talks.

#### *(i) Delegation Composition<sup>22</sup>*

Once a decision to negotiate is made, it is necessary to decide who can and should attend peace talks. Despite its obvious importance and the fact that “experience shows how important the selection of parties is to success or failure” (Zartman 2013, 128), very little literature exists on the factors which affect the composition of delegations at peace negotiations and there is no golden rule or formula to

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<sup>22</sup> While delegation composition may be seen as an issue to be considered in the pre-negotiation phase, it is treated here within the negotiation phase issue because this chapter is primarily concerned with implications of the ICC’s effects on delegation composition on the actual negotiations themselves.

decide which individuals should be part of a delegation to peace negotiations – and those which should not.

There is a recognition that “key actors” must be included in the process (Darby and MacGinty 2000, 7). However, leaders of the belligerent parties are unlikely to be able to attend the entire duration of peace talks. Indeed, it would seem unnecessary and possibly even deleterious for leaders of warring factions to take part in all stages of the negotiations. Unsurprisingly, then, it is widely accepted that intermediaries and representatives of the leadership play a key role in negotiations (Kriegsberg 1992 82). Representatives will require certain attributes and qualifications to be legitimate and effective. As Zartman (2013, 127) writes, these qualities “are clear in the abstract: legitimacy as a recognized spokesperson for the identity interests, location in the middle and not just the friendly edge of the spectrum, representativeness of a sizeable portion of the opposing group, and deliverability to carry out the agreement, among other virtues.”

A crucial issue is deciding who speaks for the parties in a peace process and that mutual recognition of the legitimacy of spokespersons will be difficult to achieve (Zartman 1995, 10). Moreover, as Christopher Mitchell and Michael Banks (1996, 34-35) argue, delegates should have an ability to represent

their party's range of feelings, perceptions and aspirations about the issues in conflict, as well as being knowledgeable about underlying interests and values, about likely reactions to alternative future scenarios and options for solutions, and about significant obstacles to achieving any progress towards some acceptable solution.

Despite the utility of employing representatives, however, at some point the leaders of the parties will have to become directly involved in the peace process. After all, “peace cannot be reached without their agreement” (Hayner 2008, 335). For example, while the negotiations leading up to the Dayton Accords were conducted with a wide array of representatives and intermediaries, negotiations at Dayton involved the *leaders* of Croatia, Bosnia and Serbia (see Holbrooke 1998). The line at the bottom on the last page of a peace agreement will ultimately require *their* signature.

The involvement of the ICC raises two issues: first, whether the ICC prevents indicted individuals, and especially indicted *leaders*, from participating directly in peace talks, necessitating the use of intermediaries or proxies; and second, what effects this ultimately has on the negotiations.

David Lanz (2011, 175-295) has examined how indictments by international courts may affect “who gets a seat at the table”. Lanz argues that two factors determine who is invited to partake in negotiations: the utility of inviting particular actors to the table and the normative appropriateness in doing so. In situations where an individual is indicted by the ICC, an acute dilemma may arise:

international norms pertaining to international criminal justice suggest that indicted actors should be excluded but their inclusion in the process is deemed essential to the peace process (Ibid., 287-290). As Lanz (Ibid. 289) writes, the creation of the ICC has “made the 'exclude-include' scenario a frequent challenge for international peacemakers.”

Where their participation *is* sought, indicted individuals may believe that their direct participation in the peace negotiations will lead to their arrest and/or demise. While pre-negotiation decisions may be taken to make them feel secure, ultimately indicted individuals may still view their direct participation as too risky. This is more likely to be the case with rebels who would have to 'come out' in order to attend talks. Indicted government or state military officials are less likely to fear being arrested while attending negotiations or where talks occur on their own territory.

Another possibility is that indicted individuals do not attend peace negotiations, not because they view their presence as endangering their personal safety or security, but because their absence from the negotiations is a pre-condition of any talks proceeding. This condition could be set by third-parties who accept the necessity of negotiations but who do not want to be seen associating themselves with ICC-indicted individuals and/or by the other party to the conflict, which may accept negotiations in principle but reject any direct role for 'evil' or 'criminal' figures in peace talks. Of course, such an attitude on the part of a third party or the other party to the conflict could very well spell disaster for potential or actual negotiations.

As suggested above, part of the dilemma of who to invite to the negotiating table may be resolved by not having the indicted individuals at negotiations but appointing representatives or intermediaries in their stead. In theory, this could satisfy the fears of arrest and insecurity on the part of indicted individuals as well as the refusal, on the part of non-indicted or third-parties, not to negotiate with their ICC-indicted adversaries. However, this may have significant – and potentially deleterious – implications on negotiations. Without oversight from leaders, there is a possibility that discipline amongst the delegates could suffer. The absence of the leaderships' presence may create opportunities for representatives to pursue personal interests rather than the interests of the leaders or the conflict party as a whole. Further, an absence of leadership may create space for fringe elements of the parties to enter the negotiations. These groups (or individuals) may not have the authority, legitimacy or capacity to produce agreements that will be followed by the rest of the group. This is a real danger. As Zartman (1995, 22) notes, negotiations can fail “because parties persist in talking to unrepresentative counterparts who cannot speak for large groups of followers or carry out an agreement if it were reached.” While representatives can play an important role, conflict resolution ultimately requires that

the leaders of the parties officially endorse and commit to the peace process and to an agreement. However, if the indicted leadership is unable or unwilling to do so, it is difficult to fathom the negotiations successfully producing a comprehensive peace agreement between the parties.

### *(ii) The Agenda*

The agenda of the peace talks sets out the issues to be negotiated (Boelscher 2011, 47). The selection of an agenda, as Kriegsberg (1992, 86) notes, is not random: while “[i]t may seem that the conflict itself will determine the choice of issues for de-escalation efforts...selecting those [issues] for emphasis in de-escalation efforts is a matter of strategy.” There is some debate as to which issues should be confronted during peace negotiations and particularly whether or not – and when – the most difficult issues should be addressed versus peripheral, but perhaps more amenable, items.

With regards to the ICC, the question is whether the existence of an ICC investigation or arrest warrants will result in the parties confronting the indictments, or justice and accountability more broadly, as an agenda item or not. This will depend on whether the attitudes and incentives of the parties towards committing to a peace process were influenced by the ICC's intervention. In other words, whether the parties confront justice and accountability will depend on whether their entering negotiations was a direct result of the ICC. Where the parties and the mediator agree to do so, we might expect to see the issue of accountability on the negotiating table. If an ICC investigation or warrant was a major concern of one or both of the parties, it is likely to have a central place in the agenda of negotiations. If the warrants are not a major concern for the parties or other issues are deemed more crucial to resolve, then we would expect that those other issues will be prioritized in the agenda of the talks or the question of justice and accountability will be neglected initially or ignored entirely.

If the parties do decide to negotiate questions of accountability, numerous options are available including, as stated above, offers of amnesty, exile and deferral. The parties may also seek to negotiate alternative measures to satisfy demands for justice by, for example, proposing non-retributive or domestic justice mechanisms (see below).

### **III. III. After the War: Post-Negotiation/Post-Conflict**

A peace process does not end with the signing of a peace agreement, nor is it over with the conclusion of hostilities. Even if a negotiated settlement is achieved, “this is only a step, and not the last one, in the conflict resolution process.” (Ramsbotham et al 2011, 174; see also Höglund 2008, 17). Not all peace processes may get to this point as many wars end “with the extermination, expulsion or capitulation of

the losing side.” (Walter 1997, 335). Such cases remain pertinent to the framework offered in this chapter. *How* a conflict ends will have significant bearing on attempts to achieve post-conflict justice and accountability.

Two key issues are considered in the context of post-negotiation. First, the identification of spoilers and the ulterior motives of parties towards negotiating peace and, second, the implementation of relevant provisions and decisions pertaining to post-conflict accountability.

*(i) Was Peace Possible?*

Darby and MacGinty (2000, 7) argue that amongst the essential criteria for a successful peace process is that the protagonists “engage seriously in negotiations, as distinct from approaching them as the continuation of war by other means.” This is not always the case. Parties to a mediated negotiation may have “devious objectives”, including the use of negotiations as a cover to regroup and reorganize as well as legitimize their positions in the conflict (Richmond 1998, 707-722). It may thus be difficult to ascertain whether the negotiating parties are committed to a peaceful compromise – even as they participate actively in peace talks. The conclusion of negotiations, however, creates an opportunity to identify and assess whether negotiations were truly about peace, rather than furthering other, perhaps more sinister, interests of the parties.

The success of a peace process is likely to be undermined by the presence of spoilers, those “leaders and parties who believe that peace emerging from negotiations threatens their power, worldview, and interests and use violence to undermine attempts to achieve it.” (Stedman 1997, 5) Spoilers may undermine the peace process from the “inside” while others may do so as “outside” spoilers who are excluded from the process (Ibid. 8-9). They have a range of aims in undermining talks (Ibid. 11-14; see also Nilsson and Kovacs 2011, 606-626). But spoilers are not always easy to spot and may only be identifiable after the peace process has concluded (Zahar 2008, 160). It is for this reason that the framework offered here treats the identification of spoilers as a post-negotiation / post-conflict issue.

A critical question arises from this debate: was the peace process actually about peace? With regards to the ICC's purported effects on peace, this is an essential yet overlooked question. If key participants in a peace process can be shown to be spoilers, to have negotiated in bad faith or to have been disinterested in a mediated solution to the conflict, then the ICC cannot be responsible for a failed peace process. However, it is also important to consider whether the ICC provides the means for actors to become spoilers, preventing negotiations from succeeding. This may be the case for both indicted

and non-indicted parties. Once a negotiation phase has concluded or a war has ended, it is possible to decipher whether parties were truly interested in peace, if they instrumentalized ICC arrest warrants and if, in doing so, they bolstered or hindered a potential peace process.

*(ii) Implementation of Post-Conflict Justice and Accountability*

The implementation of a peace agreement is “one of the most critical and uncertain processes of any post-war period.” (Bekoe 2003, 256). Numerous scholars have considered the necessary conditions for successful implementation of peace agreements, including the ripeness of the conflict, the regional environment, the quality of the agreements, the role of outside actors in supporting and securing the peace process, and the presence of external “security guarantees” (see Walter 1997, 345; Crocker et al 2001; Stedman 2002, 1-20; Duffy 2010). Stedman's theory of peace spoilers also remains a persuasive and oft-cited issue in the elaboration of challenges to implementation. To date, perhaps the most thorough treatment of the subject remains Stedman et al's *Ending Civil Wars – The Implementation of Peace Agreements*, which covers a diversity of issues that affect implementation, from economic priorities (Woodward 2002, 183-214) and the repatriation of refugees (Adelman 2002, 272-302) to the challenges of holding elections (Lyons 2002, 215-236) and securing human rights standards (Putman 2002, 237-272).

Unlike the aforementioned authors who see third-party roles as the key variable in determining the success or failure of the implementation of peace agreements, Roland Paris's (2004) theory of Institutionalization Before Liberalization (IBL) suggests that the formulaic liberal peacebuilding blueprints may destabilize or undermine a fragile peace. For Paris, the institutions necessary for administering democracy, rule of law, and free-markets must be laid *before* liberal reforms are hatched (Ibid., 188-207). This requires building up state institutions, even if that requires sacrificing liberal ideals in the short-run. Amongst these institutions we are likely to see some that deal with issues broadly pertaining to human rights and past human rights violations. As Christine Bell (2008, 213) has demonstrated, “peace agreements typically include human rights institutions...[with the] aim to ensure the protection of rights and prevention of past human rights abuses in the future.”

The way a conflict terminates or reignites in the wake of peace negotiations will have a significant impact on how justice and accountability is ultimately pursued. The victory of one side over another grants the victorious side the ability to impose conditions of 'victor's justice', where only one side is held accountable. This was the case, for example, with the international military tribunals in Nuremberg and Tokyo following WWII. Victor's peace risks translating into victor's justice, at least in the short-term. The victorious side may not only seek to hold its defeated adversary accountable but

also to protect itself from any accountability by granting itself a blanket amnesty or de facto immunity. At the same time, a party may make full amnesty a condition of its full surrender. In contrast, negotiated settlements are unlikely to result in such lop-sided approaches to accountability. Negotiations promote compromise approaches to post-conflict justice which may include protection from prosecution for both parties, alternative approaches to justice or partial accountability.

As noted above, it is also not always necessary for peace negotiations to produce a final peace agreement in order for some of the items discussed in the negotiations to be implemented. Negotiations may produce bits and pieces of an agreement which are followed-through in the post-conflict context even when the negotiations do not result in a comprehensive agreement. This has been the case in Uganda where the International Crimes Division of Uganda's High Court, an institution born out of the Juba negotiations, was created despite the ultimate 'failure' of peace talks between the LRA and the Government of Uganda (see Chapter 5). Nor is it necessary that a peace process succeed in achieving an accord between the parties at all. While the Arab League blocked any agreement between the conflicting parties during US-mediated negotiations between Israel, Jordan, Lebanon and Syria over the use of water in the Jordan River valley, some aspects of the understanding were tacitly implemented (Kriegsberg 1992, 87). But how might the ICC affect attempts to deliver post-conflict justice and accountability?

It should be clear that the ICC is not responsible for a state's approach to post-conflict, transitional justice. As Rama Mani (2002, 99) rightly observed, "it is misleading to believe that the ICC will solve definitively the many problems and dilemmas besetting the pursuit of justice in the transition to peace". Still, ICC interventions into ongoing conflicts, as well as the conflict narratives that they propagate, can shape the decisions made by societies once the war has ended.

Broadly, there are three options available to the parties emerging from conflict: fully addressing questions of justice and accountability; selectively addressing justice; or ignoring the perpetration of crimes and atrocities committed during the conflict altogether. These approaches are likely to take into account and/or reflect the attitudes and incentives of the conflict parties towards accountability, but also be shaped by the conflict narrative and manner in which the conflict concluded.

There are numerous ways in which communities and states may deal with the question of addressing post-conflict justice. It cannot be ruled out that one party seeks to support the ICC's efforts to detain the suspects, particularly where the party interprets the Court's role as boosting its international standing and legitimacy. Moreover, the party may simply want to rid itself of indicted figures. This is most likely to be the case where one side has achieved a military victory over the other.

A recent example of this is the case of former Ivorian President Laurent Gbagbo who was sent to face trial in The Hague in late 2011 for his role in Ivory Coast's post-election violence in 2010-11. His successor and adversary, Alassane Ouattara, did not hesitate to send Gbagbo to the ICC following the restoration of order in Ivory Coast (see Human Rights Watch 2013b). At the same time, victorious parties may seek to protect themselves from accountability (by providing a self-amnesty) as well as bringing additional accountability measures against their former adversaries, such as prosecutions or preventing them from holding positions of power via lustration laws.

The exact opposite, however, may also occur. A state emerging from a period of violent conflict may seek to assert its sovereign prerogatives, restore its international reputation and assert control of issues of justice and accountability. Again, this is likely where one side of the war has achieved military victory in the conflict. Rather than 'doing away' with an ICC indictee, in this case the state seeks to achieve justice through domestic mechanisms. In such a scenario, the state in question may bring a complementarity challenge to the Court, whereby the state argues that, because it is now able and willing to legitimately and effectively investigate and prosecute crimes, the ICC must cede jurisdiction (see case of Libya in Chapter 7).

Lastly, if an agreement was reached between parties that included ICC indicted individuals, it is possible that the parties would also seek to challenge the admissibility of the ICC's warrants. As in the case of the conflict in northern Uganda, they attempt to do so by creating new domestic institutions capable of adjudicating international crimes or by claiming that other mechanisms of accountability, including traditional justice mechanisms, are both sufficient and more appropriate (see Chapter 5). A promised amnesty or offer of exile could also be invoked if it had formed an integral part of moving the negotiations towards final agreement.

In short, a number of possible avenues exist in addressing the question of ICC, and post-conflict justice and accountability more broadly. These decisions will affect the nature of the peace, regardless of whether negotiations ultimately led to a comprehensive peace agreement or not.

#### **IV. Conclusion: Breaking the 'Peace Versus Justice' Impasse**

To date, the “peace versus justice” debate has neglected the various phases and dynamics that comprise peace processes. The result has been a debate which lacks in nuance.

This chapter has built an analytical framework that requires investigation of the possible effects of ICC investigations and arrest warrants on the narrative of a conflict, the attitudes and incentives of warring parties towards peace negotiations and, subsequently, the three key phases of a peace process (pre-negotiation, negotiation and post-negotiation/post-conflict) and as well as on key dynamics and issues within these phases. Not all of the issues raised in this chapter will be pertinent across all cases and an ICC intervention may not affect the different stages of a peace processes equally or similarly across differing contexts. It is also expected that some effects of the ICC will be fixed while others will be variable. Where the ICC intervenes, dilemmas about whether or not to invite ICC indictees and whether to address issues of justice and accountability during negotiations will be shaped by the ICC, regardless of the conflict's context. Other effects are likely to be variable across contexts. For example, the effects of the ICC on the location of peace talks, choice of mediators as well as how justice is dealt with at negotiations will be context-dependent and likely to vary on the basis of *who* is targeted by the Court.

It is clear that the potential to initiate a peace processes and to move it forward are different in conflicts where the ICC has intervened than in conflicts where it has not. The framework outlined in this chapter is intended to make it possible to interrogate how the ICC affects ongoing conflicts as well as the potential for peace processes to progress from one phase to the next and, ultimately, towards resolution. It is about asking the right questions when it comes to identifying and assessing the effects of the ICC on active conflicts. As such, the framework presented in this chapter is intended to guide empirical case-study and cross-case comparative research. Doing so will hopefully allow researchers to move beyond the stagnation of the “peace versus justice” debate into a richer and more nuanced understanding of how ICC interventions truly affect the prospects for peace.

We now turn to the two cases at the heart of the thesis: northern Uganda and Libya.

## **Chapter 4: The ICC and the Road to Juba**

*It was like strong wind that shook everyone* – Martin Mapenduzi (2011), describing when the ICC intervened in the crisis in Uganda

*The war is waged by each ruling group against its own subjects, and the object of the war is not to make or prevent conquests of territory, but to keep the structure of society intact. The very word "war," therefore, has become misleading.* - Emmanuel Goldstein in George Orwell's Nineteen Eighty-Four

### **Introduction**

In the late 2000s, the Government of Uganda (GoU) found itself in a quandary. Through the 1990s, the GoU, led by rebel-turned-president Yoweri Museveni was widely seen as a rare African success story, a “model for 'new' Africa's goals.” (see Apple 1998). Uganda was a leader in the fight against AIDS and an apparent example of a state where neoliberal economic reforms had actually worked. But now the country's image was being tested. A long suppressed problem had begun to garner international attention: the war in the north. Activists and religious groups were shedding light on a level of suffering that could only be embarrassing for a state that was supposed to be that rare example of post-conflict development gone right. The images of vast camps for internally displaced persons and footage of young children walking for miles from villages across Acholiland to sleep in the relative safety of crammed bus depots in Gulu conflicted sharply with the image the Government had sought to present to the world. A forgotten war had suddenly, if belatedly, become a crisis worthy of international concern. The GoU had to respond.

Of course, the GoU *had* long been doing something. It had waged a war against rebel groups in the north since the mid-1980s when Museveni's National Resistance Army / Movement came to power. But the international community, with the exception of some religious groups and NGOs seeking to provide relief and actuate a peaceful end to the war, had readily ignored northern Uganda (see, e.g. Eichstaedt 2009, 4). Jan Egeland, the former UN Undersecretary for Humanitarian Affairs and Emergency Relief famously exclaimed in 2003 that: “The conflict in northern Uganda is the biggest forgotten, neglected humanitarian emergency in the world today.” (See Agence France-Presse 2003). But Uganda's international donors caught on. Pressure mounted for new approaches to the war.

It was in this context that the GoU began to explore a self-referral to the ICC. In 2003 they referred “the situation concerning the Lord’s Resistance Army” to the Court (see ICC 2004). On 8 July 2005, ICC Judges issued sealed arrest warrants for five senior officials of the LRA: rebel leader Joseph Kony, second-in-command Vincent Otti, Okot Odhiambo, Dominic Ongwen and Raska Lukwiya. The

warrants became public on 13 October 2005. International human rights organizations hailed the ICC's indictments as a historic moment, one which symbolized the end of impunity for violators of the gravest crimes. Amnesty International (2005) declared that the indictments sent “a clear message that without justice, there can be no prospect of a lasting peace for the region.” Domestically and amongst long-time scholars and observers of northern Uganda, the story was quite different. The ICC's intervention instigated a fierce and polarizing debate about the appropriateness of pursuing international criminal justice and efforts to achieve a much yearned for peace. Like nowhere else, the “peace versus justice” debate burst into the public conscience.

The case of northern Uganda emerged as a crucible for the “peace versus justice” debate, not only because northern Uganda was the ICC's first intervention but because the ICC intervened in the midst of an active conflict and ongoing efforts to achieve a peaceful resolution to the war between the GoU and the LRA.

Once the ICC opened investigations into alleged LRA crimes in northern Uganda, a polarizing debate about the appropriateness and consequences of the ICC's potential intervention erupted.<sup>23</sup> The debate primarily reflected concerns regarding the alleged effects of retributive justice on efforts to resolve the conflict. It was largely hypothetical, concerning itself primarily with what would or might happen if the ICC process went forward. But to critics and many key figures on the ground, these hypotheticals posed all-too-real dangers. For champions of the ICC, they represented real promises.

Proponents of the ICC's intervention maintained that the ICC would marginalize the LRA by stripping it of its external support. This isolation would leave the LRA with no option but to enter – and commit to – peace negotiations. Moreover, the Court represented a commitment to end impunity in northern Uganda putting into practice the rhetoric that there is 'no peace without justice'. Critics, on the other hand, argued that the ICC was an unhelpful and belligerent intrusion that risked undermining attempts to end the conflict peacefully. The LRA had been in on-again-off-again peace talks and renewed its interest in negotiations with the GoU in 2004 (Atkinson 2009, 10). Fears were palpable that the ICC would undermine any potential talks by removing incentives for Kony and his high command to sign and follow through with any negotiated peace agreement. In explaining how the ICC would affect the LRA high command's interest in negotiating peace, Father Carlos Rodriguez noted that “nobody can convince a rebel leader to come to the negotiating table and at the same time tell him that

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<sup>23</sup> Allen's *Trial Justice* (2006) remains the most comprehensive treatment of this subject. (See also Apuuli 2004; Allen 2005; Apuuli 2006; Branch 2007a; Okello 2007; Apuuli 2008; Jackson 2009; Quinn 2009).

when the war ends he will be brought to trial.” (see Lanz 2007, 1). Local religious and civil society figures further asserted that criminal prosecutions undermined their efforts to encourage LRA combatants to defect and receive amnesty through Uganda's Amnesty Law (2000) and that retributive justice was insensitive to 'traditional' and 'local' approaches to achieving justice and reconciliation. If prosecution was necessary, they argued, it should be properly sequenced with ongoing efforts to achieve a mediated political solution to the war; peace first, justice later (Komakech 2011). Victims and survivors of violence in northern Uganda, along with long-time observers of the conflict, also saw the Court's focus as inherently biased. It was well documented that the Ugandan People's Defense Forces (UPDF) was also responsible for atrocities against civilians (see. e.g. Dolan 2009). But justice appeared to be for the LRA only.

Amidst these concerns, a curious thing happened. When the Court issued its arrest warrants, rather than balking at talks, the LRA openly requested a new round of peace negotiations (BBC 2005). Within a year negotiations restarted, and were described as “the best opportunity in twenty years to start a meaningful peace process.” (Williams 2006, 69; see also Hayner 2008, 335). But what brought the LRA and the GoU to the table? To answer this question, an examination of the conflict narrative and the attitudes and incentives of the warring parties is necessary. The following sections examine key developments and how they affected – and didn't affect – an official peace process from getting underway. First, however, it is necessary to outline a brief background to the conflict and the narratives that have been produced and reproduced about the war between the LRA and the GoU.

## **I. 'Good' Versus 'Evil' in Northern Uganda**

That the war in northern Uganda has been the subject of a dominant conflict narrative is not, in itself, a novel finding. Indeed, as shown below, it is a common refrain in most comprehensive treatments of the war. However, this and the next chapter aspire to take an additional step by bringing together this literature as well as primary research conducted in Uganda in order to demonstrate how this shaped the attitudes and incentives of the warring parties towards peace negotiations and subsequently influenced key dynamics and issues in the lead-up to official peace talks, during the Juba negotiations, and during the post-negotiation period.

In Chapter 3, it was argued that ICC interventions shape conflict narratives in specific ways. It was hypothesized that the Court's interventions in ongoing conflicts would: label indicted individuals as criminals and 'evil', thus delegitimizing them as negotiation partners whilst legitimizing those parties that are not targeted by the ICC; place particular individuals indicted by the Court and their fate at the very core of the conflict narrative; and focus the narrative on the dynamics, rather than the causes of the violent political conflict. The ICC's intervention in northern Uganda had all of these effects. It has contributed to an obfuscation of the political causes of the war and the political nature of the violence waged against northern Ugandans – by both the LRA and the GoU; it has bolstered the narrative of a good, just government fighting an 'evil' rebel group; and it has, as a direct consequence of these two preceding effects, established a narrative wherein if only Kony was 'eliminated' or 'removed', then the crisis facing LRA-affected regions and the civil war between the LRA and the GoU would cease to exist. The rest of this section offers an overview of the war and subsequently details all three of these aspects of the conflict narrative, focusing on how the ICC's intervention has reified them.

There is a danger in offering overly reductionist reasons for the conflict between the Lord's Resistance Army and the Government of Uganda (Finnstrom 2008, 8). As Doom and Vlassenroot (1999, 20) note in their analysis of the historical and political origins of the rebellion in northern Uganda, “it is far from easy to analyse Kony's LRA, or to have a clear understanding of its final goals, if they exist as such.” This section does not pretend to offer an exhaustive historical account of northern Uganda. Others have done so elsewhere (see, e.g., Doom and Vlassenroot (1999); Allen (2006, 53-71); Branch (2007b, 93-221); Sverker Finnstrom (2008); Dolan (2009); Allen and Vlassenroot (2010). Still, given the propensity of the conflict to be seen as one driven by Kony and his rebels' terrifying acts of violence, it is worth describing how a complex conflict with political causes and dynamics as well as shared responsibility for atrocities has been neglected in favour of a mainstream narrative that pits an 'evil', terrorizing and irrational LRA and Kony against a 'good' government. Contrary to Eichstaedt's

(2009, 4) observation that “[t]he LRA war in northern Uganda has been going on for so long that most have forgotten why,” the causes of the war have been actively distorted. The ICC's intervention has contributed to and entrenched this dynamic.

According to Van Acker (2004, 338), post-colonial Uganda has been characterized by the use of “the army as an instrument of domestic politics” and “ethnic retaliation” as a function of domestic politics. These dynamics “solidified violence as a means of interaction in society.” (Ibid.) In this context, the inclusion and exclusion of the Acholi people of northern Uganda within the military establishments of Uganda's various post-colonial regimes played a critical role in shaping Uganda's violent post-colonial history. Amongst the socio-economic and political divisions between north and south Uganda, recruitment into the military was the most pronounced (Doom and Vlassenroot 1999, 7).<sup>24</sup> Even before Uganda's independence, the Acholi “saw the profession of arms as their natural vocation”, a development that is owed to “colonial interference.” (Ibid., 8; see also Finnstrom 2008, 80). Whilst the Acholi made up a significant part of Milton Obote's military forces (1966 – 1971 and 1985), they were excluded from the regime of Idi Amin (1971 – 1979). Obote's reigns propagated the popular, if absurd, notion of the Acholi as inherently warlike. And if Obote elevated the concept of a militaristic Acholi ethnicity, this belief was complemented by those who viewed the Acholi as a threat and thus sought to persecute them when they were not part of the military and political establishment. When Amin took power, he ordered the mass murder of Acholi and Langi troops and was responsible for the killing of numerous Acholi intellectuals and political figures (see Okuku 2002, 20-21; Finnstrom 2008, 65; Branch 2010b, 29). Most notoriously, in 1972 Amin ordered the purge of Acholi troops after ordering them to their barracks.

When the National Resistance Army and Movement (NRA/M) of Yoweri Museveni took power from the Acholi General Tito Okello Lutwa, who had briefly seized power in 1985, “Uganda's succession of rulers from the north came to an end.” (Finnstrom 2008, 68). The Acholi, again, were painted as militaristic and as a political threat that required neutralization. Museveni's war propaganda made clear that the Acholi were enemies (Finnstrom 2008, 75; Okuku 2002, 22-23) and they were widely blamed for some of the worst atrocities committed during the NRA/M rebellion, which had begun in 1981 and ended in 1986 when the NRA/M overtook Kampala. In particular, the Acholi were blamed for Obote's 1983 Operation Bonanza, “a sustained and murderous military expedition, leading to more than 300,000 deaths” (Doom and Vlassenroot 1999, 9) in the Luwero Triangle. Many believed

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<sup>24</sup> On regional divisions in Uganda, see also Okuku (2002).

that the seemingly cyclical process of ethnic retaliation was once again aimed at the people of northern Uganda. Fleeing Acholi soldiers warned of impending revenge from the NRM (Van Acker 2004, 340).

Museveni's ascension to power initiated a new phase of conflict in Uganda, one that would be concentrated in the country's peripheries. The Acholi were targeted by the NRA/M who deemed them "responsible for Uganda's violent past" (Finnstrom 2008, 75) and their "ethnic enemy" (Branch 2010b, 31). The result was predictable. The Acholi were excluded from political power whilst the NRM launched a violent counter-insurgency into the north (ibid., 31-33). Cattle, a crucial source of wealth in the north, were raided by the government-supported and armed Karamojong (Doom and Vlassenroot 1999, 12), something widely understood as a purposeful attempt to cripple the wealth and sustenance of the Acholi people (Finnstrom 2008, 72). Doom and Vlassenroot (1999, 12) speculate that only two percent of the original stock of cattle remained by 1997. Moreover, the NRA committed numerous atrocities, often justified as revenge for the Acholi's alleged actions in Luwero (Otunnu 2002, 13). Critically, the NRM's "vicious counter-insurgency in Acholiland" left "the Acholi without effective national leadership or representation in the face of extreme state violence." (Branch 2010b, 26). Many were inclined to turn to the various rebel groups in the region.

In the mid- to late-1980s, a number of rebel groups sprung up in the north, notably the Uganda People's Defence Army (UPDA) and Alice Lakwena's Holy Spirit Movement (HSM). They drew on ex-soldiers who had not returned to rural life in the North (Finnstrom 2008, 71). Lakwena and the HSM, something of a precursor to the LRA, tapped into the spirituality of the Acholi community and thus "offered hope for worldly as well as spiritual redemption in a dark hour of despair." (Doom and Vlassenroot 1999, 16).<sup>25</sup> But perhaps more than anything, many simply "saw no alternative means of survival than to join the insurgency groups in one way or the other" (Finnstrom 2008, 74). The brutal response and treatment by the NRA fuelled an existential anxiety amongst the Acholi as human rights abuses and looting "became part of their normal conduct", behaviour which "could only stiffen the conviction held by many Acholi that surrender meant death." (Doom and Vlassenroot 1999, 15). The creation of rebellion was thus a response to the marginalization of the people in the north and an attempt for the Acholi to find "an outlet for their feelings of humiliation." (Ibid., 14)

Despite some remarkable successes in the battlefield, the HSM was eventually defeated and Lakwena fled to exile in Kenya. With the 1988 Pece Peace Agreement, the UPDA and NRM came to a negotiated settlement. In this ever-changing and violent landscape, Joseph Kony and the Lord's Resistance Army emerged as "the sole viable rebel group in Acholiland" (Branch 2010b, 39). Many

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<sup>25</sup> For more on Lakwena, see Allen (1991) and Behrend (1999)

disenfranchised Acholi officers joined the LRA; others sought a return to civilian life or joined the NRA. As with the HSM, the LRA was led by a leader who presented himself as a “spirit medium” (Allen 1991, 372). Kony claimed to be the host of spirits who spoke through him and gave orders for the LRA's operations. This has given rise to claims that Kony and Lakwena before him were 'crazy' 'lunatics'. However, as Dolan explains, Kony was, in fact, unexceptional in this regard (Dolan 2009, 94; see also Allen 1991). Moreover, according to Kristof Titeca (2010, 71), the LRA's reliance “on a coherent system of beliefs and practices of a spiritual order serves clear strategic and rational advantages: it guarantees an internal cohesion of the rebel group through legitimizing the struggle and motivating and disciplining its combatants, as well as intimidating the outside world.” It is not, he adds, evidence that the LRA is “a chaotic gang of rebels”. Numerous interview respondents, including former LRA commanders, continue to believe that Kony is, in fact, a medium for various different spirits. And rather than describing the LRA as driven by some irrational, mystical lust for violence, none hesitated to describe the LRA as a politically aggrieved entity with political goals.

From the outset, the LRA have claimed to have a political agenda, centered around defending the Acholi people, toppling Museveni's government and governing Uganda with the Ten Commandments. Still, there has been an evident difficulty amongst well-versed scholars of northern Uganda to identify the politics of the LRA and the extent to which the LRA is a coherent political enterprise with political aims. This is particularly difficult because of the duration of the conflict. It is obvious that the rebel group has been far more of a political force than the official narrative suggests. Finnstrom's (2008, 99-130) analysis of the rebel group's political manifestos is particularly useful in delineating the LRA's politics. Over time, the LRA has spelled out numerous political demands, including their desire to see the creation of multiparty politics in Uganda, respect for human rights, a division between the military and the judiciary, socioeconomic balance within the country and an end to corruption (Ibid., 122). Given the LRA's well-known and undeniably brutal tactics, some of these demands are patently absurd. And, importantly, the rebel groups' political claims are no “less propagandistic than the official discourse... [but] they are not compatible with the official discourse.” (Ibid., 118). The flaw in the dominant narrative regarding the conflict isn't that it focuses on the commission of atrocities but rather that it focuses almost *exclusively* on the LRA's responsibility for atrocities and does so at the expense of virtually any political understanding of the conflict. While it may not always be evident what the LRA's goals are, “they are *political* goals” (Vinci 2005, 363; emphasis in original).

The LRA's emergence as the primary source of rebellion in northern Uganda precipitated a

period of heightened levels of violence against civilians. During the 1990s, the LRA diverted its attention away from targeting the NRA to targeting the very people they purportedly represented: Acholi civilians. As the rebellion progressed and local support for the LRA dwindled, the rebel group became increasingly reliant on attacking the people of northern Uganda as a means to ensure the “group's material and social survival.” (Branch 2010b, 38). The LRA's violence against the Acholi people was also part of an evolving political agenda, namely an attempt to purify and control the population, some of which had allied itself with the NRM. Those seen as collaborating with the NRM were considered 'impure' Acholi. The creation of a pure and 'New Acholi' became “the centrepiece of the LRA's vision” (Dolan 2009, 92). This shift in *modus operandi* and conceptualization of who was Acholi 'enough' “had highly destructive consequences”; the “spiritual discourse of cleansing” those who were genuine Acholi and supported the LRA from those who were not and perhaps supported the NRM translated into “anti-civilian violence [emerging as] the privileged tool for carrying out this political programme.” (Branch 2010b 40). The result was a level of unprecedented violence against the civilian population of the north; maiming, abduction, murder and plunder by the LRA against the Acholi were commonplace. This campaign of violence further alienated the LRA from the Acholi. As Branch (*ibid*, 42) explains, “[t]he problem was that what perhaps appeared from the LRA's perspective to be a reasonable strategy for purifying the Acholi and eradicating the internal enemy looked from the Acholi civilians' perspective to be an unpredictable, vicious reign of violence.” (see also Finnstrom 2008, 90). But what has made the LRA's form of violence particularly egregious and what “makes this conflict unusually vicious – even for this troubled region – is that the LRA rebels target young children for abduction, virtual enslavement, and even death” (Ehrenreich 1998, 81). In response to this, the LRA's crimes became widely documented, inspiring a cottage industry of articles, blogs, documentaries and NGOs (see Cavanagh 2012; Finnström 2012). This also helps explain why observers have rejected the political nature of the LRA's rebellion and violence. Instead, for many, the LRA was engaged in a ruthless and ridiculous campaign of violence for violence's sake. In 2001 the United States State Department added the LRA to its list of terrorist organizations and, in 2008, the US government added Kony to its Specially Designated Global Terrorist list.

The shift in LRA tactics and turn against civilians coincided with the establishment of a strategic relationship between the rebels and the Government of Sudan. As Bishop Ochola (2011) observes: [t]hat was the time when abductions started... not before 1994. Abductions started very seriously, [when the LRA] got their way to Sudan.” The change in the target of the LRA's violence also followed in the wake of failed peace negotiations with the Government in 1994. According to one

former LRA commander, 28 February, “[t]he day when the L.R.A. came into contact or developed [a] good relationship with the Sudanese government is also remembered and celebrated each year.”<sup>26</sup> The LRA-Khartoum relationship was an open secret but one which the LRA and Khartoum went to great lengths to distort. The case of one LRA commander is instructive: he was ordered to take his group of rebels to destroy a radio tower and power station on the outskirts of Gulu town, in northern Uganda, using newly acquired bombs. His instructions were two-fold: to destroy the tower and station and to retrieve all remnants of the bombs. Failing either, the commander was advised not to return. The bombs had been provided by Khartoum (Odongo, Sunday and Oling Mussa 2011).

The relationship with Khartoum was transformative for the LRA. It instigated a “makeover of what had been a motley group of rebels into a coherent, well-supplied military enterprise” whilst “[t]he LRA and its use of terror became the ultimate fifth column of the Sudanese army: a clandestine, cost-effective force used to destabilize the SPLM/A and Uganda.” (Van Acker 2004, 338). As a result, what had previously amounted to an intra-state rebellion emerged as part of a regional proxy war with Sudan providing support to the LRA and the GoU supporting Khartoum's primary adversary, the Sudan's People Liberation Army (SPLA), which was fighting for secession (Finnstrom 2008, 85). In an unusual moment of candour, Hassan al-Turabi, a key political and religious figure in Sudan, explained Khartoum's support for the LRA: “It's natural. In all wars people do the same. If there's a state of war between you and the other side, then you arm the other side's opposition don't you?” (see Blair 2006; Eichstaedt 2009, 175).

In 1999 a negotiated agreement was reached between the governments of Uganda and Sudan to stop supporting each other's adversaries. However, Khartoum continued covert support of the LRA. Even with the 2002 launch of Operation Iron First which allowed the UPDF to enter into the territory of Sudan, Khartoum managed to appear cooperative (and thus gain approval from the international community) whilst simultaneously protecting the LRA. As Rodriguez (2009, 41) explains: “The UPDF could not go beyond a 'red line' that had been drawn by Khartoum near Juba. Since the UPDF had to notify the Sudanese Armed Forces every time it intended to carry out military operations inside Sudanese territory, this meant that Kony was always well informed about the movements of the Ugandan army and could react accordingly.” Branch (2011, 80, 85) asserts that this also served the interests of the US, with the GoU acting as a proxy and conduit to the SPLA, which was fighting against Khartoum, a key adversary in the Global War on Terror.

A crucial cause for the war was the response and behaviour the NRM/A (later the UPDF) in

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<sup>26</sup> Diary of former LRA commander, on file with author.

northern Uganda and, in particular, its direct responsibility for mass human rights violations and its unwillingness to provide protection for civilians from LRA violence. Human Rights Watch (2003a; 2003b, 19-21; 2005) has catalogued cases of torture, murder, rape by government soldiers and even the recruitment of child soldiers into government forces – the same egregious allegation levied against the LRA. At the same time, the GoU seemed uninterested in defeating the rebels or providing adequate protection for civilians. As Branch (2010b, 38) writes, “the NRA has generally abandoned the population to rebel violence letting it continue as a kind of collective punishment by proxy”. The result was that the people of northern Uganda were trapped as victims of violence perpetrated by the rebels *and* the violence perpetrated by the GoU. They were “caught between the fire and the frying pan: a hostile army of occupation and a 'terrorist' rebel group.” (Mwenda 2010, 55).

In response to the rebellion, the GoU propagated and imposed a system of structural violence on the people of northern Uganda. As violence in northern Uganda spread and intensified in the 1990s, the Government began to herd civilians into IDP camps, a process that began in late 1996 (Dolan 2009, 46). By 2002, 800,000 civilians had been displaced. Some civilians chose to relocate to the camps while many others were forced to do so. In 2002, for example, the UPDF ordered all citizens from the districts of Kitgum, Pader and Gulu to relocate to the IDP camps. Refusing to do so meant being identified as a rebel collaborator (see Rodriguez 2009, 102). Chris Dolan (2009, 1) captures the dynamic of northern Ugandan civilians stuck in the cross-fire of the LRA and GoU in his book, *Social Torture*. Dolan persuasively argues that the war is “a form of mass torture, whose principal victims are the population within the 'war zone', and whose ultimate function is the subordinate inclusion of the population in northern Uganda.” The primary locus of 'social torture' was the IDP camps, named “protection villages” by the GoU, although more akin to “concentration camps” according to Rodriguez (2009, 104), Branch (2007a, 181) and Mwenda (2010, 55). In these camps, Dolan (2009, 1) finds the symptoms and tactics of mass torture: “widespread violation, dread, disorientation, dependency, debilitation and humiliation”. Finnstrom (2008, 133) makes a similar argument suggesting that the IDP camps constituted a form of structural violence against the people of northern Uganda, wherein “cultural and social agency diminish as the logic of domination and violence enter the most private spheres of everyday life.” Human rights groups tended to agree. One report, prepared for United Nations Office for the Coordination of Humanitarian Affairs (UNOCHA), concluded that “the overall picture is one of severe destitution” (Weeks 2002, 5; see also Dolan 2009, 221) and that while direct violations of rights were commonplace, the camps' “most damaging achievement of all has been to inflict economic and social paralysis on an entire society, which has thereby been reduced to destitution

and dependency.” (Weeks 2002, 4). Some suggest that upwards of 1,000 people died per week, not from rebel attacks but as a result of the squalid conditions within the camps themselves (Mwenda 2010, 56; see also The Republic of Uganda Ministry of Health 2005). This represented a death toll that far exceeded what the rebels could achieve (Mwenda 2010, 56).

GoU violence against civilians was also direct. UPDF soldiers, sometimes disguised as LRA commanders, regularly abused civilians. And while some officers were held to account, this typically only occurred when cases received attention from notable citizens (Dolan 2009, 147). The camps appeared to be a tactical strategy wrapped in a ruse: the 'good' Government as a protector of civilians against the 'evil' LRA. “For from the day they were initiated in the name of protecting the civilian population, these villages instead became sites of their abuse... In fact, the 'protected villages' violated all major categories of rights, and just about all the UN's 'Guiding Principles on International Displacement'.” (Ibid. 151).

The UPDF forced civilians into the IDP camps not, as the title “protection villages” would suggest, for their ultimate benefit, but as part of its broader military strategy. In the midst of ongoing suspicion of the Acholi people as rebel sympathizers and collaborators, the use of camps to dominate and control northern Ugandans was a useful arrangement for the UPDF (Finnstrom 2008, 141-144). Eichstaedt (2009, 260) describes the government's approach as “calculated neglect” which “allowed Kony and his rebels to wage a bloody and inhumane war against his own people and then abused these same people it claimed to protect.” (see also Branch 2011, 90-118). Finnstrom (2008, 158) adds that foreign humanitarian aid agencies have been complicit in this process “as a parallel partner to the army”. The forced encampment has since been followed with forced resettlement. The process of forced resettlement, however, “has also been enforced domination and an effort to control the population”, with the GoU “imposing its rule by regulating everyday life” (Finnstrom 2008, 145).

Again, the background of the causes and dynamics of the war, as outlined above, is not exhaustive. But it points to certain key realities: that the conflict has, at its core, fundamentally political causes and dynamics; that key grievances, captured within and exacerbated by the marginalization of the north and a north-south divide, have remained unresolved and generally neglected; and that northern Uganda has long been mired in political contestation that privileges militarism and produces cyclical violence. Of course, these realities are not separate but mutually enforcing. As Juma Okuku (2002, 32-33) writes, the Museveni government's militaristic and confrontational approach to the north deepened the north-south divide. This fuels grievances and propels new cycles of atrocity. Yet the dominant narrative has generally ignored these realities.

The political causes and dynamics of the war are largely ignored in favour of a narrative that views the LRA's actions as being propelled by an irrational need to commit atrocities and as being responsible for a humanitarian rather than political crisis.<sup>27</sup> The chapter now turns to describing three key elements of the mainstream narrative of the conflict, demonstrating that the ICC's intervention and decision-making has entrenched each.

*(i) Good (the Government) Versus Evil (the LRA)*

In the mainstream narrative of the war, there is no doubt about which party bears responsibility for the suffering of the people in northern Uganda. The conflict is seen as a war perpetrated and propagated by the LRA against the GoU and against civilians. The dominant discourse of the war paints “the LRA as irrational terrorists or greed-driven bandits, and as *the* problem rather than *a* problem.” (Dolan 2009, 256-7). The ICC intervention not only fit neatly into the narrative of the LRA being the only bearers of guilt but exacerbated it. The GoU's referral of the LRA situation to the ICC “directed the spotlight at the LRA as the cause of all the problems. By accepting the [GoU's] referral with alacrity, the ICC played into this – thereby reducing the people's confidence in the ICC as an impartial institution.” (Ibid., 100).

There is no question that the crimes the LRA have committed fall under the purview of the ICC (Allen 2006, 1). The brutal nature of the crimes and their classification as war crimes and crimes against humanity is rarely contested. Branch (2004), one of the most vehement critics of this mainstream narrative of the conflict is unequivocal: the LRA is guilty of “terrorist subjugation”, is “unambiguously evil” and is “synonymous with a reign of terror against children.” However, the mainstream narrative which starkly contrasts good and evil, legitimate and illegitimate, criminal and innocent, obfuscates key realities of the war's causes and dynamics as well as the intentions of both the GoU and the LRA.

The common narrative emerging from the conflict has been of an evil, apolitical, terrorist LRA waging war against a legitimate, terrorist-fighting GoU struggling to protect the civilians of northern Uganda from LRA violence. But in virtually every interview for this thesis and conversation conducted with citizens of northern Uganda about the causes of the conflict, the atrocities committed by the government were highlighted. As noted above, evidence has been collected and presented about crimes

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<sup>27</sup> Finnstrom (2008, 64) also notes: “In the dominant narrative, if the war in the north is commented on at all, the crisis is held to be humanitarian rather than political”.

committed by UPDF troops. The people of northern Uganda have suffered atrocities at the hands of *both* the GoU and the LRA; *both* are responsible for the plight, suffering and abuse of citizens. Everyday existence in IDP camps was to live as a “living shield” between the LRA and the UPDF (Finnstrom 2008, 143). Moreover, Okello (2007, 3) argues that “[t]he violations committed in northern Uganda are quite clearly attributable to the government of Uganda for failing in its obligation to protect its citizens by commission and omission of acts of a serious human rights nature.” (See also Seguya 2010, 45). This is not how the ICC sees the situation.

Key decisions by the ICC engrained the narrative that the war was one-sided. As noted at the outset of the chapter, Uganda controversially referred “the situation concerning the Lord’s Resistance Army” to the ICC, giving the appearance that the Court’s intervention was about targeting the LRA and no one else. Moreover, when ICC Prosecutor Luis Moreno-Ocampo declared that he was opening an official investigation into the situation in northern Uganda, he did so sitting alongside President Museveni. Though Moreno-Ocampo insisted that the ICC’s Office of the Prosecutor (OTP) remained interested in investigating the UPDF, the decision to appear with Museveni sent a clear signal that the ICC had adopted the mainstream narrative: Museveni was partnering with Moreno-Ocampo to announce the ICC’s investigation because he represented the legitimate (and innocent) party in Uganda. After all, it is impossible to imagine the Court’s Prosecutor announcing an investigation alongside someone he would subsequently indict! It is important to note that many atrocities committed by the UPDF occurred prior to 2002 and are thus outside of the Court’s temporal jurisdiction and are unlikely to ever be adjudicated (See, e.g., Branch 2007a, 186). As argued in the examination of OTP decision-making on northern Uganda in Chapter 8, there are political justifications for why OTP sought to target the LRA and not the GoU. But the perception of the Prosecutor’s decision-making was obvious: the UPDF would not be targeted by the Court. This regretful incident helped instigate the widely held belief that the ICC is working in the interest of the GoU. According to Human Rights Watch (2011b, 25), “it is not surprising that Uganda’s referral to the ICC of the situation in 2003 struck many as nothing more than a ploy to strengthen its hand in a rebellion it had been unable to end over nearly two decades.”

Assurances of impartiality and protestations against allegations of bias have been insufficient to dispel the widespread perception that the Court was biased and intervened in a conflict where there was a ‘good’ and innocent party (the GoU) and an ‘evil’ and guilty party (the LRA) (Ibid.). They couldn’t be sufficient. Arguments that the ICC was continuously monitoring and investigating crimes belied the fact that the UPDF’s crimes had already been committed and were already catalogued. When the

arrest warrants against the LRA's high command were issued, Richard Dicker of Human Rights Watch described it as “a historic step, but only a first step because the prosecutor has been silent about crimes by the Ugandan Army.” (See Simons 2005). However, with massively reduced resources and staff dedicated to the situation, it is unlikely that GoU or UPDF officials will be prosecuted by the Court for their role in perpetrating atrocities and crimes during the war. ICC assurances have “worn thin.” (Human Rights Watch 2011b, 26).

*(ii) The Focus on Kony*

As described in Chapter three, the ICC has an 'individualizing' effect on the conflicts in which it intervenes. The ICC's focus is on the individual perpetrator and his or her responsibility for atrocities. A consequence of this dynamic is that the very nature and understanding of a conflict becomes entangled with the actions and fate of the individuals indicted by the Court whilst structural factors are put by the wayside. This effect can certainly be seen in the context of northern Uganda.

There is little doubt that Kony is a mysterious figure, owing in part to the fact that he has only rarely communicated to the outside world. The mainstream narrative paints Kony as an evil lunatic waging a senseless and apolitical war (Vinci 2005, 361). But this is not how those who have been close to Kony see the rebel leader. A diary entry of a former senior LRA commander is instructive:

Kony is just a normal human being like any normal human being. He is a medium height man, brown in colour and slender. He is not what most people think of him as being half way a human and half way a snake or fish. He is a friendly person who likes coming and talking freely with his fighters.<sup>28</sup>

Indeed, “Kony is not a lone freak running wild in northern Uganda.” (Butcher 2008). But the LRA leader is not only seen as 'crazy' in the mainstream narrative but as being solely responsible for the war and the suffering it has wrought on the people of northern Uganda. As Vinci (2005, 361) notes, “[s]ometimes the nature of the Northern Uganda conflict is chalked up to the madness of its leader.”

There is no question that Kony is the face of the war. His image has been plastered on the placards and t-shirts of NGO campaigns.<sup>29</sup> Despite the indictment of four other senior commanders of the LRA, it is Kony who emerged as a 'poster-child' for international criminal justice, with his face even appearing on “Wanted” ads (see Callaway 2012). The groups that have produced these campaigns

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<sup>28</sup> Diary of former LRA commander, on file with author.

<sup>29</sup> A quick search on Google images for “Kony t-shirt” reveals hundreds of different t-shirt advertising campaigns against the LRA.

typically ascribe responsibility for the war to Kony and advocate the view that dealing with him is *the* key – not just *a* key – to resolving the war. One observer, for example, declares: “We’ve long argued that Joseph Kony’s leadership is central to the LRA’s survival, and that a solution to the LRA’s atrocity crimes is nearly inconceivable without dealing with him.” (Poffenberger 2013). Most dramatically, this was the message behind Invisible Children’s Kony2012 video campaign, watched by one hundred million viewers and which advocated the elimination of Kony as a solution to the war (see Tiernay 2013).

This obsession with Kony has been criticized by some scholars of the war. Finnstrom (2008, 112), for example, argues that viewing Kony as the be-all and end-all of the conflict is a reductionist conclusion that leads to reductionist prescriptions: “If the alleged lunatic and murderer is removed, as is often suggested, the violent conflict will be no more... now the only solution to the war was to have Kony ‘eliminated.’ International peace initiatives have followed the trend of individualizing a very complex war.” Crucially, it is difficult to imagine that killing or capturing Kony would be the end of the rebel group he has led for over 25 years. Without removing the *reasons* why rebel groups like the LRA have proliferated in Central and East Africa, if Kony were ‘eliminated’, others could easily step in, rebrand the LRA and continue fighting. As Amanda Weisbaum of War Child UK has remarked: “Just getting rid of one person does not solve the problem.” (see Mollins 2012).

Still, the belief that Kony is individually responsible for the conflict appears to have driven the OTP in its decision-making. Upon the announcement that arrest warrants for five LRA commanders had been unsealed, Moreno-Ocampo issued a statement which focused primarily on Kony’s role and responsibility. In it, the Prosecutor declared:

We have collected evidence showing how he personally manages criminal campaign of the LRA. From his bases in the Sudan, Kony directs all LRA operations. Joseph Kony is the absolute leader of the LRA and controls life and death within the organization. Our investigation has shown that he orders the movements of his forces and dictates the types of military and civilian targets of the LRA attacks. (See Statement by Chief Prosecutor 2005, 4-5).

The statement included thirty-three lines on Kony. Otti received five, Lukwiya and Ongwen two and Odhiambo one. Despite protestations that the Court would investigate both sides impartially, the Prosecutor sent the message that it was Kony who bore ultimate responsibility for the war and for the suffering of the people of northern Uganda. Notably, Dolan (2009, 100) writes that it was “Museveni’s decision to refer Kony” (and not northern Uganda or even the LRA) to the ICC, indicating the extent to which it appeared, even to those with intimate knowledge of the war, that the ICC was focused on

Kony himself. It should thus come as little surprise that Moreno-Ocampo declared that if only Kony were arrested, “we will have peace tomorrow.” (see Eichstaedt 2008). The Prosecutor's comments reflect not a belief in what *justice* will be served with Kony's detention but what is necessary for the *conflict* to conclude, thus dissolving the lines between the pursuit of individual accountability and the dominant conflict narrative. “[T]he best way to finally stop the conflict after 19 years is to arrest the top leaders,” he added (see IRIN 2006).

Of course, the focus on Kony isn't only the result of the ICC's indictment. But the ICC helped ensure that this would continue to resonate and deepen in the dominant narrative of the war. The conflict is about Kony and the violence he perpetrated against innocent civilians. This violence is dissociated from its causes and its politics.

### *(iii) Focus on Humanitarian Dynamics not Political Causes*

In Chapter 3 it was argued that when the ICC intervenes in ongoing conflicts, its focus is on the dynamics of war and, specifically, on the manner that violence is committed (and by whom). Complexity is shed as the causes and motivations of violence are neglected. This has certainly been the case in northern Uganda where the dominant conflict narrative typifies the war as the consequence the moral backwardness of the LRA rather than an extension of political dynamics. The war has been predominately interpreted as constituting a humanitarian crisis with humanitarian dynamics rather than a political conflict with political causes and dynamics. Kony and the LRA are cast as the source of this humanitarian – rather than political – crisis. Crucially, this humanitarian crisis requires a humanitarian response and has thus acted as a justification for international intervention (Dolan 2009, 257). In this context, “the political issues the rebels have tried to address are left without commentary on the public arena” (Finnstrom 2008, 99). The overall neglect of the conflict as a political crisis in favour of the dominant discourse which sees it as a humanitarian disaster caused by the LRA has been exacerbated by the ICC's intervention.

The ICC intervened at a time when the situation in northern Uganda was already seen as a humanitarian disaster rather than a political conflict (Finnstrom 2008, 64). The UN consistently referred to the situation as a humanitarian issue (see, e.g., Agence France-Presse 2003; UN 2004). Of course, it *was* a humanitarian crisis, but it was also a political conflict and war in which both sides were responsible for ongoing violence and the suffering of the civilian population. What mattered, it seemed, was *that* violence occurred and not *why* it did.

The ICC's intervention did not establish that the GoU-LRA war was a humanitarian rather than

political crisis, but it entrenched the dominant narrative by ensuring that the causes of the war were left outside the scope of its inquiry. The Rome Statute imposes a structural limitation on the temporal jurisdiction of the ICC. The Court can only investigate crimes committed after 1 July 2002, the date when the Statute came into force. In the context of the conflict in northern Uganda, this limit on the temporal jurisdiction of the ICC renders sixteen years of the war out of the Court's scope. Consequently, the primary drivers of the LRA rebellion are often left unexplored and under-examined. Grievances over the marginalization of the Acholi people and the concomitant abuse of the people of northern Uganda by the NRA and, subsequently the UPDF are typically ignored in favour of a conflict characterized by the sheer brutality of the LRA and the resulting humanitarian suffering. The political roots of the war simply do not fit within the temporal frame of reference available to the ICC to investigate and prosecute crimes. For some, given the injustices of the first sixteen years of the war, this temporal limitation on the ICC's jurisdiction “makes the court a highly inappropriate vehicle for finding justice in response to this legacy of violence, especially since much of the most atrocious violence happened before 2002.” (Branch 2007a, 186).

Compounding the fact that the causes of the war lie outside the jurisdiction of the ICC, the political nature of violence in the north, as brutal and indiscriminate as it may appear, is further ignored because of the preference for seeing the war as erratic and irrational. This narrative is propelled by a “heart-of-darkness paradigm” (see Finnstrom 2008, 109; Ehrenreich 1998, 83-4; Branch 2011, 81) that depicts African states as inevitably and inherently mystical and violent, the locus of endless bloodshed and misery and “a place of bizarre and irrational terror” (Allen 1991, 370). Here, references to the spiritual nature of the LRA play a critical role and allow the GoU and external actors to claim that the LRA is primitive, primordial and beyond the pale of reason: “It is concluded that the LRA, embodied in Joseph Kony, is simply insane, the latest manifestation of incomprehensible African violence.” (Branch 2007a, 182). This framing is a useful tool “in the effort to deny any political dimension to the conflict... [making] the wider national, political and socioeconomic dimensions of the war marginal” (Finnstrom 2008, 114-115). Rodriguez (2009, 21-23) adds: “Even the Ugandan government has been fond of presenting the LRA problem as a form of the 'backwardness' they are on a mission to fight against. But all that is a part of a history much more complex and difficult to understand.”

The dominant conflict narrative has ensured that the political and historical context of the war is actively set aside in favour of a focus on the fact that the rebels are perpetrating atrocities and fuelling a humanitarian disaster. By focusing on the commission of violence and atrocities by the LRA at the expense of the political causes of violence by the LRA and the GoU, the ICC has contributed to an

imbalanced and depoliticized narrative of the war. It has fallen into cahoots with the “reductive official discourse”. (Branch 2007a, 182). According to Branch (*ibid.*, 191),

by criminalizing the LRA leadership, the ICC denies the rebels the possibility of political relevance or of becoming a political force. Their leaders are to be hunted down and captured, and the rest of the LRA is to disintegrate. The ICC dismisses the political demands that the LRA leadership has made, some of which have resonance with many displaced Acholi: a return to their homes, the end of government violence and repressions, the political and economic equalization of north and south, and reparations... It denies that the existence of the LRA is a symptom of deeper national problems that would require a political solution involving the LRA, the Ugandan government, and the various political and social factions among Acholi.

The mainstream narrative pays little-to-no attention to the political drivers of violence in northern Uganda. Instead it suppresses the political causes, grievances and dynamics of the war in favour of a moral outlook that unequivocally apportions blame to the LRA and legitimacy to the GoU. Again, the ICC is not solely responsible for the establishment of this narrative. But its intervention did nothing to challenge it and much to reify it. One might, at this point, assume that this would have deleterious effects on getting the LRA and the GoU to the negotiating table. For reasons explained in the rest of this chapter, it did not.

## II. Attitudes and Incentives

Despite the ICC's arrest warrants, the GoU and the LRA agreed to unprecedented peace talks. But what role did the ICC play in shaping their attitudes and incentives towards the peace process? This section argues that, in combination with a number of important developments, the ICC's intervention contributed to the LRA's decision to commit to engaging in peace talks. However, there is little evidence that it directly contributed to the GoU's commitment to do likewise.

### *(i) Getting the LRA to Juba*

Those scholars and observers who have concluded that the ICC had a positive impact on bringing the LRA to the negotiation table rely on accounts of how the Court's intervention affected the relationship between the LRA and Khartoum (Akhavan 2009, 625, 642; see also Wegner 2012, 11). There is some evidence that the LRA-Sudan relationship changed in the mid-2000s, at the same time as the ICC intervened in the conflict. As noted above, during a 2004 military campaign against the LRA, the UPDF received the approval of Sudan to operate on its territory. Khartoum even concluded an agreement with the OTP in which it agreed to arrest any LRA rebels wanted by the Court who were on its territory (Brubacher 2010, 275). The removal of direct support for the LRA has been linked to the ICC's investigation of the LRA, the implication being that Sudan did not want to be associated with the LRA. This can be seen as an extension of arguments regarding the ICC's marginalization effects which suggest that states do not want to be seen to be supporting or cooperating with criminal or criminalized parties. This view was described by some interviewees. Justice Alfonse Owiny-Dollo (2011), for example, remarked that the ICC “made it difficult for Sudan to identify with [the] LRA.” At the same time, the 2005 Comprehensive Peace Agreement between Sudan and South Sudan left little need for Khartoum to continue supporting the LRA. This was, according to Otim and Wierda (2008, 22), “the most significant factor giving impetus to the [Juba] talks”. Mwenda argues that “the peace agreement between the Sudanese government in Khartoum and the SPLA has denied the LRA a core military asset – a territorial sanctuary.” Sudan would no longer offer training for LRA soldiers, the rebels' supply roots would be disrupted, and the LRA would have no place to withdraw from UPDF forces, no place to recuperate or regroup and reorganize (Mwenda 2010, 57). As a result, developments in Sudan “left the LRA highly vulnerable – militarily and financially.” (Ibid.).

The effects of the ICC on Khartoum's support of the LRA and its sincerity in withdrawing support for the LRA are difficult to verify. Despite changes in the relationship between the LRA and the Government of Sudan, relations between local Sudanese military units and the LRA were maintained

(Dolan 2009, 83). Moreover, as noted above, the agreement between the GoU and Khartoum to allow the UPDF to track down the LRA in Sudan included a 'red line' beyond which the Ugandan army was prohibited from going. At the same time, despite evidence that the LRA continued to seek refuge on Sudanese territory, Khartoum has not demonstrated much interest in arresting them. On the contrary, the Sudanese Government has been adamant that the United Nations African Union Mission in Darfur (UNAMID) not expand its mandate to include searching for the LRA, threatening that the entire operation would otherwise be abolished (Sudan Tribune 2012). Lastly, there is evidence that the relationship was never entirely spoiled and that the Government of Sudan continues to view the LRA as a valuable proxy force (see BBC 2012b; Benner 2012; Butagira 2013). Thus changes in Khartoum's support for the LRA may have had some effects on the rebels' decision to enter peace negotiations with the GoU, but the effects are limited. Sudan's behaviour is not a sufficient reason to explain why the LRA committed to the Juba peace talks.

There is evidence that Joseph Kony and the senior commanders of the LRA viewed entering negotiations as the only way in which they could negotiate the removal of the ICC's arrest warrants. This argument is supported by the seriousness with which Kony and senior LRA officials took the issue of the warrants. According to Sheikh al Jaji Musa Khalil (2011), a key member of the Acholi Religious Leaders Peace Initiative (ARLPI) and a member of the delegations that met with Kony, the LRA leader "was monitoring and very much suspicious of [his] own security as far as the ICC indictment [was] concerned." The UPDF's spokesperson, Lt. Col. Felix Kulayigye (2011) adds that, in response to the ICC's arrest warrants, the influential Acholi diaspora, many of whom had long financed and supported the LRA, pressured LRA rebels to enter into negotiations with the GoU. The ICC's intervention may thus have given the LRA something other than peace to negotiate – the lifting of the arrest warrants. If so, the warrants *added* rather than removed an incentive for the LRA to enter talks with the GoU. The belief that this was a feasible outcome was bolstered by government statements to the effect that, as a carrot to the LRA for positive engagement in the Juba talks, the warrants could be lifted if negotiations succeeded and, more specifically, that the GoU would request the UN Security Council to defer any prosecutions of LRA commanders if the rebels signed a final peace agreement (Rugunda 2011). In short, Kony and the LRA may have made a decision that Juba represented their best chance at removing the ICC warrants (and the labels that came with them). As Mwenda (2010, 56-7) observes, "there is strong evidence that the rebels have a stronger interest in peace than the government... With international arrest warrants issued for him and his top commanders, Kony's only hope lies in reaching an agreement with Museveni". A legal consultant to the LRA delegation (confidential interview 2011a)

similarly adds that the ICC did contribute to getting the LRA to the negotiating table by instilling in them an attitude of “let's solve our problem.” But the warrants represented another affirmation of a conflict narrative that the LRA sought to challenge. The opportunity to re-negotiate that narrative itself was a key incentive for the LRA.

Since the earliest peace talks between the LRA and the GoU in 1994, the LRA voiced a desire to express its political demands and to communicate its purpose (see O'Kadameri 2002). With a dominant narrative skewed in the GoU's favour, the LRA saw the Juba peace talks as an opportunity to clear the air, communicate their (political) agenda, and publicly confront the causes of the war. Negotiations offered a secular pulpit from which to achieve these aims. Kony clearly paid attention to the ICC's involvement in Uganda and maintained that the GoU's referral to the ICC was intended to “spoil our name” (see Schomerus 2010, 127). Vincent Otti also felt the ICC had mischaracterized the LRA and expressed a desire to set the record straight, stating: the “ICC should quickly come to Garamba but without the warrant of arrest. We are ready to host them for three days so they get our side of the story... Our side of the story must also be heard.” (see Allio 2006d).

The LRA evidently felt that the warrants – and the conflict narrative-affirming labels they came with – misrepresented their rebellion. They saw the narrative that depicted them as evil terrorists as propaganda. But they were largely powerless to counter that narrative given their seclusion and relative inability to communicate with the external world. Kony declared: “(It is) only that I don't have means or I don't have good communication to the world which can inform the people that these things which happened, was not LRA.” (see Green 2006) One way to communicate would be through official and international negotiations where the LRA could hope to be treated as an equal partner and have greater channels of communication with the outside world. Within months of the arrest warrants being unsealed, the LRA entered peace negotiations with the GoU. On the eve of the Juba talks, Kony described to Sam Farmar and Mareike Schomerus his views on being indicted and the prospects of the talks:

So with me, I am now here. You have now seen me, I am a human being like you. I have eyes, I have brain [...] I wear clothes also...you cannot hear the word from one side only. You cannot say that Mr Joseph is guilty without hearing anything from [me]...If they want peace to be, they will call all of us together then we talk about it. But [it is not enough to say] that I am guilty or I am wanted with the ICC...it is very difficult to [go to The Hague]. But when we talk this peace talk, when we talk and everything is finished well, we go. We go and talk. We go and judge that case to show that I am not found guilty...My message to Museveni is if Museveni can agree to talk with me, it is only a very good thing which I know will bring peace to the people of Uganda. (See Schomerus 2010, 128-129).

Kony's remarks suggest that the ICC instigated a renewed desire to demonstrate to the world that the LRA was not the band of crazed terrorist depicted in the narrative constructed by the GoU and propagated by popular conceptions of the war. Kony also seems to have made the judgement that peace talks with international attention would provide a platform to achieve this. Unsurprisingly, the LRA delegation's first move was to open direct negotiations with a statement which reads like an exasperated plea to tell their side of the story:

Your Excellency, it is not true, as has been suggested, that the LRM/LRA has no political agenda. To say so is to underrate the problem at hand and to give the false impression that LRM/A has no cause for its armed rebellion. Failure to express its Political Agenda loudly in intellection form does not mean the lack of it. Until now, we have been speaking through action. We now want to use this forum, space and time to express our agenda in words. (See Daily Monitor 2007).

The LRA wanted to challenge the conflict narrative. Juba gave them the opportunity to do so.

*(ii) Getting the GoU to Juba*

The actions and statements of the GoU towards negotiating with the LRA might best be described as schizophrenic. As noted above, a blanket amnesty was passed and offered to all LRA rebels under the Amnesty Act (2000). However, some argue that Museveni was never truly supportive of the Act (Allen 2006, 37; Finnstrom 2008, 92, 96; Rodriguez 2009, 39). Museveni stated at the time that: "We should apply the law of Moses; an eye for an eye, a tooth for a tooth, to bring discipline to society." (see Finnstrom 2008, 92). Statements by the President and others suggested that Kony and those indicted by the ICC were ineligible to receive an amnesty. This position was subsequently reversed in favour of offering amnesty as an incentive for the LRA to agree to finalized a peace agreement and even promises that if Kony "respects the truce, we shall convince the ICC not to arrest him." (see Ahimbisibwe and Jaramogi 2006).<sup>30</sup> Similarly, government officials first maintained that they would not negotiate if Kony, Otti or anyone indicted by the ICC was involved (IWPR 2006), only to reverse course and declare that they would *only* negotiate if the LRA leadership personally led the talks (see Allio 2006f). This cohort of contradictory statements suggests that the question of the ICC's indictments tailored how the GoU communicated its positions towards negotiating with the LRA. However, there is little evidence to suggest that the GoU's attitudes and incentives towards peace talks were directly affected by the ICC or its arrest warrants.

The GoU faced immense pressure to resolve its war with the LRA (Otto 2011). As noted at the

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<sup>30</sup> For an in-depth analysis of the use of amnesties in Uganda, see Mallinder, (2009).

outset of this chapter, the GoU's reputation had suffered in the early 2000s as the “forgotten” plight of northern Ugandans became the subject of documentaries and NGO attention. Rodriguez (2009, 101) writes that “[l]ittle by little Uganda stopped being Africa's success story in international circles and became Africa's place of horror, especially for children.” As the International Crisis Group (2006, 11) noted, engaging in negotiations gave “Museveni an opportunity to polish an image increasingly tarnished by allegations of corruption, electoral malpractice and inability to end the humanitarian crisis in the north.” The GoU also felt pressure from South Sudan to play a constructive role in the peace negotiations. Following the signing of the CPA between Khartoum and South Sudan, the SPLA sought to remove the LRA from its territory. One way to achieve this was by finally settling the war between the LRA and the GoU. Museveni was keen to demonstrate support for his long-standing allies in South Sudan (Mwenda 2010, 57).

As international pressure mounted to resolve the war, so too did pressure from community leaders in northern Uganda, particularly from Acholi-region religious leaders. Members of ARLPI went to great lengths to persuade the GoU to enter negotiations, acting as unofficial mediators in the lead-up to the Juba peace talks. The GoU seems to have calculated that it would be unlikely to have gained future political and electoral support in northern Uganda, the most hostile of areas towards the Government, had they rejected the efforts of religious leaders. District Chairman of LC.V Martin Mapenduzi (2011) suggests that it was the changing political climate in the early 2000s that pressured Museveni to take negotiations seriously. An increase in internal opposition to his rule as well as poor electoral outcomes led the Ugandan President, in the words of Mapenduzi (*ibid.*), to say, “well, maybe I need to change and go with [the people of northern Uganda]’ who had consistently called for a peaceful resolution to the war.” Entering negotiations was thus an attempt by the GoU to rescue its image abroad and improve its political standing in the North by appearing to be interested in constructively participating in a dialogue over peace in northern Uganda. Critically, however, both internal and external pressure preceded the ICC's intervention and the Court's issuance of arrest warrants.

It is important not to over-state the GoU's interest in negotiations (see Chapter 5). Kulayigye (2011) and another senior government official (confidential interview 2011b) involved in the peace talks claimed they *never* thought the peace talks would succeed. The GoU's attitude was that the LRA was a “defeated” group to whom they could offer a “soft landing” and offer amnesty as a “gift” (Kulayigye 2011) rather than insisting on criminal prosecution of senior rebel commanders, including Kony and Otti. This hesitancy should come as little surprise. Insofar as the mainstream narrative, as

crafted and propagated by the GoU, depended on denying the LRA political agency, acknowledging them as legitimate partners in negotiations would be counterproductive. But that narrative also required the international community's buy-in, literally and figuratively. Entering negotiations should therefore be seen as an attempt by the GoU to repair its image abroad by appearing to be interested in constructively participating in a dialogue over peace in northern Uganda. As Kulayigye (ibid.) claims, it “made no sense to the military to negotiate with [the LRA] but it was done because of political expediency and pressure.” Agreeing to negotiate with the LRA may have granted the rebels' a degree of political agency, but it also allowed the GoU to remain the benevolent benefactors willing to negotiate with the 'bad guys'.

### III. The Pre-Negotiation Phase

In order to explore how the parties ended up at Juba and assess the ICC's impact, the following section examines three key issues in the pre-negotiation phase: the creation of a 'ripe moment' for negotiations between the LRA and the GoU; the decision to choose Juba as a location for peace talks; and the mediation strategies to ensure that the LRA would come to the negotiation table.

#### *(i) A Ripe Moment?*

Asked why the LRA was willing to enter direct negotiations with the GoU, LRA second-in-command Vincent Otti stated that “[p]eace talks come when the war becomes difficult.” (see Eichstaedt 2009, 232). So why did the Juba peace talks begin in 2006 and did the ICC have any effect on making the war “difficult” for the LRA?

Matthew Brubacher, a former analyst and international cooperation adviser to the ICC's investigation in northern Uganda, usefully outlines key changes in the LRA during the ICC's investigation. Brubacher (2010 272-4) notes that the OTP focused its investigation on crimes occurring between July 2002 and July 2004, when the frequency of LRA attacks was at its peak. During this period, a combination of military operations and defections from the rebel group severely weakened the LRA's capacity to continue fighting against the GoU in northern Uganda and to abduct children to replenish its ranks. Estimates of defections – measured by the number of applications to the Amnesty Commission for an amnesty certificate – are in the neighbourhood of 20,000 over the period of 2000-2008 (Okee 2011). For a period in mid-2004, attacks in northern Uganda dropped close to zero. It was during this time that the LRA also moved into Southern Sudan and, subsequently, into the eastern Democratic Republic of Congo and the Central African Republic. Brubacher (2010, 274) argues that “[w]ith the constant pressure and the depleting officer corps...[t]he continued existence of the LRA in northern Uganda was ending and the LRA knew it.”

In addition to the weakened capacity of the LRA prior to the peace talks, it is again necessary to consider the changing political dynamics in South Sudan during the period under consideration. The signing of the CPA between the SPLA and Khartoum in 2005 ended the decades-long civil war in Sudan and guaranteed that the South could hold a referendum to decide whether they would constitute a new state.<sup>31</sup> However, as Khartoum's proxy force, the LRA posed a significant problem for South Sudan. The country had been an active theatre of conflict for the LRA since the mid-1990s and

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<sup>31</sup> In 2011, the South Sudanese voted overwhelmingly in favour of becoming the 54<sup>th</sup> country on the African continent.

thousands of civilians had suffered as a result of LRA abductions and attacks. Gerard Prunier (2004, 359) maintains Sudan and Uganda have long been waging an “undeclared war on their common border”. Indeed, it is a fallacy to see the war in Uganda had an intra-state conflict or even a single conflict between the LRA and GoU (Seguya 2010, 65). So important was this proxy war that one commentator observed: “a purely Ugandan solution, whether by military means or dialogue, cannot resolve the LRA issue in Uganda. The solution to [the] LRA war is in Sudan.” (see New Vision 2006a). With relative peace between the North and South and with South Sudan on the road to independence, Khartoum no longer had as strong a need for the LRA to act as its proxy force and the Government of South Sudan made it a priority to rid its territory of the LRA.

For many, it was changes in Sudan, not Uganda, that explain why peace talks began. When asked why the Juba negotiations started in 2006, Sheikh al Jaji Musa Khali (2011) stressed the shifting state of affairs in Sudan:

I think if you follow the history of the event, there were dimensions if you follow the negotiation between Khartoum and the SPLM that successfully made the CPA sign and immediately the CPA was signed, was a twist of events. The LRA is an army group, they knew their way behind them would be now enemy, in front of them would be an enemy.

Of course, it is important not to overstate the role of changes in Khartoum's behaviour. Sudan continued to support the LRA. Still, sufficient space was created for talks to begin. The changes in Khartoum's relationship with the LRA may have been perceived by the rebels as a sufficiently real threat to their continued existence – even if these changes did not mean that Sudan completely withdrew its support for the LRA. In others words, the LRA could have seen the negotiations as a useful 'time-out' and opportunity to explore what interests could be satisfied through peace talks.

As argued above, the ICC warrants were part of the LRA's calculus in committing to peace negotiations. Some, like Grace Okeng (2006), argued that “[t]he LRA’s decision to engage in talks now is a clear indication of panic and an attempt to avoid the ICC.” Panic or not, the ICC warrants contributed to creating a ripe moment for negotiations. Contrary to those who speculated that the LRA would fight to the death because of the ICC, the LRA understood the warrants could not simply be fought away; they needed (if possible) to be negotiated away. Still, the ICC contributed to the timing of the peace talks as only one of a complex set of factors which weakened and threatened the LRA and which, together, led Kony to believe that a new round of negotiations was in his, and the LRA's, best interest.

*(ii) Picking Juba*

Juba in 2006 could hardly be described as an ideal location for peace negotiations. It had recently been a central locus of the war between the GoS and GoSS. Juba was also the soon-to-be capital of South Sudan and, as noted above, the LRA had consistently fought against the SPLA and no previous peace talks between the LRA and the GoU had taken place in the country. More importantly, having the talks in a state with strong ties to one of the warring parties – the GoU – and powerful interests in eliminating the LRA from its soil – was unlikely to be an ideal choice. So why was Juba chosen and did it have anything to do with the ICC?

Holding talks in Uganda was never seriously contemplated. By 2006, the LRA high command was outside of the country and the GoU was steadfast against in-country talks. Museveni wanted negotiations to take part outside the country whilst the UPDF continued its military campaign in the north (Rodriguez 2009, 244). Holding negotiations in Uganda could also have posed a serious dilemma for the GoU. It had referred the LRA to the ICC because the LRA senior command was no longer on its territory. This allowed the GoU to claim it was “unable” to arrest Kony. Holding the talks in Uganda would have required (at least at some point in the process) that members of the LRA's senior command return to the country. If they returned, there would be expectations that the GoU would fulfil its obligations in arresting LRA commanders and transferring them to The Hague. The commanders might also have gained political credence and authority in such a scenario. Thus, if the GoU was intent on keeping the LRA outside of northern Uganda, the ICC's intervention helped minimized the chances that the talks would be held in the country. But the ICC's intervention also complicated the decision of which external location could serve as host for peace talks.

When the LRA began exploring the possibility of entering into negotiations with the GoU to end the conflict, a number of host locations emerged as possibilities: Italy, because it was where San D'Egidio was based, a religious organization active in attempts to resolve the conflict and trusted by the LRA; South Africa; and Norway. The first head of the LRA's delegation at Juba, Martin Ojul (2011), dismissed discussion on these locations as “just brainstorming” but others maintain that the LRA thoroughly explored having negotiations take place outside of the immediate region (Ochola 2011).

South Sudan proactively sought to mediate the talks and, as noted above, had keen interests in resolving the conflict and pushing the LRA out of the country. The Government of South Sudan (GoSS) offered Vice President Dr. Riek Machar as chief mediator. Machar travelled to visit Kony and the LRA command, giving them US\$20,000 as a gesture of good will. While the LRA delegation, frustrated by a perceived bias against them in the GoSS, later agitated to change the location of the talks and held side-

track negotiations in Mombasa, Kenya, Juba remained the location of the official peace negotiations throughout the peace talks process.

It appears that the ICC, at least in part, shaped the decision-making process and the acceptance by the LRA to hold talks in Juba. A key concern was that holding talks in an ICC member-state could result in the arrest of the LRA's ICC indictees. It seems unlikely that the LRA could have been convinced to hold talks on the territory of a member state whilst the indictments against them remained. Rodriguez (2009, 244) captures this worry: "The International Criminal Court's insistence on intervening in Northern Uganda was quite an obstacle to negotiations taking place outside Uganda. What would happen if a top rebel commander arrived in a country that was a signatory to the Rome Statute and was arrested?" Simon Simonse et al (2010, 229) maintain that being a non-member state made "Sudan a place where it was safe to talk." Indeed, Sudan, whose own President, Omar al-Bashir, was under investigation by the ICC at the time and whose history with the LRA preceded over a decade was unlikely to arrest Kony. Ojul (2011) admits that South Sudan was indeed selected/accepted as a location for negotiations as part of the LRA's calculations regarding the ICC arrest warrants.

The ICC warrants appear to have precluded holding talks anywhere but in a non-ICC member state. Sudan was likely also chosen because it was close to Uganda and to the DRC where Kony was stationed. Kony would not have to travel through areas where there was a risk that he would be arrested.

### *(iii) Mediation Strategies to Get the LRA and GoU to the Table*

While Machar eventually emerged as the chief mediator of the Juba peace talks, the LRA did not initially intend for this scenario. It was only after failing to contact other possible mediators that the GoSS vice president entered the fray. Ojul (2011) maintains that the rebels first wanted the Dutch religious organization Pax Christi to mediate talks. The LRA also requested that South Africa play a role in mediating the negotiations, with members of the country's Truth and Reconciliation Commission participating (see Reuters 2006; Uganda Radio Network 2006). All overtures were rejected and Machar was left as chief mediator.

As suggested above, the civil war between the SPLA and Khartoum was closely interwoven with the war between the LRA and the GoU. With the CPA between North and South Sudan, the SPLA had finally managed to achieve potential sovereignty. Yet gaining independence also meant consolidating order and stability. In the wake of the CPA, removing an enemy rebel army which posed a constant threat to civilians and which regularly attacked South Sudanese citizens quickly became a

priority. Salva Kiir, who later became President of South Sudan, argued that South Sudan took the decision to host negotiations “because the people who they kill are southern Sudanese, the women they rape are southern Sudanese women and girls, and the boys they abduct are southern Sudanese” (see Allio 2006a).

Prior to the Juba negotiations, between 4,000 and 5,000 LRA combatants were present on South Sudanese soil with twice as many UPDF troops (Atkinson 2009, 10). The LRA's presence in South Sudan was, in an odd twist of political fate, linked to Machar's relations with Kony. When asked why the LRA would accept Machar as a mediator, many interview subjects responded that there had been a long-standing bond between Kony and Machar. In the mid-1990s, Machar's Southern Sudan Independence Movement (SSIM), which had broken off from the SPLM-United, became allied with the LRA and “facilitated the first LRA-Khartoum contact” (see Schomerus 2007, 18, citing Johnson 2003). Khartoum, as noted above, subsequently deployed the LRA as a proxy force against the SPLM. As Bishop Ochola (2011) explains, “Sudan said this is a great opportunity because Uganda has been supporting SPLA against Khartoum government so we are going to support you against Kampala government. It was tit-for-tat. So Khartoum started helping the LRA militarily.”

Following the signing of the CPA, the LRA's presence created an untenable situation for South Sudan and “[h]ence the GoSS interest in trying to resolve the northern Uganda war.” (Atkinson 2009, 10). For Kiir, co-existing with the LRA was impossible “because it would be like living with a snake in the same house.” (See Allio 2006f) Defeating the LRA militarily wasn't an option; after all, neither the SPLA nor the GoU had been able (or perhaps willing) to achieve this aim over a period of twenty years, despite vastly outnumbering the LRA and wielding superior military hardware. But perhaps South Sudan could bring the parties together and make the need for ongoing war between the GoU and the LRA obsolete. According to Lyandro Komakech (2011), “to stabilize South Sudan mean to sort out the LRA conflict...the priority of peace in northern Uganda was actually an outcome of a discussion of the security interests of the Southern Sudan government.” As a result of South Sudan's keen interest in the outcome of the war between the LRA and the GoU, the SPLA offered to mediate and host peace negotiations. Far from reflecting a neutral, disinterested position South Sudan was directly interested in the outcome of the talks.

South Sudan managed to get both the GoU and the LRA to agree to negotiations. According to Bishop Ochola (2011), Southern Sudan took a proposal for peace talks to Kampala on their own initiative: “President Salva Kiir with his vice, Riek Machar, told Museveni: 'look, LRA has been a thorn in our foot as much as in yours, why don't you talk to them.' Surprisingly, President agreed.” Jacob

Oulanyah (2011), a legal advisor to Machar and an NRM MP for Kony's home constituency, adds that when Kiir met with Museveni in 2005 he said: “We as the Government of South Sudan, we have a problem on our hands. We cannot deliver on the CPA for as long as the LRA remains in that territory. If you can't do it for anything else, do it for us. We are failing to manage our people's expectations because of this LRA there.” Museveni subsequently agreed to support his long-standing allies in South Sudan and a government delegation for Juba was formed. South Sudan's strategies for getting the LRA to the table were very different. Here, dealing with the question of the ICC warrants, was crucial.

From the number and nature of his statements, it is evident that Machar was compelled to address the question of the ICC's arrest warrants as a matter of priority. He subsequently elaborated his position on how the ICC had to be sequenced with the goal of negotiating a resolution to the war:

If the ICC came out to say that they would give the peace process a chance before the legal process is done, then we would resolve the conflict in the region...If they did that, they would give the peace process a big boost, it would assist the Ugandan government to boldly say ‘we are going to negotiate’...The ICC indictments are extremely important as part of a process of accountability and ending impunity. But the priority has to be getting [Kony] out of the bush...We are a vehicle to mediate a peaceful settlement. With a peaceful settlement, the environment would have been set for the ICC to trigger off the legal process (see New Vision 2006b).

In the lead-up and during the negotiations, the fate of the top LRA command was an issue of primary concern. A key reward for the LRA's participation, the government suggested, would be that Kony and his fellow ICC indictees would receive protection from prosecution. On the eve of talks, Museveni declared: “We must sit on the table and agree that he comes out of the terrorism. Once [Kony] does that, we shall pardon him.” (see Nyanzi 2006). The GoU suggested this was an extension of their “kindness” (see New Vision 2006d). Their approach was welcomed by Machar who exclaimed that it demonstrated the GoU's political will and “builds their confidence to arrive at a peaceful solution in the shortest time possible.” (see Mukasa 2006a). But the issuance of an amnesty was immediately rejected by the LRA. Rather than an act of “kindness”, the LRA saw the Government's offer of an amnesty as a one-sided request to surrender. Its delegation declared that an amnesty “presupposes surrender” (ibid.) and that “[w]hen we go for negotiations, we negotiate as equal persons on the table so it is.” (see BBC 2006a). Rather than challenging the dominant narrative of the war, the offer of amnesty reified it. In offering an amnesty, the Government framed its actions as those of a benevolent and generous actor seeking a solution to the conflict, going so far as to pardon the LRA's top command. Moreover, insofar as amnesties can be understood as a non-judicial form of accountability (see Villa-Vicencio, 2000; Olsen et al 2010, 36), the GoU's unilateral offer of amnesty suggested that the LRA was, again, the sole

guilty party in the war. But, as Allen (2006, 80-81) wrote, “there were commanders in the LRA who did not want 'forgiveness', which implies an admission of guilt, so much as a negotiated settlement. Basically, they wanted to be taken seriously and not dismissed as lunatic or misguided children.” Accepting amnesty was untenable to the LRA which, as Finnstrom (2008, 229) writes, “opposed the Uganda government's reinforcement of a hierarchical structure in the process of war and peace.”

At the same time, Machar understood the desire amongst the LRA to receive political recognition and challenge the dominance of the conflict narrative. Machar reassured them that engaging in the peace process would not translate into their arrest and surrender to the ICC. He stated: “The ICC should differentiate between a political process and a legal process. The main agenda of this process is peace.” (see Allio 2006b). Whilst noting that the ICC was “extremely important as part of a process of accountability and ending impunity”, Machar reiterated that the ICC had to give peace talks a chance: “If the ICC came out to say that they would give the peace process a chance before the legal process is done, then we would resolve the conflict in the region.” (see New Vision 2006b). Crucially, Machar also demonstrated an understanding of the LRA's desire to confront the mainstream narrative that had painted them as an 'evil' rebel group fighting a 'good' government in Kampala. In the lead-up to negotiations Machar told the LRA: “We defied the whole world so you could have a chance to come and say your viewpoints.” (see Agence France-Presse 2006). He subsequently explained that “[w]e thought that the LRA should take this chance and tell the international community their cause. They felt insecure.” (see Mukasa 2006b) Committing to Juba gave the LRA the opportunity to use the talks a stage to confront what they saw as an uneven and unjust narrative and discourse of the war and, ultimately, their responsibility for it.

#### **IV. Conclusion: Getting Justice to Juba**

The ICC's intervention did not preclude peace talks from taking place. While the extent to which it contributed is debatable, overall the Court appears to have contributed positively. This chapter has argued, however, that it did so not for the reasons traditionally provided in analyses of the ICC's involvement in northern Uganda, namely that the Court's intervention marginalized the LRA and pressured Kony into negotiating. Rather, the LRA saw talks at Juba as an opportunity to confront the dominant conflict narrative, accentuated by the ICC's intervention, which had painted the LRA as a gang of indiscriminate and criminal terrorists fighting an apolitical war against a legitimate government. Without traditional means to communicate their political agenda, the Juba peace talks offered the LRA the opportunity to tell 'their side of the story' to the world. The ICC warrants provided the impetus for an attempt to renegotiate this narrative. Moreover and relatedly, the LRA seems to have calculated that the ICC arrest warrants were something they could negotiate away, a calculation likely propelled by statements from the GoU and Machar that justice could be delayed and protection from prosecution given to the senior LRA command. This provided Kony with an incentive to commit to at least exploring what could be gained through peace talks.

Of course, the effects of the ICC should be tempered by context: there are no easy causal mechanisms to be drawn. While it has been argued that the ICC had a positive effect on getting the LRA to the negotiating table, there is little-to-no evidence that it encouraged the GoU to do so. Instead, the GoU's commitment to talks is attributable to its desire to retain good relations with South Sudan and its reputation as a benevolent and peace-seeking government. Moreover, while the ICC may have contributed to the timing of the Juba talks, it did so only amidst a constellation of other crucial factors, especially changes in the conflict between Khartoum and South Sudan. Where the ICC clearly did have a significant effect was on selecting Juba, a capital of a state that was under no obligations to arrest ICC indictees, as the location for peace talks. Insofar as the warrants represented a reification of the dominant narrative that the LRA wanted to challenge, they also affected Machar's strategy of presenting the talks as an opportunity for the LRA to tell their story.

Still, the commitment on the part of the LRA and GoU to enter peace negotiations should not be confused with a commitment to see them through. The intervention by the ICC may have contributed to getting the LRA to the negotiating table and to the selection of Juba as a location for peace talks. However, this did not mean that the LRA and the GoU would commit to a negotiated settlement.

## **Chapter 5: The ICC, Juba, and the Kwoyelo Trial**

*The Juba peace talks are the last chance for these terrorists to come out safely from what they have been doing so that peace returns and they also stay alive... If the peace talks fail, we shall hunt for the rebels and kill them because we were moving on very well with the operations before the peace talks.* – Yoweri Museveni (see Ocowun and Moro 2006)

*Joseph Kony with his other four notorious commanders now will not accept the idea of peace negotiations with anybody since they know for sure arrest warrants have been issued for them. They will only be buying time with anyone who tries to talk peace with them and it will be peace jokes.* – from the diary of an LRA combatant (on file with author)

### **Introduction**

Official peace talks between the Government of Uganda (GoU) and the Lord's Resistance Army (LRA) commenced in August 2006 in Juba, South Sudan. The negotiations began amidst an atmosphere of apparent – if cautious – optimism amongst participants and observers.<sup>32</sup> The talks were labelled as the “best opportunity” (Williams 2006, 69; New Vision 2006c; Finnstrom 2008, 227) and “most promising” (Egeland 2008, 198-199) chance to finally resolve the conflict between the GoU and the LRA. This palpably positive view amongst both Ugandan and outside observers was perhaps unsurprising. Since the outbreak of the conflict, virtually every approach to ending the war had been attempted – and each had failed. Tellingly, a delegate at Juba explained the initial impetus of the government's decision to refer Uganda to the ICC as being the result of an attitude that “we have tried other stuff.” (Anywar 2011). Massive military operations led by the GoU, and complemented by international and regional support, were unable to produce a verdict to the war. While the offer of amnesty, in combination with traditional forms of reconciliation, for any rebels who denounced the rebellion produced an impressive stream of defectors from the LRA, it did not result in comprehensive defections nor the defection of the rebels' senior command (Otim and Wierda 2008, 22). Previous rounds of peace negotiations in 1994, 1998 and 2004 floundered, resulting in deepening distrust between the warring parties, renewed intensity of violence, and an increased frequency of atrocities against civilians. When the ICC intervened, fears that the Court would ruin any chance of getting the

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<sup>32</sup> For an excellent and thorough examination of the Juba Peace Process, see Seguya, (2010). See also Otim and Wierda (2008, 21-28); Mallinder (2009, 41-55); Atkinson (2010, 205-222); Simonse et al (2010, 223-241).

LRA and GoU to the negotiating table were palpable (see, e.g. Pelser 2005; Parrot 2006, 15). But those fears proved to be overstated; both sides appeared ready to negotiate, even if the ICC question loomed large over peace talks. It is in this remarkable context of an exhaustive and exhausting pursuit of virtually every approach to conflict resolution that the Juba peace talks began.

The Juba peace talks covered five agenda items: a cessation of hostilities; comprehensive solutions to the conflict; accountability and reconciliation; a permanent ceasefire agreement; and demobilisation, disarmament, reintegration (DDR). The talks broke down on numerous occasions but, in the end, all agenda items eventually resulted in agreements between delegates of the GoU and LRA delegations. Still, neither Kony nor Museveni signed a comprehensive peace agreement. Despite delegates and observers eagerly waiting for the LRA leader to emerge from the bush and endorse the agreements reached at Juba, by 2008 the talks had ground to a halt and ultimately failed to produce a final, comprehensive resolution to the war. Military operations against the LRA quickly resumed and the rebels retaliated with renewed violence (Schomerus and Tumutegereize 2009).

Following the analytical framework developed in Chapter 3, this chapter seeks to parse out key elements in the Juba peace process and its aftermath to suggest how they were affected – and not affected – by the ICC's intervention. This analysis makes clear that international criminal justice can impact particular phases in a peace process and the ICC may have *both* positive and negative effects within the *same* context. Specifically, this chapter isolates the Juba negotiations and the post-Juba phases in northern Uganda. The chapter begins by considering the effects of the ICC's investigations and arrest warrants on the composition of the delegations at Juba and the agenda of the peace talks. The second section of the chapter tackles evidence which indicates that the Juba peace talks were never really about negotiating peace and that neither party was sufficiently or genuinely interested in a final resolution to the conflict. If this is the case, then the ICC can neither have helped nor hindered the possibility of a negotiated peace between the LRA and the GoU. In the third section, developments since the end of the peace talks are considered, focusing primarily on Uganda's first war crimes trial. While concerns that retributive justice would undermine peace in northern Uganda have subsided, the conflict narrative of a 'good' GoU fighting an 'evil' band of terrorists has been entrenched post-Juba through the selective prosecution of LRA commanders. As this case shows, the effects and implications of the ICC on the northern Ugandan peace process are far more complex.

## **I. The ICC at Juba**

This section explores the ICC's effects on two key elements of the Juba negotiations: the composition of the delegations and the agenda of the peace talks. The ICC had significant effects on both.

### *(i) Delegation Composition*

While there is no evidence that the composition of the GoU's delegation was affected by the ICC, it is evident that the form and membership of the LRA's delegation was shaped by the ICC indictments. The nature of its composition subsequently had significant implications for the Juba talks. Most obviously, the absence of the two most senior commanders – and political figures – within the LRA (Kony and Otti) has been linked to the ICC's arrest warrant against them. After originally insisting that they could not negotiate with 'terrorists' like Kony and stating that “[i]t is absolutely impossible for us to sit and talk to people who have been indicted by the International Criminal Court (ICC) and wanted by Interpol for war crimes and crimes against humanity” (Allio 2006a), the GoU quickly changed tack and demanded that Kony and Otti lead their delegation since “the Government can only speak to authentic and authoritative leadership” (Allio 2006e). The GoU's delegation head and senior Ugandan diplomat, Ruhakana Rugunda (2011), now admits that it was *not* accessing Kony that made earnest negotiations difficult.

Early in the negotiations it became clear that neither Kony nor Otti would travel to Juba. Publicly, both maintained that their fear of being arrested precluded any possibility of them attending the peace talks. On the eve of the talks, Machar stated that the LRA “are concerned about this issue [of the ICC indictment]; that there is no guarantee that they will not be abducted in Juba.” (See Mukasa 2006b) Machar was unable to convince either to lead the LRA's delegation. When he asked Otti to bolster the delegation by sending at least one ICC-indicted member of the LRA, he was apparently told: “It’s easy for you to ask...you’re not indicted.” (see ICG 2006, 15). Complicating matters, LRA Brigadier Sam Kolo, who had previously acted as a negotiator for the LRA during 2004 peace talks with Betty Bigombe, had defected from the LRA, leaving the rebels without a representative with “enough credibility, support from Kony and the capacity to negotiate” on the LRA's behalf (Rodriguez 2009, 246). In the end, only two rebel field commanders joined the delegation – Colonel Lubwa Bwonne and Lieutenant Colonel Santo Alit (Ibid., 256). But Otti was unequivocal about his or Kony's participation in the negotiations:

You are aware that Kony, [and] myself cannot attend the peace talk process although they wanted one of the top leader of the LRA to attend in person. We are afraid of the ICC indictment on us. (See Ocen and Agencies 2006).

[The] ICC is just like a landmine or thorn [ahead] of me which I will not accept to step on. I will keep dodging it even if I am being pushed. (See Ocowun 2006).

For Kony, it was not simply a fear of being arrested. There is evidence to suggest that Kony viewed the ICC not merely as a threat to his freedom but as a threat to his personal security and, ultimately, his survival. McMot Kitara (2011), a former local district chairman in Gulu and a Juba observer, maintains that even if he was captured or had surrendered, Kony believed he would never reach the ICC alive. In a telephone conversation in which Kony reached out for advice from the respected and experienced Kitara, the rebel leader maintained that:

I will not [go to The Hague] because Museveni has a lot of connections with the British and the Americans....I will not accept it. They will hijack me on the way to The Hague and kill me.<sup>33</sup>

George Omono (2011), the former country director for ACORD Uganda, argues that the question of Kony's security and safety was never sufficiently addressed during the peace talks: "Kony was mainly concerned about his safety, that's all. So, in all this process we never thought carefully about the safety of Kony and who would convince him about his safety." Omono further notes that Kony accepted numerous visits by people like Jacob Oulanyah and Justice Owiny Dollo to explain what the ICC meant for his fate precisely because he wanted to understand how his own safety was implicated by the Court's warrants (ibid.). In the end, Machar – and other parties involved, including the United Nations, the European Union and the United States – failed to provide Kony and the senior LRA command with sufficient guarantees for their security. What fate awaited Kony if the talks succeeded and he came out of the bush, was never clarified. Kony thus calculated that he could not attend the talks – not as a matter of his freedom but as a matter of life and death. This, in turn, had significant implications for the Juba talks.

As a result of his absence from Juba, Kony was unable to control much of the proceedings or to keep the delegates who were there to represent him in line. The delegation, which had dozens of members and high turnover rates throughout the talks<sup>34</sup>, consequently suffered from two problems: first, the delegation did not reflect or represent the LRA senior command or its positions; second, and relatedly, divisions amongst the delegates quickly became apparent and hampered any progress towards a final agreement.

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<sup>33</sup> George Omono (2011) agrees that it was Kony's personal security that guided his views on the ICC.

<sup>34</sup> The delegation chief, for example, changed twice.

Delegates and observers on both sides of the conflict agree that there were serious problems with the composition of the LRA delegation. Most members were part of the Lord's Resistance Movement diaspora and knew little about the actual conditions within the LRA. The International Crisis Group (2006, 8) worried that with only two active commanders in the rebels' delegation, the delegation could not effectively represent the LRA high command and the talks would “stagnate” (ibid., 13). One LRA delegation member, Ayena Crispus Odongo (2011) described his initial concerns when he first met a congregation of delegates in Nairobi, prior to the Juba talks:

When I went to Nairobi I found the kind of people who were actually going from a team actually with men of very mean educational background and men who had been in the diaspora who did not know *anything* if at all about what was going on – people who did not inspire confidence in the people of northern Uganda in the peace talks.

Michael Otim (2011) argues that while these delegates claimed to represent the senior LRA command, “in reality, when you speak to the commanders in the bush what they want is completely different.” Similar sentiments have been echoed by observers in detailing what they see as the most significant obstacles and challenges facing the peace talks. John Oryema Lacambel (2011), whose popular radio show on MEGA FM often aired programs featuring LRA commanders (including Kony and Otti), described the challenges of including diaspora members, many of whom had not been in Uganda for decades let alone been in the LRA. In a similar vein, Dolan argues that the LRA delegation was not the “real thing” while Brubacher maintains that the connection of most delegates to the “real LRA” was “intermittent and dubious” (Dolan 2009, 77; see also Brubacher 2010, 276). Jackson (2009, 325) adds that “[t]he Acholi in the diaspora appear[ed] to have no idea what Kony seeks from the negotiations and there is a real question of legitimacy hanging over this group.”

Remarkably, the dissociation between the LRA command and its Juba delegation was evident in even the most senior delegation positions. LRA delegation chief Martin Ojul (2011) insists that before he was selected to become the initial head of the LRA delegation, “the LRA [didn't] know me.” David Matsanga, who replaced Martin Ojul as the head of the LRA delegation in 2008, admitted that he had never actually met Kony (Eichstaedt 2009, 275). Most bizarrely, Odongo, who had been a self-professed supporter of Museveni's National Resistance Movement and who now serves as a Member of Parliament in Museveni's Government, was selected to take part. Odongo (2011) maintains that he did not seek out any position in the LRA delegation nor did he previously have any relations with the LRA senior command. The closest individual to Kony participating in the negotiations directly was Yusuf Adek, an elderly man from Gulu, who many of those interviewed believed has long been amongst Kony's most trusted advisors.

Whatever shuttle-diplomacy was attempted between the LRA delegation and the LRA high command, hiding out in Garamba National Park in the Democratic Republic of Congo, was insufficient in producing a final agreement. No top LRA officials attended the negotiations and communication between the delegation and the LRA command was poor. While some members of the delegation visited Kony in his eastern DRC hideout, as Jane Anywar (2011) explains, key individuals providing advice and consulting the LRA delegation did not confer with Kony. This lack of communication contributed to Kony's heightened suspicions that delegates were working for the government and seeking to undermine – or even kill – him.

The lack of effective and direct representation of the LRA leadership, in combination with the size of the delegation, created ripe conditions for divisions to emerge within as well as between the LRA and the LRA delegation. Consequently, it became easy for delegates to begin pursuing personal interests that fell outside of those of the negotiations. These cleavages created major challenges to progress in the negotiations and contributed to the ultimate failure to produce a final peace accord.

As noted above, delegation members from the LRA diaspora – individuals from northern Uganda who had politically and financially supported the LRA from the UK, the US, Canada, Kenya, Germany, etc. – had a very minimal understanding of the LRA or its leader, Joseph Kony. Lacking knowledge of the shifting dynamics of the conflict, many focused on achieving personal and political gains. As Lacambel (2011) explains:

LRA delegates – people who got in exile, came in and [stood] on behalf of [the] LRA, but didn't know the inner heart of Kony. [They] didn't know him at all [but believed that] through him they could come to power.

It is not uncommon for two levels of negotiations to occur simultaneously – on the one hand, negotiations on the key issues to be included in a final peace agreement and, on the other, a second set of negotiations on the provisions to be given to specific individuals. The former is what is visible to observers and the media, while the latter often lurks in the shadows of peace talks. Many members of the LRA delegation evidently spent a significant amount of time in these shadows trying to get a 'good deal' for themselves.

Numerous participants and observers in the peace talks note that a significant number of LRA delegates sought to prolong the talks in order to benefit financially from the negotiations (see also Hendrickson and Tumutegyereize 2012, 6). Delegates were paid a stipend of \$300 a day and wanted the money to continue flowing into their accounts. As George Omono (2011) puts it: “for some people, it was the longer it takes, the more money you make.” Betty Bigombe (2011), a respected mediator in a number of negotiations between the government and LRA, maintains that “senior commanders

contacted different people to see who gives them more, [undermining] the process very badly...[The] LRA ended up with over 200 satellite phones and food was given illegally [to LRA fighters].” Others engaged in negotiations with the government sought personal financial gain (sometimes running into the thousands of dollars) and positions within the Ugandan government. Rumours persist that the LRA's second in command, Vincent Otti, sought a lucrative deal with the GoU in return for his defection (see below). Many also suggest that interested individuals contacted the LRA leadership to dissuade them from concluding the peace talks and to destabilize negotiations. Lacambel (2011) argues that calls were made to Otti to tell him that local leaders who visited him and Kony in the DRC were “ICC agents”.<sup>35</sup> LRA delegate Ayena Odongo (2011) noted that “one of the biggest challenges again was the scramble for power. People came in, new people came in...on the LRA delegation, who had their own personal ambitions.” An advisor to the LRA delegation (confidential interview 2011a) agrees, arguing that greed within the LRA delegation undermined any possibility of Kony signing the final peace agreement:

Greed in [the] LRA had a very negative impact and caused Kony to break off. They were negotiating money from the Government side without telling Kony...[They] get money and [Kony] doesn't know about it and doesn't get any.

Not only was this underbelly of the negotiations kept away from public scrutiny but, according to Lino Ogora (2011) of the Justice and Reconciliation Project, it was kept away from Kony himself: “all of these guys had something they wanted...[and this] contributed to the failure of the talks because Kony was never informed what was happening in Juba...those other extra discussions.”

Suspicious of divisions within the LRA high command went to the most senior levels. According to former senior rebel commanders, Otti had participated in direct talks with Museveni and the Government delegation leader, Dr. Ruhakana Rugunda without forwarding the details of his conversations to Kony (Odongo, Sunday and Oling Mussa 2011).<sup>36</sup> Further, Otti was being lured by Government officials, including Salim Saleh, Museveni's half-brother, who reportedly offered Otti 12 billion Ugandan shillings in exchange for his defection. In 2007, Otti's dealings with the GoU, or perhaps more accurately, the GoU's dealings with Otti, cost him his life and also resulted in the removal of Ojul, who had been close to Otti, as head of the LRA delegation. Many suggest that Otti was a crucial force behind the peace talks, the “strong man behind negotiations” (Lacambel 2011), and that his assassination signalled the end of any hope for negotiations to succeed: “Everything got ruined the

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<sup>35</sup> See also Mukasa and Opolot (2006).

<sup>36</sup> Father Felix Opio (2011) also argues that Kony began to see Otti as a threat.

moment Vincent Otti was killed. From the time Vincent Otti was killed, nothing good came...[Kony] just cut off contact until the peace process collapsed.” (Mapenduzi 2011).

It is impossible to know whether Kony would have attended the peace talks had the ICC warrants not been issued or had they been revoked. Kony had participated in face-to-face meetings with Betty Bigombe during the 1994 negotiations but did not participate directly in the 1997 talks and had Brigadier Sam Kolo guide negotiations during the 2004 round (Refugee Law Project 2004, 6). In other words, Kony had not led delegations in previous rounds of peace talks. By 2006, it was evident that part of his recalcitrance stemmed from a fear for his life – and not just his freedom – if he chose to participate. However, had he taken part in the Juba talks, it seems unlikely that such cleavages within the LRA delegation would have been tolerated. Without Kony or any other senior rebel delegate, the LRA delegation's discipline quickly eroded. Tellingly, Anywar (2011) recalls that on the day Kony was expected to sign the Juba Comprehensive Peace Agreement, he declared “I'm not part of it. I don't know what you are doing.”

#### *(ii) Justice on the Agenda*

Unlike previous attempts at negotiating peace in 1988, 1994 and 1998, the Juba peace talks placed justice, accountability and reconciliation at the forefront of negotiations. As Lyandro Komakech (2011), a transitional justice scholar from northern Uganda, maintains, it was “the critical stuff” of the talks. The ICC warrants were not ignored. As Schomerus (2007, 39) argued: “a comprehensive peace deal can only be signed if there is a solution to the problem of the ICC warrants—one that satisfies all parties to the peace talks as well as the ICC.” Other agenda items, including demobilization and disarmament as well as an agreement on comprehensive solutions to the conflict were quickly negotiated to agreement. The question of how to achieve justice, however, seemed far more difficult to agree on and dominated the Juba talks. Predictably, the LRA delegation focused its efforts during the negotiations on dealing with the arrest warrants. The question of the ICC warrants was framed as the issue which, above all, would determine whether the peace negotiations would succeed or fail. Oulanyah (2011) claims that the arrest warrants were a “dominant theme” in the negotiations, affecting not only questions of justice and accountability, but a diversity of other issues, including trust and confidence-building and getting LRA combatants to agreed-upon assembly points in South Sudan.

It should be clarified that the negotiations regarding accountability and reconciliation were not solely conducted in order to *achieve justice*, as it were, but to specifically address the ICC's arrest warrants. Justice Onega (2011), the head of Uganda's Amnesty Commission, argues that the effect of

the ICC at Juba was that “both sides were bent on trying to get an agreement that pleased not just themselves but the ICC.” The warrants (and the dominant conflict narrative they represented) shrouded the talks. As a result, there was “an early recognition by both sides that the issue of accountability must be addressed as a central part of the negotiations.” (Otim and Wierda 2008, 23).

Competing demands and views on the appropriate approach to justice were evident at Juba. Many argued that local, traditional justice should be prioritized (see Southwick 2005, 113-117; Baines 2007, 101-103; Allen 2008, 47-54). Others argued that the demands of justice were lop-sided and reflected a conflict narrative that painted the LRA as the sole perpetrator of atrocities and human rights abuses (see Otim and Wierda 2008, 22; Wegner 2012, 21). As discussed in the previous chapter, only the LRA was offered amnesty and was held responsible for crimes committed during the war despite the widespread recognition that, in the lifespan of the conflict, both sides had committed atrocities. But the ICC also affected the scope of injustices that could be confronted at Juba.

Delegates at the peace talks came to the conclusion that traditional justice had to be enacted parallel to formal justice rather than replace it (Otim and Wierda 2008, 24). The compromise position was to combine a domestic legal institution which could try perpetrators of crimes during the conflict with traditional justice mechanisms for less serious crimes. The Annexure to the Agreement on Accountability and Reconciliation (2007), agreed to by both delegations in June 2007, stated that retributive justice would be achieved via the creation of a special unit of the Ugandan High Court, the War Crimes Division mandated to “try individuals who are alleged to have committed serious crimes during the conflict.” The Agreement (2007) stipulated this formal court was to prosecute “individuals who are alleged to bear particular responsibility for the most serious crimes, especially crimes amounting to international crimes, during the course of the conflict.” Signifying just how central questions of justice and accountability were to any potential success at Juba, one GoU delegate exclaimed that the Agreement on Accountability and Reconciliation was “an indication that soon we will be signing the final peace agreement.” (see BBC 2008a).

The War Crimes Division was created in order to meet not only demands for formal accountability but as a possible challenge to the ICC's jurisdiction (see below). Specifically, the ICD was established in order to meet the standards of the ICC's complementarity regime, which dictates that the Court cannot open a case unless the state concerned “is unwilling or unable genuinely to carry out the investigation or prosecution.” (Rome Statute, Article 17). As LRA delegation head Martin Ojul (2011) explains, the War Crimes Division was created to “satisfy [the] ICC.” There was a widespread sentiment that it was possible to convince the ICC to return jurisdiction to Uganda. Jane Anywar (2011)

believes that: “[ICC Prosecutor Moreno-Ocampo was ready to give case back to Uganda because he was tired, [but only] if there was a system that could try [the LRA] at that standard.” It was hoped that Kony would be more amenable to a prosecution in Uganda and would thus be willing to sign the peace agreement, which, as noted above was not the case.

International observers also viewed the creation of the ICD as having the potential to constitute a legitimate alternative to the ICC. Should the government of Uganda demonstrate that it would prosecute those indicted, the “ICC could be persuaded to defer to Uganda the prosecution of LRA leaders.” (Apuuli 2008, 813). The International Crisis Group (2008, ii) noted that the combination of the special division with traditional forms of justice has “some prospect of satisfying...the standards of the Rome Statute, so that the ICC case against the LRA leaders can be suspended.” Its advice to Kony and the LRA was blunt: “accept that trial by the special division of the High Court is the only alternative to ICC prosecution.” (Ibid., iv)

The assumption that he could feel more secure in Uganda is curious at best. The agreement to create a special division of the High Court appears to have lacked approval from Kony himself. Indeed, for many, it is hard to imagine that Kony would accept being brought before any formal, retributive accountability mechanism. Ayena Odongo (2011), who was no longer with the LRA delegation when the Annexure was signed, concedes that the inclusion of such a special division was a poison pill in the agreement: Kony could not possibly accept it. Michael Otim (2011), who met with Kony seven times during the Juba peace process, agrees that the special division was a non-starter and contributed to spoiling the negotiations:

national proceedings as a compromise [was] not good enough for the LRA, for whom any form of accountability which is punitive or what you call retributive justice was not acceptable to them. And so, of course, Kony could not imagine himself, for instance...signing a peace deal, coming back to Uganda and ending up in jail. He's a guy who fought for half of his life, thinking he was fighting for some power and to be humiliated with a trial and imprisonment would be the least thing. So whatever was happening now was no longer attractive to him. And so he was better off continuing what he was doing.

Moreover, and as explored in greater detail below, despite an agreement that the War Crimes Division would be responsible for prosecuting perpetrators of mass atrocities and human rights violations, it soon became clear that what that meant was that the division would prosecute *LRA* perpetrators; UPDF perpetrators would be dealt with through other mechanisms, including via Court martial (International Crisis Group 2007, 7).

The decision to create an accountability mechanism for the LRA but not for the GoU fit

perfectly within the dominant conflict narrative. Ultimate, even sole, responsibility for the war and for the atrocities it produced lay at the feet of the LRA; it only made sense that the LRA alone would be held to account. But an affirmation of the conflict narrative could only hinder the negotiations.

Anglican Bishop Macleod Baker Ochola II (2011), a respected elder in northern Uganda who was heavily involved in the peace process, attributes the breakdown of the talks to the insistence on the creation of the special division which would hone in on the LRA but not the Government:

[The talks failed] because they added that Government of Uganda would create a special division of the High Court to deal with the LRA, not the UPDF. But Kony said, if he has already agreed to Agenda Item 3 [on Reconciliation and Accountability]...he will go through the process of truth-telling...that's why they did not sign it.

There can be little doubt that the ICC was, in large part, responsible for the focus on justice and accountability issues at the Juba talks. It was, in the words of Otim and Wierda (2008, 23), the ICC's "main impact (and a positive one)" on the peace process. Issues of accountability had never been so thoroughly discussed and negotiated in previous rounds of peace talks. Yet the Juba talks were as much about negotiating how to circumvent the ICC as they were about how to achieve justice. The answer to how to deal with the ICC was to create an institution that could challenge the Court's jurisdiction. But this solution only reified the dominant conflict narrative post-Juba.

## II. Was Peace on the Table?

As discussed in Chapter 3, analyses on the effects of the ICC on peace processes largely assume rather than critically examine whether peace is being negotiated at peace talks. But if justice is an obstacle or a hindrance to the achievement of a negotiated peace, then peace must be credibly sought during negotiations. In other words, justice cannot be a barrier to peace if peace is not the goal of the parties during negotiations. At Juba, it is not clear that a credible commitment to peace existed on either side of the negotiation table. Invoking a popular line in northern Uganda, Dennis Ojwee (2011) remarked that Juba, like previous negotiations between the LRA and the GoU, constituted not “peace talks but peace jokes”.

As illustrated in Chapter 4, viewing the conflict in northern Uganda myopically as one between the GoU and the LRA ignores the regional nature of the war. It is for this reason that a group of leading experts on Uganda (Schomerus et al 2011) has exclaimed that “[u]ntil the underlying problem -- the *region's* poor governance -- is adequately dealt with, there will be no sustainable peace.” (Emphasis added). The war is an extension of regional dynamics, including the tensions and conflict between Uganda and Sudan. As one Acholi elder states:

The war is not between Kony and the government – it is between the government of Sudan and Uganda. The peace talks and conferences will not stop the war unless the Sudan and Uganda governments understand each other and Sudan stop support [to the] LRA and Uganda stop support [to the] SPLA. (Quoted in Dolan 2009, 47).

The fact that regional players, and particularly the role of Sudan (but also the DRC and CAR), were excluded from the negotiations hindered attempts to find a *comprehensive* solution to the war (Seguya 2010, 39). As the ICG (2008, i) reported, Machar refused to confront Khartoum's role. Machar had been personally responsible for initiating the relationship between the GoS and the LRA in the early 1990s: “Not least because of this embarrassing history between Kony and Machar, the Juba talks have generally treated the LRA as purely a Ugandan phenomenon, with little attention to the changes since 1994.” (ibid, 13). It is difficult, if not impossible, to negotiate peace without some of the parties to the conflict at the negotiating table. It is even harder when the primary parties aren't genuinely interested.

### (i) *The GoU*

While some believe that Museveni and the GoU took the peace negotiations very seriously (Otim 2011), it is clear that many senior GoU officials, and even delegates, did not believe that there was any

chance of the talks succeeding.<sup>37</sup> Numerous peace negotiations had failed and, since at least the mid-1990s, the Government favoured a military solution to the LRA question, a position that has been in tension with northern civil society groups like the Acholi Religious Peace Initiative who have consistently urged a negotiated settlement to the conflict (see Dolan 2009, 47-49). Even the GoU's referral of the situation in northern Uganda to the ICC can be understood as an extension of the GoU's hopes of finding a military solution. As Bishop Ochola (2011) argues, "Museveni felt at that time that his UPDF could not defeat LRA so he went to ICC so that ICC may be with international community could find means and ways of defeating LRA. That was the intention."

Previous negotiations between the LRA and the GoU had done little to foster confidence in a peaceful solution to the war. The GoU regularly issued rigid timelines and ultimatums, insisting that the LRA surrender on the Government's terms. Rhetoric and propaganda invoking the dominant discourse of the war wherein the LRA were reduced to a band of crazy terrorists was regularly invoked.<sup>38</sup> According to the ICG (2008, 15), the experience of past negotiations "was one of the strongest suggestions that the government may be more comfortable with the continuation of a low intensity conflict, which can be used to justify an oversized, non-transparent defence budget, than with a negotiated settlement." Little in the GoU's behaviour changed at Juba.

As argued in Chapter 4, the Government accepted negotiations in order to appease international and domestic pressure and to salvage an increasingly sullied reputation. Recounting the early days of the negotiations, Ayena Odongo recalled that the GoU had no intention of signing an agreement on the cessation of hostilities, the first agenda item of the peace talks. Past experiences had inculcated a deep mistrust that the LRA would simply use the time to re-arm and re-group. But pressure from the international community forced their hand and they agreed in August 2006 to a ceasefire (Ayena Odongo 2011). Without scrutiny from domestic civil society groups, their international allies, and the international community more generally, the peace talks may have stalled early on. This reality betrays the extent to which the GoU itself saw the Juba peace talks as a real opportunity to negotiate a settlement to the conflict.

In a telling account, Jan Egeland (2008, 211), the former UN Undersecretary-General for Humanitarian Affairs and Emergency Relief International recalls that, following a 2006 meeting he had

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<sup>37</sup> This point was made, for example, by UPDF spokesman Felix Kulayigye (2011) who claimed that the Government knew from the beginning that the peace talks would fail.

<sup>38</sup> For analyses of previous peace negotiations, see Lamwaka (2002), Neu (2002) and O'Kadamari (2002).

with Kony and Otti in Garamba, Democratic Republic of Congo, he communicated the importance of the peace talks to President Museveni. Museveni responded: “No, those talks were not to our benefit. Let me be categorical -- there will only be a military solution to this problem.” According to Kulayigye (2011), because of their faith in a military rather than negotiated solution, when negotiations at Juba began, Uganda's “military and politicians disagreed but obeyed.” To the military, the LRA were a defeated force and it “made no sense to the military to negotiate with them but it was [accepted because of] political expediency [and external] pressure.” (Ibid.). Again, negotiations then, were a 'hand-out' or 'gift' to the LRA, an opportunity for a defeated force to have a “soft-landing” (see, e.g., Mukasa 2006c).

At the same time, and as discussed above, the GoU employed divide-and-rule tactics to marginalize Kony. They encouraged his fellow commanders to accept lucrative personal settlements and defect from the LRA. Atkinson (2009, 12) writes that the GoU “resorted to manipulations, including secret cash payments to certain LRA/M members that divided the rebels and undermined the peace process.” (See also Seguya 2010, 74). The clearest example of this was with Otti. It appears the GoU was attempting to isolate Otti from Kony by offering him a lucrative package in exchange for his defection from the LRA. The 2007 side-negotiations in Mombasa were primarily designed by the GoU “to broker a deal with Vincent Otti that would create an opportunity to eliminate Kony and divide the LRA, after which deserters would receive amnesty and DDR packages, and, it was thought, the LRA problem would be solved....Dividing Otti and Kony was key to the government’s strategy and led to the former’s assassination.” (International Crisis Group 2008, 15). If the GoU did, in fact, seek to create cleavages within the senior ranks of the LRA by offering Otti a defection package, this too should be seen as an attempt to undermine the peace talks as it posed a serious threat to Kony and the LRA's post-negotiation viability – at a time when clarifying their future was of tantamount importance.

Preparations by the UPDF to initiate military operations against the LRA continued during the peace talks. In August 2006, the UPDF killed Raska Lukwiya, the third-highest ranking LRA commander and one of the LRA officials wanted by the ICC, in an attack. As the Juba talks continued, the GoU began to prepare for another military engagement, Operation Lighting Thunder which commenced in late 2008. The end of peace talks and placing blame for their failure on the LRA was a cunning way to justify a return to militarism as the dominant expression of conflict.

Ayena Odongo believes that the “[g]overnment wanted to get as much from [the negotiations] as could justify the [military] action it was taking against the LRA, as much from it as would now justify the involvement of the international community to descend on the LRA.” The government enjoyed a degree of legitimacy as America's partner in the war on terror (Mwenda 2010, 49) before,

during and after the Juba peace talks and the US maintained support for the GoU's military approach to the conflict, both politically and directly in the form of 'non-lethal military aid' and selling of arms to the UPDF. Komakech (2011) thus argues that the Government never sought a successful conclusion to the peace talks and that the GoU was duplicitous in ascribing the negotiations' ultimate failure to Kony's decision not to sign the final peace agreement:

the government kept maintaining propaganda, you know, that he refused to sign...So, they wanted to justify that Kony should not sign it so that they can move on him militarily. If you remember that explains the [Operation] Lightning Thunder.

While many point to Kony's failure to sign the final peace agreement as the ultimate failure of the negotiations, it is often overlooked that Museveni too refused to put pen to paper.

The GoU's preference for a military approach to the war, however, should not be conflated with a genuine interest to resolve the war – militarily or by other means. Serious questions remain about whether the GoU is genuinely interested in defeating the LRA. Some believe the propensity to continue the seemingly unending barrage of military operations serves the interests of some government officials (see Otunnu 2006). Komakech (2011) describes the existence of “conflict entrepreneurs” who benefited from the ongoing war: “We had individuals within the national army whose interest was business and therefore to sort out Joseph Kony would also mean the end of business.” The use of 'ghost soldiers' – names of officers who had been killed in action on payrolls – was a common tactic by the UPDF officials throughout the war. The conflict, according to Finnstrom (2008, 169; 177), was “good business for high-ranking army officers...the involvement of the president's closest military and political associates, even his half-brother [Salim Saleh], in the shadow economy of war in northern Uganda and beyond should not be dismissed out of hand.” One of the senior UPDF officers regularly used as an example of war entrepreneurs is Gulu-based Brigadier Charles Awany Otema who in 2003 was found responsible for the extra-judicial killing of a prisoner in Gulu Central Prison (see The Guardian 2010). Not only has he continued to enjoy impunity, Otema's personal prestige and wealth flourished during the war. He is the owner of the Acholi Inn, the most expensive hotel in Gulu and was promoted to the position of commander of the Fourth Division of the UPDF.

The GoU has benefitted from an ongoing conflict with the LRA, especially one that has been exported beyond its borders, allowing the UPDF to make periodic – and potentially profitable – excursions into neighbouring states. According to Dolan (2009, 96-97), the LRA's core of fighters is small and, in comparison to the strength of the UPDF, the GoU should have long been able to defeat the LRA. Yet, despite regional assistance and military support from the United States, the UPDF has been unable to turn its rhetoric of the LRA being a “defeated force” into reality. Dolan (ibid., 102) explains

that “for the GoU winning seemed to lie in keeping the opponent alive for as long as possible, in particular by using humiliation tactics to provoke him into reacting whenever the situation became calm for too long.” Eichstaedt (2009, 137-138) similarly observed: “It was a cat playing with a mouse, swatting it, batting it, biting it on occasion, but never killing it...The continued existence of the LRA was a useful evil.” (see also Mwenda 2010, 57). When the talks failed, the GoU could blame the LRA for not signing – a convenient way of leaving its own responsibility and lack of genuine commitment to the peace talks unexamined whilst acting as a cogent justification for renewed military operations.

*(ii) The LRA*

Questions abound as to whether the LRA was committed to the negotiations. While the government continued military operations, the LRA also committed atrocities and to abducted civilians during the negotiations. Further, as noted above, Kony ordered the execution of Otti, who many felt was the most serious about negotiating a peaceful settlement to the conflict. Ogora (2011) argues that the LRA “was never interested in a peaceful settlement and that is why he had to execute his Deputy, Vincent Otti.” Whatever Kony's rationale, killing Otti had a chilling effect on the negotiations and undermined the prospect of success.

Some former rebel commanders and observers believe that Kony was ready to “walk out of the bush” and sign a final peace agreement if only the ICC had revoked its indictment against him (Odongo, Sunday and Oling Mussa 2011). Additionally, they argue that had the ICC dropped its warrants and Kony decided not to come out of the bush to sign the Juba peace agreement, his commanders would have deserted him (Ibid.; Onega 2011). Others disagree. Lacambel (2011), for example, maintains that Kony would never have come out regardless of the ICC warrants because he fears and mistrusts the northern Ugandan community. Michael Otim (2011), who met Kony seven times, also doubts whether Kony would have signed the peace agreement and returned to Uganda, even if the warrant against him was lifted:

I highly doubt Kony would come back because, one, he is aware of the atrocities he has committed in Uganda. He even has a sense he cannot be forgiven. Actually, he thinks all this talk of forgiveness is not genuine. He fully understands that...To even imagine himself submitted to someone else's jurisdictional control is just unthinkable. It's as good as he's walking naked. That's how this guy feels...he has the power because he has the gun. And to imagine himself coming back, with hands folded, no arms, no bodyguards – it's just unthinkable to this guy.

Omono (2011) also believes that Kony would not have come to the peace talks or signed the final agreement because, again, Kony's personal security was not guaranteed. Schomerus (2010) has

similarly suggested that there was too much uncertainty facing Kony's fate for him to sign the peace agreement. Notably, no interview subject was able to coherently articulate what would happen to Kony after he had come out of the bush and signed the peace agreement.

It has often been suggested that the rebels, weakened by military strikes and defections, sought the space a cease-fire afforded them in order to regroup and re-arm. Under the cover of the Juba talks which guaranteed the rebels' security, the LRA had the opportunity to re-arm and re-stock. Some dispute this (see, e.g., Atkinson 2009, 16). For others, this was the obvious goal of the LRA's engagement with the talks themselves. The District Chairman of LC.V, Martin Mapenduzi (2011), for example, believes that, in the context of neither side being fully committed to the Juba negotiations, Kony used the opportunity to re-arm and re-mobilize in lock-step with the UPDF's military preparations:

In [2006, Museveni] did not want to show total willingness to the process and every time he would say...that “this is a soft landing ground”. And so, such a message is not good for a kind of confidence building and negotiation...And so [the LRA] thought maybe they were being under-estimated and at the time, Museveni was saying “in case we fail with this, we will have Plan B [military solution]” and when they started talking about Plan B, Joseph Kony said he has already Plan C. Now, so Museveni was developing a plan B, Joseph Kony was already in the plan C stage. They were pretending to be talking in Juba, he had this men in Congo, but some were already in Central African Republic doing abduction and training. So he knew, after failing from here there would an attack in Congo, and he had already sent his wife and children in CAR. We were wasting time. He had already succeeded in doing his Plan C, Museveni was still doing Plan B – planning war – but Kony was already building another base.

If the LRA was not genuinely interested in a peaceful solution to the war, then it is easy to see how the tension between achieving a final peace agreement and pursuing criminal accountability was instrumentalized by the LRA delegation in order to prolong the cover of negotiations. As suggested above, the ICC's intervention and the “peace versus justice” formed the backdrop of the peace talks themselves. It was the impetus and framework in which argumentation and negotiation took place, the language with which much of the talks were described. This discursive framing of the negotiations provided fertile ground for manipulation of the “peace versus justice” vocabulary not only to evade justice but to prolong peace talks.

As early as 2005, HRW (2005, 59) predicted that the ICC would be blamed for spoiling peace negotiations that were not, in fact, about peace: “It may be that the issuance of arrest warrants results in the LRA cutting off peace negotiations, but this may be only a pretext for a foreordained result. The ICC may be criticized unfairly”. If they were not interested in peace but wanted to stretch out talks, the “peace versus justice” rhetoric proved a useful tool. The LRA, according to Eichstaedt (2009, 273),

was adept at framing the war within the discourse of “peace versus justice”. An LRA combatant also suggests that the ICC gave the LRA an excuse with which to drag talks on:

My fear is I.C.C. has jeopardised the process of peace talks because these guys will never accept it anymore. If they try to accept, it will be only to buy time and nothing more. They will be play 'GWENO-ONIN'. 'GWENO-ONIN' means someone is just deceiving you and not telling you the truth or fact and wants time to go so that he achieves what he/she is planning to.<sup>39</sup>

An LRA delegation advisor (confidential interview 2011a) argues that the LRA kept using the ICC “as their trump card” to continue to avoid signing the agreement.<sup>40</sup> The issue of the warrants and efforts to negotiate a way forward that balanced all of the demands for justice and accountability necessitated continuing negotiations. And so long as the ICC issue remained unresolved, the LRA could use it to prolong negotiations. Dennis Ojwee (2011), a journalist who covered the talks, goes so far as to argue that had the arrest warrants been successfully removed, the peace talks would have collapsed: “the indictments were the biggest hook that kept Kony on his toes and made him think that if he did not send delegates to the talks, they would get him.” But if Kony had an interest in drawing-out the negotiations, he wasn't alone. The “peace versus justice” language was also instrumentalized by the LRA delegation. And the longer talks persisted, the more money they would receive. The ICC was the perfect “scapegoat”<sup>41</sup> to prolong the negotiations and thus the time and space for the rebels to regroup and rearm as well as to fill the coffers of individual members of the LRA delegation. Importantly, the necessary language pitting justice against peace was readily available. Not only could the Court be blamed for prolonging the conflict but the “peace versus justice” debate presented a well-versed explanation of *how* and *why* it did so.

When the ICC became involved in the situation in northern Uganda, the polarizing “peace versus justice” rhetoric flourished – both within northern Uganda but also amongst external observers and scholars. However, in 2011, when fieldwork for this thesis was conducted the “peace versus justice” discourse had dissipated markedly. During the interviews, subjects were asked to describe the key challenges and obstacles at Juba. Later in the interview, they were asked to describe what effects the ICC's intervention had on the Juba talks. This sequence of questions was chosen in order to see

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<sup>39</sup> Diary of senior LRA combatant. On file with author.

<sup>40</sup> Ugandan Minister Steven Kagoda (2011) concurs. See also Eichstaedt (2009, 253).

<sup>41</sup> “Scapegoat” was also used by Omono (2011) to describe how delegates used the ICC to prolong negotiations.

whether subjects immediately associated “obstacle” and “challenge” with the Court without first being prompted into a discussion about the ICC's intervention. Interestingly and importantly, *most* respondents did not initially reference the Court as a key obstacle and challenge, often only suggesting that it was a stumbling block when asked about the specific impact of the ICC on the peace process. This is particularly remarkable given that the interviewees were made aware of the subject matter of the thesis prior to the interviews. In line with the empirical analysis offered above and in Chapter 4, this would seem to suggest that unless directly framed within the “peace versus justice” discourse, even those most closely associated with the peace talks view the ICC's arrest warrants as just *one* of the key challenges and issues at Juba. The lack of trust, the unrepresentative nature of the LRA delegation, and the lack of a credible commitment of either parties to a negotiated settlement all contributed to the ultimate failure of having a final peace agreement signed. The fact that respondents typically no longer suggest that the ICC was *the* biggest challenge but rather one of many, suggests that there is a gulf between the “peace versus justice” language and the actual effects of the ICC on peace and conflict processes in northern Uganda. This supports a key claim in the thesis, namely that key arguments posited within the “peace versus justice” rarely reflect reality.

There is ample evidence to suggest that the ICC and the Juba negotiations were instrumentalized by the LRA and the GoU for their own political aims. The attitudes and incentives that led the GoU and LRA to commit to coming to the negotiation table did not translate into a genuine interest in finding a final, negotiated resolution to the conflict. The GoU's global standing clearly benefited by siding with international justice. At Juba it could re-entrench a narrative that showed it as a peaceful government giving peace talks a chance whilst simultaneously preparing to continue the war. The LRA may have benefited from using the ICC to prolong negotiations and thus increase the space and time to re-arm and re-mobilize. If this holds true and neither the GoU nor the LRA were genuinely committed to a negotiated peace, then both parties can be (and indeed have been) considered to “fall into the category of insider spoilers” (Seguya 2010, 71). Moreover, the talks may have been destined to be, in the words of Justice Owiny Dollo (2011), a “still birth” and the “peace versus justice” dilemma in northern Uganda truly represents a false debate. If peace isn't on the table, justice can't be said to help or hinder it.

### III. Justice After Juba

It has been five years since the Juba peace negotiations fell apart. Yet, while the Juba talks may not have been about establishing peace, to a remarkable extent, order and stability has been achieved in northern Uganda. Virtually every interview respondent claimed that there was peace in the country. The few that did not, cited the academic distinction between negative and positive peace, acknowledging that northern Uganda enjoyed the former but still not yet the latter.<sup>42</sup> Nevertheless, as a process where the ultimate goal was a final, comprehensive peace agreement, the Juba peace negotiations failed. A diverse host of reasons have been given to explain why the Juba talks collapsed. Prominent amongst them is the view that the ICC warrants posed an insurmountable obstacle; the LRA simply would not sign without the warrants being removed.

A decade after the ICC became involved in the conflict in northern Uganda, there remains significant division in opinion over the effects of the ICC on the talks. The preponderant view remains that the ICC helped get the LRA to the negotiation table but was too much of a stumbling block to overcome, leading the negotiations to fail (see Wegner 2012). This view becomes problematic when put under scrutiny and when the assumption that the talks were, in fact, about achieving peace is tested. Overall, it is impossible to make the causal claim that the failure to arrive at an agreement was the result of the ICC. Importantly, this is reflected in the views of individuals involved in the peace process. Fears that the ICC threatened to derail any possibility of peace were not commonly expressed in interviews. At the same time, the concern that the ICC would derail peace talks or squander a fragile peace in northern Uganda have dissipated with time. This was evident in interviews with actors involved in the Juba peace process as well as in the lack of fear that Uganda's first war crimes trial would derail peace. This may be the result of a process of social learning: the doomsday predictions regarding the ICC's role in northern Uganda simply did not come to fruition and northern Uganda is currently enjoying its lengthiest relief from large-scale violence in decades.

It would be tempting to suggest, at this point, that the ICC's intervention into northern Uganda was a success. But the LRA crisis remains unresolved. Whilst northern Uganda is stable, the LRA remain active in neighbouring regions. The GoU regularly conducts military operations into neighbouring states in order to 'hunt Kony' (see, e.g. Araali and Talemwa 2013; Candia 2013). At the same time, the dominant narrative that needed to be challenged and undermined if peace talks were to succeed was reaffirmed at Juba – and in its wake.

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<sup>42</sup> This assertion was made, for example, by both Lyandro Komakech (2011) and Bishop Ochola (2011).

Despite the ultimate failure to get a comprehensive peace agreement signed by all parties, many of those involved directly and indirectly in the Juba peace negotiations insist that the talks were a success. Part of the “success” of the Juba talks was an agreement, outlined in the annexure to the agreement on accountability and reconciliation, was the creation of a War Crimes Division which could prosecute international crimes in Uganda. In the summer of 2011, Uganda began its first ever war crimes trial. Treatment and reactions to the trial of Thomas Kwoyelo in Uganda or, better, the lack thereof indicates a population that no longer fears that retributive justice will undermine peace. This may reflect a level of comfort amongst Ugandans with criminal justice or at least a dissipated fear that it would destabilize the north's fragile peace. But it has done nothing to challenge the conflict narrative.

As noted above, a key breakthrough in the negotiations occurred in June 2007 when the delegations agreed that a domestic approach to accountability and reconciliation should be pursued. In the agreement, both sides maintained that national jurisdiction over LRA crimes could be achieved by creating a special unit of the Ugandan High Court “to try individuals who are alleged to have committed serious crimes during the conflict.” Importantly, the creation of the special division did not require a signature or ratification of the final peace agreement, allowing the government to move ahead to establish the division irrespective of the Juba talks' demise. Originally titled the War Crimes Division of the Ugandan High Court, it was subsequently re-branded as the International Crimes Division (ICD).

The GoU sought to demonstrate its commitment to retributive accountability. As Minister Ruhakana Rugunda (2011), the former head of the GoU delegation at Juba, explains:

You know, many who came were given amnesty, were given amnesty because there was an amnesty law operating at that time. So people like [Brigadier Kenneth] Banya and others...they gave themselves up. Some of them were caught, they were all forgiven. But now the situation has changed. The standards of accountability have become sharper both in Uganda and international community.

But the GoU also knew that retribution was for the LRA only.

In July 2011, the ICD began its first case, the prosecution of former senior LRA commander, Thomas Kwoyelo in Gulu, northern Uganda.<sup>43</sup> Following his capture in 2009, Kwoyelo was charged with 12 counts and 53 charges under Uganda's Geneva Conventions Act (1964). His trial began in July 2011, amidst much pomp and circumstance. A marching band played on the grounds of the courthouse in Gulu before Kwoyelo was delivered, shackled and dazed, to the High Court. Journalists gathered to take snapshots of the diminutive rebel who held the distinction of the first-ever LRA commander to be

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<sup>43</sup> The first proceedings of the Kwoyelo trial were attended as part of the fieldwork in Gulu and Kampala.

prosecuted. Human rights workers and advisers gathered to watch, some of whom were actively advising Government prosecutors. A number of Kwoyelo's family members looked on. Once proceedings were under way, the courtroom was overflowing. One could easily imagine that this was a momentous day in Ugandan history for post-conflict justice, and that the whole country would be watching keenly. It wasn't; they weren't.

The Kwoyelo trial was not particularly big news in Uganda. In comparison to the ICC investigations and arrest warrants, it did not feature prominently in the media nor in public discourses.<sup>44</sup> On the contrary, there appeared to be widespread apathy towards the trial. This is all the more remarkable given that the trial was replete with controversies – many of which mirrored the controversies, expressed just a few years earlier, of the ICC's involvement in the war. Most notably, the prosecution of Kwoyelo flew in the face of the 2000 Amnesty Law which stated that any rebel who denounced the rebellion could apply and receive an amnesty from the government. Indeed, this contradiction constituted the basis of Kwoyelo's defense, who argued that because other commanders of similar seniority, most notably Brigadiers Sam Kolo and Kenneth Banya, had received amnesties, the ICD violated Kwoyelo's constitutional right to equal treatment before the law. Kwoyelo's defense was successful in getting judges to agree to refer the “amnesty question” to Uganda's Constitutional Court (Aber and Akena 2011) which, in September 2011, ruled that trying Kwoyelo did, in fact, violate his right to an amnesty (see BBC 2011h; Human Rights Watch 2012a). Despite rulings that Kwoyelo should be released from prison and granted amnesty, as of writing, he remains in prison.<sup>45</sup>

The uproar, couched in the harsh and dichotomous language of the “peace versus justice” debate in the wake of the ICC's investigations and arrest warrants was reduced to a whimper in the Kwoyelo case. This is not to say that the trial was completely ignored. Local and international human rights organizations watched the proceedings keenly. But public discourse was more interested in the extent to which Kwoyelo was a scapegoat. Ogora (2011), for example, commented that:

I practically still believe [Kwoyelo] is a scapegoat of the ICD because several senior commanders have not been prosecuted [but] he has been prosecuted. I think he has been just unlucky because he came in at the wrong time, at the time when [Operation] Lightning Thunder was on and there was a stalemate and the peace talks cannot take place. So he was a senior figure captured and they just had to make an example [of]

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<sup>44</sup> Relative to coverage of the ICC there were relatively few analyses of the Kwoyelo trial in newspapers in Uganda.

<sup>45</sup> Despite multiple rulings ordering Kwoyelo to be issued an amnesty certificate and to be released, he remains imprisoned in Luzira prison. See Anyoll (2012); Kisige 2012).

something...he was [a] scapegoat, he [was] unlucky, he was a sacrificial lamb, describe it the way you want but I think Kwoyelo is just unlucky. He came in at the wrong time.

At the same time, there were some who feared the implications of prosecuting Kwoyelo. Former rebel commanders of similar rank worried about what Kwoyelo's prosecution could mean for their own amnesties. Three former senior LRA fighters expressed such fears in interviews, noting that they saw the ICD "as more or less the same as [the] ICC." (Odongo, Sunday and Oling Mussa 2011). Similarly to when the ICC became involved in this crisis, the rebels and some observers also suggested that the ICD would negatively affect the rate of defections amongst LRA rebels still in the bush (Ibid.; IRIN 2011). If commanders like Kywoyelo could be tried, despite the Amnesty Law's existence, or if the amnesty was done away with altogether, there would be no incentive to stop fighting and return to northern Uganda. These concerns echoed previous debates about the effects of the ICC. Yet their minimal expression and their relative lack of urgency is noteworthy. It is powerful evidence that the fear that retributive justice would destabilize northern Uganda has withered.

There may be a number of reasons for the level of popular disengagement in the Kwoyelo trial. In the wake of the return of thousands of formerly displaced northern Ugandans, the most pressing issue in recent years has become land ownership. At the same time, the pursuit of selective justice against former LRA combatants is nothing new to the people of northern Uganda; however, this time there are few tangible implications for the region's population. While concerns that LRA fighters will not return because of challenges to the amnesty remain, it is important to note that the number of defectors has been reduced to a trickle in recent years (Okee 2011). Rather than being a result of the Kwoyelo trial, the decrease in returnees is more likely a result of the majority of the LRA no longer being based in close proximity to northern Uganda. The negative peace that the country enjoys has not been sacrificed on the altar of justice. The result, it seems, is that northern Ugandans no longer fear the effects of retributive international justice as they once had. There are more important and pressing issues on their agenda.

Still, it remains unclear whether the ICD can be considered a positive development. Indeed, it may make a peaceful solution to the war *less* likely rather than more. As an institution prosecuting war crimes, it is structurally biased against the LRA and thus represents the failure of the Juba talks to challenge the dominant narrative of the conflict. The ICD, as noted above, has been consecrated as a legal institution to prosecute anyone the GoU sees fit – and not any "individuals who are alleged to have committed serious crimes during the conflict." LRA rebels can be prosecuted by the ICD for their "international crimes" but offenders within the Government and UPDF will be admonished with

internally through the use of non-transparent court martial proceedings – if at all. Despite providing material support (in the form of evidence previously gathered) as well as sharing “lessons learned and best practices, including in relation to witness protection and support and evidence handling” (see Report of Court 2011, 8), the OTP has not pushed nor mentioned accountability measures for GoU officials or UPDF soldiers (Rodman 2014, 18).

But the ICD is not only a Court for the LRA. After all, most LRA commanders, even senior ones, are not prosecuted by the Division. The ICD is for those LRA commanders who the GoU *wants* to see prosecuted. Others, especially those of use to the UPDF, are left outside the realm of accountability. This became particularly evident in the case of Caesar Achellam who, like Kwoyelo, was a senior rebel commander. In May 2012, the UPDF claimed to have captured Achellam in the Central African Republic. Achellam was then flown to a base in South Sudan where, dressed in military fatigues, he smiled for cameras and spoke calmly to gathered reporters whilst sitting amongst contented UPDF officers. Surely, if Kwoyelo was to be brought to the ICD, Achellam would too. After all, he did not surrender according to the UPDF, but was captured (The Independent 2012). Yet no action has been taken to initiate a prosecution of Achellam. Instead, he lives in UPDF barracks with his family in Gulu (see Ross 2013). Some have suggested that he is “an intelligence goldmine” for the army (Webb 2012) while Kwoyelo “is considered of little use by the ruling party.” (Nouwen 2013, 221).

The ICD seems to be only for those LRA commanders than the GoU believes can and should be prosecuted. This asymmetric understanding of responsibility and accountability for mass atrocities and human rights abuses lies at the very core of the conflict narrative and has been transplanted onto the post-conflict narrative. The ICD was a direct response to the ICC's intervention but, as a solution to promoting justice and accountability, the ICD did nothing to deal with the mainstream narrative and everything to entrench it. The “peace versus justice” debate may have dissipated and the people of northern Uganda are enjoying the current period of calm. But accountability for atrocities remains something to be done to the LRA and not the GoU – just as it was with the ICC's intervention.

#### **IV. Conclusion: The ICC, Juba and Beyond**

The conclusions that can be drawn at this stage regarding the effects of the ICC on the stages of the peace process are modest but nonetheless important. First, the ICC did not prevent negotiations between the LRA and the GoU from taking place. The ICC was not an obstacle to moving from the pre-negotiation phase to the negotiation phase of the peace process.

Second, during the negotiation phase, the ICC warrants affected the composition of the LRA delegation by creating an obstacle for the indicted senior command's direct participation in the talks themselves. The Court also shaped the agenda of the Juba peace talks by putting questions of justice and accountability front and center. However, the ICC warrants have been identified by those involved in the peace process as only *one* of many issues which prevented Kony from signing a final peace agreement. Many of the individuals interviewed who were involved in the peace process neglected to bring up the ICC as a primary stumbling block when considering the main challenges at Juba. A lack of trust, a disconnect between the LRA delegation and the senior LRA command, and the lack of commitment from both the LRA and the GoU to a negotiated settlement deeply impinged on the peace talks. Importantly, there is strong evidence that the peace negotiations at Juba were never really about *peace*. Rather, they represented an opportunity for both the GoU and the LRA to pursue their own political and economic interests.

Post-Juba, the ICC has had no negative effects on the level of stability and security in northern Uganda. While the language of “peace versus justice” remains prevalent in discussions about the Court international criminal justice does not loom large in public discourses. In comparison to the ICC's intervention, the trial of Kwoyelo has barely registered within the “peace versus justice” discourse. But as a direct response to the ICC's intervention, the ICD may make a return to negotiations more difficult because it has reaffirmed the asymmetrical conflict narrative which lies at the core of the conflict between the GoU and the LRA and which has fuelled the war's intractability.

The mainstream understanding of the effects of the ICC suggests that the Court contributed to getting the LRA to the negotiating table at Juba but subsequently became an obstacle in getting Kony to sign a final, comprehensive peace agreement (see Wegner 2012, 11). This chapter and the preceding one has sought to complicate this neat picture of the ICC's intervention. Together, these conclusions suggest that reaching an overall verdict for the ICC in northern Uganda remains difficult. The jury, as it were, is still out. The ICC's investigations and arrest warrants affected every stage and element of the peace process in northern Uganda. But the Court's effects have been mixed, denying the possibility of coming to any sweeping conclusions about its role in establishing peace. Indeed, asking whether the

ICC helped or hindered peace is, quite simply, the wrong question. This, of course, points to the futility of the “peace versus justice” debate which tends to assume that a conclusive answer to whether justice aids or abets conflict resolution can be found. The analysis above suggests that, instead of attempting to come to a final conclusion about the ICC's effects on peace, researchers should focus more on the different stages and elements of peace processes and recognize that the Court's implications on peace are mixed.

## **Chapter 6: Peace, Justice and the ICC's Intervention in Libya**

*One Libyan-American said he and his friends, hiding in Tripoli at the time, felt they were watching a climatic image from Lord of the Rings, as the forces of evil amassed to destroy the forces of good. (Chorin 2012, 208)*

*The ICC warrant arrest did not force the conflict to be prolonged. It did not force Gaddafi to remain put inside Libya. If he wanted to stop the bloodshed, he could have left. He had many options where he would not be arrested by the ICC and yet bring the conflict to an end. – Senior NTC official (confidential interview 2014)*

### **Introduction**

In late February 2011, the UN Security Council requested that the ICC intervene in the ongoing conflict in Libya. A host of rebel militias and their political wing, the National Transitional Council (NTC), had risen against the rule of Muammar Gaddafi. What began as a series of protests quickly escalated into civil war. The regime faced an aggressive opposition bolstered by a UN-sanctioned NATO-led military intervention. In this volatile context, the feasibility of resolving the Libyan civil war through diplomatic means was perhaps always unlikely. Indeed, on first glance, it would appear as though Libya had little in terms of a peace process as no official negotiations between the sides ever took place. Yet a closer reading of the conflict reveals a number of attempts to initiate mediated negotiations. Drawing on the analytical framework developed in Chapter 3, this chapter is concerned with how the ICC affected – and didn't affect – those attempts.

The ICC intervention, at the behest of the Security Council, instigated a debate centered around whether the Court's intervention would help or hinder peace. The debate did not reflect realities on the ground, which were complex and nuanced. The chapter begins by setting the scene of the ICC's intervention into the war in Libya. The chapter then examines the empirical effects of the ICC on both the conflict and attempts to initiate a peace process. The first and second sections examine the effects of the Court's intervention on the dominant narrative and understanding of the Libyan conflict and the attitudes and incentives of the warring parties towards committing to an official peace process. The next section explores the effects of the ICC on the strategies employed to get the rebels and the Gaddafi regime to the negotiating table and the potential emergence of a ripe moment for peace negotiations. By examining the attitudes, behaviour and positions of key actors (the Libyan opposition, Gaddafi, Saif al-Islam Gaddafi<sup>46</sup>, the African Union, and the intervening forces), the fifth section of the chapter interrogates whether a negotiated settlement could have been achieved, irrespective of the ICC's

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<sup>46</sup> Hereinafter referred to as “Saif” to avoid confusion with Muammar Gaddafi.

intervention.

## **I. The ICC Enters the Arab Spring**

Libya's uprising was remarkable for both how quickly it descended into civil war as well as how rapidly the international community responded. The Gaddafi regime had enjoyed an international renaissance in the preceding decade. Just months prior to the uprising, the former pariah could be seen sharing the stage with international leaders, shaking the hands of foreign dignitaries and pitching his Bedouin tent in European capitals. The international community had its share of political squabbles with the erratic Colonel, but “the regime looked as invincible and unassailable as it had ever been.” (Vandewalle 2012, 203). No crisis or conflict monitoring group suggested that Libya was at risk of state collapse or a descent into civil war (Bellamy 2011, 4) and Foreign Policy's 2010 Failed States Index ranked Libya 111<sup>th</sup> in the world, ahead of states such as India, Turkey, Russia and Mexico (Foreign Policy 2011). Just months prior to the onset of Libya's revolution, a significant number of states had praised Libya's human rights record at the country's Universal Periodic Review (see OHCHR 2010). But within a few short weeks in early 2011, Gaddafi's seemingly airtight grip on the state began to loosen.

In February 2011, protesters emboldened by events in neighbouring 'Arab Spring' states and agitated by long-held socio-economic and political grievances staged largely peaceful demonstrations. In the eastern capital of Benghazi, protests escalated on 17 February, named the Day of Rage, with demonstrators calling for political reforms. The largest demonstrations against the regime in decades quickly turned bloody as Libyan security forces opened fire on protesters who in turn resorted to violent measures. Despite attempts to contain the proliferation of protests and the fomenting unrest in Libya, images of bloodshed spread rapidly, instigating greater – and much less peaceful – agitation against the regime.

What began as large-scale demonstrations voicing grievances and demanding political reforms quickly transformed into a full-scale rebellion with the aim of overthrowing the Gaddafi government. Increasingly fervent, armed, and organized groups clashed with the regime's feared security forces. The NTC was also set up to manage the opposition's political objectives. With violence escalating, a consensus emerged that without a concerted international intervention, Gaddafi was prepared to indiscriminately slaughter any challengers to his regime (see Chesterman 2011, 4). The Security Council was faced with unprecedented regional and state support for coercive measures to end the violence in Libya. The Organizations of the Islamic Conference, the Arab League, and the African Union lined up to call on the international community to intervene. If detractors of international intervention had reservations, an impassioned plea by Libya's deputy permanent representative to the

UN, Ibrahim Dabbashi, appeared to tip the balance. On 21 February 2011 he declared:

Gaddafi's regime has already started the genocide against the Libyan people since January 15. His soldiers and the mercenaries being flown into the country were ordered to shoot to kill...We call on the UN Security Council to use the principle of the right to protect to take the necessary action to protect the Libyan people against the genocide...We also call on the prosecutor of the International Criminal Court to start immediately investigating the crimes committed by Gaddafi (see du Plessis and Louw 2011, 1-2).

According to Hugh Roberts (2011), “[i]t was Dabbashi more than anyone else who, having primed his audience in this way, launched the idea that the UN should impose a no-fly zone and the ICC should investigate Gaddafi’s ‘crimes against humanity and crimes of war’”.

Amidst widespread support for intervention in Libya, the Security Council passed Resolution 1970 (26 February 2011) and Resolution 1973 (on 17 March 2011). Resolution 1970 (2011) was passed unanimously and consisted of a package of sanctions aimed at pressuring the Gaddafi regime to cease its violent crackdown on civilians. Amongst its measures was the Security Council's second-ever referral of a situation to the ICC. Resolution 1973 (2011), notable for the fact that it marked the first time the Security Council authorized military intervention to protect civilians against the wishes of the target state, authorized a no-fly zone over Libya (Bellamy and Williams 2011, 825), precipitating a military engagement which was subsequently spearheaded by a NATO-led coalition of forces.<sup>47</sup> It was a remarkable moment which came on the back of a widespread sense that “the assertive liberal intervention heyday of the 1990s [was] ancient history.” (Weiss 2013, 215-216; see also Keating 2013, 200).

Just two weeks after Resolution 1970 was passed, ICC Prosecutor Luis Moreno-Ocampo opened an investigation into alleged crimes committed in Libya. On 16 May 2011 he requested that the Court issue three arrest warrants – for leader Muammar Gaddafi, Abdullah al-Senussi, Gaddafi's head of internal and external intelligence, and Saif al-Islam Gaddafi, son of the Libyan leader and one-time heir apparent. On 27 June, the ICC's Pre-Trial Chamber issued warrants for all three. This represented a remarkable turnaround time from referral to the issuance of warrants. In Darfur, the only other case of a UN Security Council referral to the ICC, the Court took two years to move from accepting the referral to issuing arrest warrants.

In the wake of the ICC's intervention and its subsequent indictments, a chorus of observers

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<sup>47</sup> In addition to NATO states, Jordan, Qatar, Sweden and the United Arab Emirates participated in the military intervention in Libya.

tapped into the “peace versus justice” debate in their assessments of the Court's alleged impact on the Libyan civil war. Max Boot (2011) exclaimed that the ICC's intervention gave Gaddafi the incentive to “fight to the death and take a lot of people down with him.” Doug Saunders (2011) similarly suggested that the ICC's intervention “created a dilemma that has become tragically familiar in recent years: By applying the pressure of justice to a savage leader, the ICC may have perpetuated, rather than ended, his crimes.” Phillippe Sands (2011a), who would subsequently represent the Libyan government in its admissibility hearings at the ICC, declared that the ICC “made Gaddafi's orderly, early departure from Libya less likely. Once he was subject to arrest warrants, he was bound to dig in his heels.” Leslie Vinjamuri and Jack Snyder (2011) opined that the ICC's decision to issue arrest warrants against Gaddafi and his inner circle would severely complicate efforts to bring the conflict to an end: “Qaddafi or his core supporters will be unlikely to abdicate power without guarantees against prosecution. The international coalition that backed UN Security Council Resolutions 1970 and 1973 may have boxed itself into a corner.”

As the conflict progressed, Jackson Diehl (2011) argued that the ICC itself was to blame for the protracted violence in Libya, stating that the country was “in a civil war in large part because of Gaddafi’s international prosecution.” Bâli and Rana (2012, 339) add that the indictments closed the space for a negotiated solution: “by threatening the regime with criminal indictment, this first concrete action seemed likelier to foreclose than encourage a negotiated solution to the crisis.” Similarly, the International Crisis Group (2011, ii) insisted that the ICC warrant was potentially counter-productive to a negotiated settlement: “To insist that [Gaddafi] both leave the country *and* face trial in the International Criminal Court is virtually to ensure that he will stay in Libya to the bitter end and go down fighting.”

All of these accounts suggested that the ICC had clear, significant and deleterious effects for any potential negotiated resolution to the conflict. They tapped into the common premise that intervention by the ICC would necessarily complicate the fate and possible future political role of its targets, leaving them with no incentive to negotiate and every incentive to continue fighting. In sharp contrast to the aforementioned arguments, there has been a distinct lack of attention paid to the Court's role in Libya in full-length monographs on the revolution and civil war (See St John 2011; Chorin 2012; Hilsum 2012b; Pargeter 2012; Vandewalle 2012). The role of the ICC simply does appear to figure as a key factor in the lifespan of the conflict.

The ICC's actual impact, lies somewhere in between these two poles: while the ICC had some important effects on the conflict and attempts to initiate peace negotiations, they were complex and

interwoven with other key developments and dynamics in the war.

## **II. Libya – A War of 'Good' versus 'Evil'?**

In Chapter 3, it was suggested that ICC interventions shape conflict narratives in three ways: by labelling indicted individuals as 'evil' and thus delegitimizing them as negotiation partners; by making the conflict narrative about particular individuals, namely those indicted by the Court; and by focusing on the dynamics, rather than the causes of the conflict itself. The ICC's intervention into Libya had all of these effects.

The causes of the Libyan uprising should be understood primarily as the result of long-standing socio-economic, political and regional grievances. Gaddafi's forty-two year reign had been plagued by unfulfilled promises of political and socio-economic reforms (see Wright 2010, 210-222; St John 2011, 262-270; Vandewalle 2012, 137-209). The depth of these grievances cannot be understated. By the turn of the century, Libyans “lived under persistent and insidious economic and social pressure more typical of conditions during a total war.” (Wright 2010, 218).

The Libyan uprising was not spontaneous. Rather, in the words of Hassan al-Amin (2013), a human rights advocate and former member of the post-Gaddafi General National Congress, “it was a cumulative kind of thing.” Dirk Vandewalle (2013), a historian of modern Libya, suggests that the “real starting point [of the Revolution] was 2003 “when the Gaddafi regime was rehabilitated by the international community and there was an apparent “economic and political opening led by Saif”. Such an opening was, according to Vandewalle (2013), impossible due to the regime's patronage system: “Expectations were raised but then nothing really happened to the average Libyan” and it was “very clear that it was the Gaddafi family that was manipulating the system.” Despite periodic declarations and guarantees by the regime that real reform was forthcoming, these were consistently hampered and limited by conservative-minded regime officials. The result was that “the quality of life of the Libyan people failed to improve, with widespread corruption, high unemployment, and limited housing compounding the negative political and human rights aspects of an authoritarian regime.” (St John 2011, 262-263)

Political freedoms were virtually non-existent. Freedom of expression and speech was severely limited and the effective political expression of grievances was constrained by the regime's systematic suppression of civil society. Gaddafi's four-decade rule “seemed determined to destroy whatever institutions could create any sense of political community.” (Vandewalle 2012, 211; see also St John 2011, 279). As a result, there were few places to express resentment or communicate grievances other than in the streets and in the relative safety of numbers. As a consequence of the limited efforts to reform and increase freedoms (many instigated by Saif al-Islam Gaddafi) in the years leading up to the

revolution, it had become increasingly common to organize local demonstrations to protest the regime and demand reforms (Pargeter 2012, 216). According to Alison Pargeter (Ibid.), these protests “were symptomatic of the burning anger and seething resentment that had been building in the country for decades, but that had worsened in recent years.” This was particularly true in eastern Libya which had long experienced a sense of regional disenfranchisement and “relative political deprivation.” (Wright 2010, 218). As former Canadian Ambassador to Libya, David Viveash (2013) notes, “it was not surprising that people from the east started the uprising.” The region “was on a knife-edge, ready to explode.” (Pargeter 2012, 216).

The memory of one particular tragedy played a crucial role in fomenting dissent. A lack of accountability and a consistently frustrated yearning to know the truth about the 1996 Abu Salim Massacre, where some 1,200 prisoners were murdered, acted as a lightning rod around which concerted political action could take place. The importance of the memory of Abu Salim should not be underestimated. It was an enduring historical grievance and “a running sore” for the regime, a constant point of agitation (Hilsum 2012b, 5). In this context, the observation of Neil Kritz (1997, 127) seems particularly astute: without a sense of justice and accountability, “the past will haunt and infect the present and future in unpredictable ways.”

It was the arrest of Fathi Terbil, a lawyer who represented the families of Abu Salim victims, that more than anything else galvanized an escalation of protests in Benghazi. With his arrest, Hilsum (2012b, 7) writes, “the accumulation of grievances had toppled over, like a huge pile of documents. Fathi Terbil's arrest was the last file thrown on top, causing the whole lot to collapse.” As Terbil explained, for the families of Abu Salim victims, “calling for the release of people, including me, who had been arrested became the justification for their protest.” (Quoted in Hilsum 2012b, 7).

While some believe that any uprising necessarily required the overthrow of the Gaddafi regime (see, e.g. confidential interview 2014d; Tarhuni 2013), it is important to note that the uprising was *not* initially about regime change (see Pargeter 2012, 215). As al-Amin (2013) explains, “no one was talking about regime change at the beginning (though some were thinking about it).” Indeed, prior to NATO's intervention in support of the Libyan opposition, it is difficult to imagine how a fully-fledged campaign of regime change would have been feasible.<sup>48</sup> However, “with momentum people started saying Gaddafi must go.” (al-Amin 2013). In reaction to the Gaddafi regime's violent response to demonstrations, which included the killing of scores of demonstrators on the planned 'Day of Rage' as

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<sup>48</sup> According to Hana El Gallal (2014), who helped set up the NTC, “if there was no help from the outside we would not have been here talking today.”

well as opening fire on mourners grieving for killed protesters, the demands of Libyan protestors turned sharply away from voicing grievances towards demanding Gaddafi's ouster. As St John (2011, 283) notes, "the thrust of the protests shifted from complaints about a lack of housing, social services, and jobs to a call for regime change."

It was during this shift towards demanding the overthrow of the regime that the UN Security Council referred the situation in Libya to the ICC. In moving expeditiously to target Gaddafi and his regime, the solution to the war crystalized: getting rid of Gaddafi. As al-Amin (2013) suggests, the ICC's intervention bolstered efforts to bring an end to the regime:

I think the ICC decision to put Gaddafi on the list along with the others, that really helped a great deal. In terms of the morale of the people it was amazing - the effect that decision had on people. Second, it was ending the legitimacy of Gaddafi if ever he had any. He's now wanted. And for that to come from the international community is something. Now we are dealing with a guy who is criminal, who is wanted. It made it very clear we are going all the way to make sure he is out and he is finished.

The ICC also helped to broaden the consensus regarding regime change for the international community which, in turn, legitimated the aims of the opposition on the ground. According to HRW's Fred Abrahams (2013), "[t]he ICC gave a boost to the opposition fighters – justice is on our side, the world is on our side, political backing to their cause. I can accept that it gave moral support to the opposition – they welcomed it." Elham Saudi (2013), Director of Lawyers for Justice in Libya called the ICC's intervention a "vote of confidence for the revolution". Libya's Ambassador to the United Nations, Ibrahim Dabbashi was unequivocal about the ICC's impact on reinforcing the Libyan opposition and its goals: "it gave them an indication that the international community is with them and they can continue their struggle into the fall of the regime." The ICC's involvement publicized the revolution and paved the way for NATO intervention – and its justification. As one Libyan activist claims, "It helped us a lot to turn the attention of the world, not only leaders of the world, journalists, normal people all to stand on one side to say Gaddafi must stop, NATO must intervene to protect civilians." (Badi 2013). A senior Western diplomat in Libya (confidential interview 2013g) concurs, arguing that the ICC was "seen as a necessary element to the combined efforts of those opposed to Gaddafi and those assisting." In short, the Court lent the Libyan opposition and their international backers support in their ultimate aim of overthrowing the Gaddafi regime.

In crystallizing and propelling the goal of regime change, the original grievances of the conflict were made largely irrelevant. Or, perhaps more accurately, addressing grievances and regime change became synonymous. What mattered, above all, was that Gaddafi was an 'evil' that had to be expunged.

At the same time, the ICC helped shape a narrative that ignored the previous political support of Gaddafi by Western states. The focus was on Gaddafi and his regime which, as suggested above, made it easier for NATO to justify its military intervention on humanitarian and 'justice' grounds. The very same states that had rehabilitated Gaddafi and his regime in the years leading up to the civil war were also the states responsible for the demise of the 'Brother Leader'.

The referral of Libya to the ICC under Resolution 1970 placed a strict limit on the temporal jurisdiction of the ICC. While Article 11 of the Rome Statute (1998) provides the ICC with jurisdiction for crimes perpetrated after 1 July 2002, the resolution curtailed the ICC's jurisdiction to 15 February 2011 (UNSC Resolution 1970). To date, there has been no official explanation as to why the ICC's jurisdiction was restricted to events post-15 February 2011, nor has the Court commented on the subject. This may reflect a general acceptance that the temporal restriction is not necessarily problematic under international criminal law. However, given its explicit inclusion in the Security Council's referral, it is clear that the inclusion of this temporal limitation was pre-meditated and negotiated by the Council's members. It is noteworthy that Resolution 1593 (2005), which referred Darfur to the ICC, did not limit the Court's temporal jurisdiction. It would thus appear that the restriction to events after 15 February 2011 was included in order to shield key Western states from having their affairs and relations with Libya exposed or perhaps even investigated.

The period between the ICC's establishment and the Libya referral is almost exactly the same period when relations between Libya and the West were restored. Libya had previously been a pariah state, especially in the West, for the better part of two decades. But during its period of rehabilitation, numerous Western states saw Libya as a key ally in the global war on terror and a lucrative source of oil (see Vandewalle 2011; Vandewalle 2012, 173-194). Many of the same Western states that ultimately intervened in Libya in 2011 developed close economic, political and intelligence relations with the Gaddafi regime during this period. This inevitably helped to legitimize and sustain the Libyan leader's oppressive government (see Wright 2010, 221-229; St John 2011, 225-278).

Western states, according to former Canadian Ambassador to Libya, David Viveash (2013), were "anxious to convince [themselves] that the leopard had changed its spots". Gaddafi's rehabilitation and the development of closer relations, it was argued, had been both necessary and pragmatic in that it achieved a worthy outcome: Gaddafi's abandonment of a nascent nuclear programme as well as the development of weapons of mass destruction. In the hopes that he could be a liberal heir-apparent, Western diplomats and senior political officials maintained close relations with Colonel Gaddafi's son, Saif al-Islam, who was widely seen as a reform-minded potential successor to

his father and who successfully spearheaded efforts to de-radicalize members of the Libyan Islamic Fighting Group (LIFG) (Hilsum 2012b, 179-182).

But the rehabilitation of Gaddafi and his regime was not tied to significant or actualized democratic reforms or improvements in political or human rights standards. While there were, in the words of former UK ambassador to Libya Oliver Miles “signs of relaxation” in the years before the uprising, promises of reform were consistently broken and the regime appeared to feel minimal pressure to address long-standing grievances. As Ethan Chorin (2012, 143, 145), a US diplomat in Tripoli between 2004-2008, notes, increased coordination and cooperation between Western states and the Gaddafi regime undermined Western attempts to push for human rights reform and “[a]ll Gaddafi (or his advisers) had to do – and perhaps did do – when asked to moderate his behaviour on any number of outstanding issues, was remind his handlers that he was doing some of their dirty work... [C]ooperation effectively turned the US and Western intelligence agencies into collaborators with Gaddafi in the repression of his own people.”

What dirty work? In the years preceding the Revolution, a close intelligence relationship between the US, the UK and Libya developed. This burgeoning cooperation on intelligence was no secret, even if its darker practices were denied or hidden from the public eye. On his infamous visit to see Colonel Gaddafi in March 2004, British Prime Minister, Tony Blair proudly praised Gaddafi's joint commitment to the 'global war on terror', claiming that “the world is changing and we have got to do everything we possibly can to tackle the security threat that faces us,” and requesting Libya to make “common cause with us against al-Qaeda, extremists and terrorism” (see BBC 2004). The extent of this joint commitment and its seedy underbelly of human rights violations was exposed, in dramatic fashion, during the Libyan conflict.

In the chaos of war in Libya and in the absence of any foreign troops able to secure sensitive sites of interest, political offices replete with confidential government files were left abandoned. In September 2011, documents were found by officials from Human Rights Watch (HRW) in the office of Gaddafi's defected foreign minister, Moussa Koussa. They detailed American and UK engagement with Libyan intelligence and anti-terrorism practices, including the extraordinary rendition of individuals to be interrogated and tortured in Libya (see BBC 2011a). HRW (2012f) subsequently issued a report outlining the participation of the US, in particular, in the systematic use of torture, including waterboarding, and extraordinary rendition.

In the midst of the NATO intervention, the West's indulgence of intelligence ties with Gaddafi created a particularly awkward development when the chief rebel commander in Tripoli and a former

leader of the LIFG, Abdel Hakim Belhadj, declared that he was suing the British and American governments for their complicity in his extraordinary rendition and torture (see Reprieve 2014). The documents retrieved by HRW appear to confirm Belhadj's charges against MI6. Additionally, in a damning letter, Mark Allen, the former chief of counter-terrorism at MI6, wrote to Koussa that the rendition of Belhadj to Libya “was the least we could do for you and for Libya to demonstrate the remarkable relationship we have built over recent years.” (see Spencer 2011c).

None of the above is to argue that engaging Gaddafi was unwise, even if it does expose the limits of so-called political pragmatism when dealing with autocratic leaders. Gaddafi's abandonment of his nuclear programme and weapons of mass destruction were valuable concessions. However, a threshold was exceeded in relations between Western states and Gaddafi whilst little, if anything, in terms of human rights improvements was achieved with Gaddafi's reintroduction into the mainstream of international relations. As al-Amin (2013) explains: “although we acknowledged that the West had their interests, they should not go as far as celebrating the rehabilitation and treating Gaddafi as a Messiah and someone who is completely transformed. I think they went over the top.” (See also Glover 2011).

The effect of curtailing the ICC's temporal jurisdiction was to prevent investigators from exposing the unsavoury, possibly illegal, and undoubtedly embarrassing relations and partnerships between the Gaddafi regime and some of the very states that ultimately guaranteed its demise. Moreover, these relations fed into Gaddafi's confidence that Western support would allow him to sustain his grip on power. This, in turn, contributed to the continued frustration of grievances held by Libyans. As Romesh Ratnesar (2011) observed: “Far from initiating domestic reforms or improving human rights, the Libyan leader used the legitimacy conferred on him by the West as cover to crush dissent and steal more of his country's wealth.” The ICC's restricted jurisdiction, however, framed the conflict as one which began in February 2011 and not one whose roots reached much deeper into Libya's political history. Key elements in the wider understanding of the causes of the conflict remained largely outside of the scope of the narrative of the war.

In the wake of the unanimous UN Security Council vote to refer the situation in Libya to the ICC, Western states, in particular, voiced their support for the Court and its role in the Libyan crisis. In a joint letter titled *Libya's Pathway to Peace*, UK Prime Minister David Cameron, French President Nicolas Sarkozy and US President Barack Obama (2011) declared that the Court “is rightly investigating the crimes committed against civilians and the grievous violations of international law.” In early May 2011, American Ambassador to the UN, Susan Rice reaffirmed support for the ICC,

stating that the US administration

welcomes the swift and thorough work the Prosecutor has done... The specter of ICC prosecution is serious and imminent and should again warn those around Qadhafi about the perils of continuing to tie their fate to his. (Remarks by Ambassador Susan E. Rice, 2011).

As the organization leading the military intervention, NATO similarly supported the work of the ICC (see Press Briefing on Libya). These statements also made clear that the ICC's intervention was, in the eyes of intervening powers, singularly about targeting Gaddafi and his regime.

The demonization of Gaddafi had a legitimating effect on intervention and regime change as the solution in Libya. The 'good' versus 'evil' narrative was established by Western governments and taken up by the media-justified intervention (Roberts 2011; see also Curtis 2012). As a result of this demonization, some argued that the possibility of a negotiated settlement evaporated. Roberts (2011), for example, writes that any negotiations between the NATO-supported rebels and the Gaddafi regime “would have called the demonisation of Gaddafi into question...And that would have ruled out violent – revolutionary? – regime change and so denied the Western powers their chance of a major intervention in North Africa's spring.” He adds that the ICC “crowned” this process of demonization. In a similar vein, Alan J. Kuperman (2013) has argued that this narrative justified not only intervention as the best solution to the Libya crisis but regime change as its only logical conclusion. Despite having a mandate to protect Libyan civilians, the removal of Gaddafi emerged as NATO's ultimate goal, closed off opportunities to seek a negotiated settlement, and fuelled the conflict until Gaddafi's demise was finally achieved:

...intervening states, to justify their use of force to domestic and international audiences, tend to demonize the regime that they are targeting. Unfortunately, such demonization later inhibits the intervening states from considering a negotiated settlement that would permit the regime or its leaders to retain some power, which often would be the quickest way to end violence and protect civilians... NATO's intervention, launched explicitly on humanitarian grounds, evolved within two weeks to the goal of regime change, thereby inhibiting even the exploration of a negotiated settlement that could have saved thousands of lives (Kuperman 2013, 214-215).

The ICC's intervention obfuscated grievance-based accounts of the Libyan uprising, bolstered widespread perceptions of the conflict as a one-sided revolution between 'good' opposition forces and an 'evil' regime that needed to be removed by force, and left the preceding decade of Western rapprochement with Gaddafi outside of the narrative of the conflict. Of course, the establishment of a 'good versus evil' narrative, as argued in Chapter 3, is likely to resonate through, and impact, other aspects of a peace process. But while the ICC may have affected the possibility of successful

negotiations taking place, it did not prevent numerous efforts at initiating negotiations from taking place.

### **III. Attitudes and Incentives of Towards Negotiating Peace**

No direct negotiations took place between the NTC and the Gaddafi regime (Gebreel 2013). However, numerous overtures aimed at bringing the Gaddafi regime and the opposition to the negotiating table were made. What role and impact did the ICC have?

In February 2011, at the outset of the civil war, Muammar Gaddafi declared: “I am not going to leave this land. I will die as a martyr at the end. I shall remain, defiant.” (see St John 2011, 262). Nothing suggests that his resolve to remain in Libya changed at any point. For their part, once Libya descended into civil war, opposition forces, bolstered by the NATO-led military engagement, remained steadfast in their conviction that regime change was a precondition to any negotiations. An analysis of the numerous attempts to initiate peace talks demonstrates that there is little-to-no evidence that the ICC had any effect on Gaddafi’s attitude or incentives towards a negotiated settlement of the conflict. However, the intervention by the ICC boosted the Libyan opposition’s position that negotiations with a ‘criminal’ like Gaddafi were a non-starter. The morality tale of a ‘good’ opposition opposed to an ‘evil’ regime was crucial for the Libyan opposition. As one individual who helped set up the NTC argues “the most important thing to win the battle with this prize is to have the morality around the people”. (El Gallal 2014). The ICC helped them do just that. As Ayat Mneina (2013) maintains, “as soon as the ICC decision had passed (pretty early on), I think it just gave Libyans or those fighting during the revolution a real sense of credibility – what they were doing was being recognized by the world and the world even recognize that such-and-such should to tried at the ICC... They are so evil, everyone recognizes it, not just us.” This sense of credibility, according to one senior Western diplomat (confidential interview 2013h), was “very valuable for the NTC”. It fell on the back of an intervention which “criminalized the regime” (Gheblawi 2013). But could it have made a negotiated solution to the conflict more difficult to achieve?

In early March 2011, even before the military intervention by NATO, the Libyan opposition rejected offers to hold negotiations with Gaddafi. Echoing earlier statements by Libya's ambassador to the UN that Gaddafi was waging a genocide against Libyan civilians, an NTC spokesperson, Mustafa Gheriani, declared that the rebels' “position is [that] there will be no negotiation with this man. He has committed genocide with aeroplanes and tanks...We will never compromise...We would like him to leave the country to stop the bloodshed. But even if he leaves we will go after him and bring him to justice.” (see Spencer 2011a). A spokesperson for NTC Chairman Mustafa Abdul Jalil added that “[i]f there is any negotiation it will be on one single thing – how Gaddafi is going to leave the country or step down so we can save lives. There is nothing else to negotiate.” (see BBC 2011g). Still, this did not

preclude some actors from attempting to bring the warring parties to the negotiation table.

In April 2011, a high-profile, five-member African Union High-Level Panel, that included South African President Jacob Zuma, Mauritanian President Mohamed Ould Abdel Aziz, Malian President Amadou Toumani Toure, Democratic Republic of Congo President Denis Sassou Nguessou and Ugandan President Yoweri Museveni, travelled to Libya in an attempt to broker an end to hostilities. In addition to a cessation of hostilities – including NATO airstrikes – the AU's peace plan included provisions for the unimpeded delivery of humanitarian aid, the protection of foreign nationals, and official peace talks between rebels and the Gaddafi regime aimed at finding a political solution to the crisis. On 11 April, it was announced that Gaddafi had accepted the AU roadmap (Al Jazeera 2011b). The AU's plan was immediately rejected by the rebels. When the AU delegation reached rebel-held Benghazi, they were greeted with slogans that declared “African Union take Gaddafi with you”. A rebel spokesman was clear, declaring that “[t]here is no other solution than the military solution, because this dictator's language is annihilation, and people who speak this language only understand this language.” (see Golovina 2011). Jalil explained why the rebels had rejected the plan: “The African Union initiative does not include the departure of Gaddafi and his sons from the Libyan political scene, therefore it is outdated.” (See The Independent 2011). In words that echoed statements by Gaddafi himself, Jalil added: “We will not negotiate with the blood of our martyrs... We will die with them or be victorious.” (see Fahim, 2011b).

At the same time, Gaddafi made overtures to initiate negotiations with the primary participants in the NATO-led military intervention in Libya (France, the UK and the US), an offer quickly rejected on the basis that Gaddafi failed to cease attacks on civilians. However, while Gaddafi declared “Let us negotiate with you, the countries that attack us” (see Reuters 2011a), he simultaneously maintained that he was not the official leader and would not yield: “I have no official functions to give up – I will not leave my country and will fight to the death” (see BBC 2011g). This contradictory perspective was captured in further comments in which the Libyan leader recalled his previous ability to negotiate with Western states:

We are ready to talk with France and the United States, but with no preconditions. We will not surrender, but I call on you to negotiate. If you want petrol, we will sign contracts with your companies—it is not worth going to war over. Between Libyans, we can solve our problems without being attacked, so pull back your fleets and your planes. (Ajbaili and Ghasemilee 2011).

With NATO's intervention propping up the rebels' military gains, the NTC's vice chairman, Abdul Hafiz Ghoga, responded to potential talks by declaring that “[t]he time for compromise has passed. The

people of Libya cannot possibly envisage or accept a future Libya in which Gaddafi's regime plays any role.” (see BBC 2011g). NTC foreign minister, Ali Al Issawi, was unequivocal: “[Gaddaf] has to choose between three options; he can either join [Slobodan] Milosevic at the ICC, or his friend [President Hugo] Chavez [in Venezuela], or have the same fate as Hitler... His only option to avoid death is to go to a country that has not signed the ICC Agreement [the Rome Statute], the African option [of exile] remains in place, and we are not against this.” (see Asharq Al-Awsat 2011b). A senior NTC official agrees (confidential interview 2014d), stating that the NTC “even said that there are countries that are not signatories to the Rome agreement of the ICC that Gaddafi and his sons can go to.” However, he added that the NTC was not directly negotiating Gaddafi's exile:

We did not actively encourage Gaddafi to go to a country that is not a signatory to the Rome agreement. But we said that Gaddafi knows very well that that option is open to him. Especially that he is well-connected with the majority of African countries, for example. He is very well connected with Venezuela, with Nicaragua, with Zimbabwe... So he had that option.

During the first weeks of NATO's intervention, Gaddafi did not show any flexibility with regards to stepping down as a precondition to talks and, at the end of May 2011, Zuma conceded that Gaddafi would not yield (BBC 2011e). Zuma explained that Gaddafi had “called for an end to the bombings to enable a Libyan dialogue [but h]e emphasized that he was not prepared to leave his country, despite the difficulties.” (see Bearak 2011). Throughout meetings aimed at bringing the conflict to a negotiated end, Zuma refused to discuss exile with Gaddafi which he saw as a non-starter with the Libyan leader (BBC 2011d). In June, Gaddafi again reiterated that he would not leave despite the military campaign led by NATO against his regime: “We have only one choice, we will stay in our land dead or alive. We will not kneel. We will not surrender. We are stronger than your missiles, stronger than your planes, and the voice of the Libyan people is louder than explosions.” (see St John 2011, 262).

In June, the AU High Level Panel stated that Gaddafi had agreed to remain outside of any negotiation process (Al Jazeera 2011c). Still, the rebels showed no interest in negotiating. Remarks by NTC Foreign Minister Fathi Baja at the end of May reflected this position and the skepticism that any overture by Gaddafi could be trusted: “We refuse completely. We don't consider it a political initiative, it is only some stuff that Gaddafi wants to announce to stay in power.” (see BBC 2011e).

As the conflict progressed, Gaddafi appeared increasingly interested in potential negotiations. At this juncture, the international community and the intervening powers also indicated a degree of interest in peace talks. With the backdrop of a military stalemate and fears amongst Western powers of

becoming mired in another dragged-out military engagement, NATO member states were reportedly “anxious that the military campaign has not yet succeeded and are keen to explore a political solution.” (Black 2011a). In July, UN Secretary General Ban Ki-moon maintained that negotiations continued: “[w]e are far from reaching an agreement to reach an end to the conflict but the negotiating process is ongoing.” (see Chikhi 2011). Back-channel negotiations were also taking place. In mid-July, France admitted that indirect talks were ongoing with the Gaddafi regime. French defence minister Gérard Longuet even suggested that a practical solution for Gaddafi's involvement in talks had been identified: “He will be in another room in his palace with another title.” (see Al Jazeera 2011d). However, Longuet also continued to affirm the precondition that the Libyan leader be removed from power. He insisted that “[t]he question is not whether he leaves power but how and when.” (See Lichfield 2011).

While hosting July meetings on a 'Libya Summit', Turkey proposed a new, two-stage “roadmap” to bring the crisis to a negotiated end involving an immediate ceasefire, UN monitoring, the withdrawal of forces loyal to Gaddafi from besieged areas and unimpeded access for humanitarian aid (Black 2011a). Turkey's proposal was, in the words of Ibrahim Kalin (2011), an advisor to the Turkish Prime Minister, an attempt to “prevent two potential disasters: a protracted civil war in Libya, or partition.” Kalin (Ibid.) explained that the creation of “a new political order...means Gaddafi leaving office”. However, while Turkey's proposal followed the prescription that Gaddafi leave power, it did not “spell out how that should happen or whether he would have to be accompanied by his sons.” (Black 2011a). At the same time, Jalil seemed to suggest that the NTC had softened its position on Gaddafi by declaring that he could remain in the country in a location determined by the NTC and “under international supervision.” (See Norton-Taylor and Stephen 2011). Some observers have suggested such a plan was “never really an option” (Stephen 2013). However, attempts to find a solution to the question of Gaddafi's fate were complemented by a softening on the part of William Hague who claimed that “[w]hat happens to Qaddafi is ultimately a question for the Libyans”, as well as French Foreign Minister Alain Juppé who suggested that a possible solution was that Gaddafi “stays in Libya on one condition, which I repeat: that he very clearly steps aside from Libyan political life.” (See Cowell 2011). These developments were met by sharp criticism from human rights groups. HRW's Richard Dicker (2011), for example, decried any potential “get-out-jail-free card” for Gaddafi and warned that not only did it risk undermining the pursuit of justice, but that any “plan that gives Qaddafi a comfortable retirement (inside or outside of Libya) is short-sighted. Qaddafi... would remain a destabilizing figure.” The ICC also weighed in, insisting that Gaddafi had to be arrested (see Norton-Taylor and Stephen 2011). Notably, Saif emerged at this time to discuss the conflict and the ICC's

warrant against him and his father, suggesting that some offer had been made which could have by-passed the ICC's arrest warrants:

It's a fake court. Under the table they are trying to negotiate with us a deal. They say if you accept this deal, we will take care of the court. What does that mean? It means this court is controlled by those countries which are attacking us every day! It is just to put psychological and political pressure on us. That's it. Of course, it won't work. The court is a joke here in Libya. (See RT 2011).

Whatever deal was offered (indeed, *if* any deal was offered), ultimately failed to come to fruition.

As Tripoli came under sustained attack from rebel fighters in August 2011, Gaddafi's spokesperson declared that the Libyan leader was offering to negotiate a transfer of power (Al Jazeera 2011f). But the prospects of opening negotiations in the midst of the regime's imminent collapse were immediately shot down by the NTC. As Vandewalle notes, “[t]he diplomatic process became overrun by events on the ground – the fall of Tripoli. The whole diplomatic climate changed. Even the South Africans realized their original suggestion was unrealistic. By default the rebels/NTC and Gaddafi [were] committed to [a] military solution. I talked to NTC leaders. It was very clear that most, if not everyone, sensed victory in the air. In Tripoli, they really wanted to see military victory.” (Vandewalle 2013).

Having made significant in-roads in the conflict only to turn to negotiations was not in the Libyan opposition's interest. And Gaddafi's last offers appeared to be an act of desperation. As the NTC's Ali Tarhouni declared, “No negotiation is taking place with Gaddafi... If he wants to surrender, then we will negotiate and we will capture him.” (See Smith 2011c). NTC information minister Mahmoud Shammam exclaimed: “We are looking at them as criminals. We are going to arrest them very soon.” (See Shelton 2011). Another NTC official, Guma el-Gamaty stated that the opposition was “absolutely 100% not” prepared negotiate with Gaddafi:

[t]he only negotiation is how to apprehend him, [for him] to tell us where he is and what conditions he wants for his apprehension: whether he wants to be kept in a single cell or shared cell or whether he wants to have his own shower or not, you know. These are the kind of negotiations we are willing to talk about. (See Smith 2011c).

All parties, including Gaddafi, had come to realize that Libya's transition was irreversible. It was not a conducive context for negotiations. William Hague described any offer from Gaddafi to hold talks as “delusional”, stating that “[a] transition of power is already taking place. The NTC ministers are in Tripoli and in increasing control of the situation.” (Ibid.).

One development which may have contributed to the regime's apparent willingness to negotiate

as the conflict persisted was that, throughout the civil war, the leader appeared increasingly isolated and marginalized as a result of a stream of defections. Beginning just days after the conflict erupted in February 2011, scores of high-profile diplomats, loyalists and generals defected from the regime (Spencer 2011b), including General Abdelfatah Younis and controversial Foreign Minister Musa Koussa, who arrived in the UK from Tunisia, reportedly on a British military aircraft (BBC 2011b). Abdul Jalil and Mahmoud Jibril also defected, becoming senior political figures in the NTC. Interior minister Abdel-Fatah Younes al-Obeidi and oil minister Shurki Ghanem both abandoned Gaddafi and, in May 2011, five generals, two colonels and a major defected to Italy. But did the ICC instigate these defections?

As noted in Chapter 2, proponents of international criminal justice often suggest that the ICC has a potential marginalization effect. The spate of defections in the wake of the international community's engagement in the crisis in Libya would seem to be at least cursory evidence that the Court contributed to the isolation of Gaddafi. Juan Cole (2011) speculated as much, arguing that the ICC indictment of Gaddafi “is likely to hasten the end of the regime by signalling to the Tripoli elite that they are increasingly likely to face prosecution and sanctions, encouraging them to throw the Qaddafis under the bus.” Similarly, some in the NTC believe the ICC may have instigated defections. El Gallal (2014), for example, maintains that the ICC primarily impacted “on the morality of Gaddafi and his regime and more people defected after that because they didn't want to have their names coming in.”

But there is no evidence that the defections of senior officials are directly attributable to any single aspect of the conflict, including the ICC's intervention. A fear of being killed by siding with Gaddafi is just as likely to have played a role in the decision-making of former Gaddafi loyalists to 'abandon ship', as it were. Moreover, it should be noted that the majority of Gaddafi's closest allies remained loyal throughout the conflict, many remaining with him until his death (Pargeter 2012, 225). More importantly, there is no evidence to suggest that defections affected Gaddafi's attitude towards committing to a peace process.

On 21 August 2011, Tripoli finally fell to the rebels. While he had fled the capital, true to his word, Gaddafi refused to leave Libya and instead sought refuge in his birthplace of Sirte. There is no evidence that the ICC's intervention had any effect on Gaddafi or his regime's attitude towards negotiations with the rebels. Continuing to fight may have been the regime's best and, for Gaddafi the *only*, option – but not because of the ICC but rather because, for the Libyan leader, the war was always 'all or nothing'. As Daniel Serwer (2011) argued in April 2011: “we can be certain that Muammar

regards the issue as one of life or death and will therefore fight on until he finds a way out that enables him and his family to survive.” On 20 October, Gaddafi was captured alive and subsequently killed by rebel forces.

Importantly, there is no evidence that the Libyan leader sought, at any point, to address the ICC's intervention as a pre-condition to coming to the negotiating table. Thus it cannot be concluded that the Court gave Gaddafi an incentive or disincentive to negotiate a peaceful resolution to the conflict. However, this analysis also suggests that the ICC's intervention affected the attitudes and incentives of the rebels and NTC towards negotiations by bolstering their refusal to negotiate with Gaddafi. This is evidenced by their consistent rejection of negotiations with the Gaddafi regime as well their insistence that Gaddafi be permanently removed from power and brought to 'justice'. The rebels and the NTC drew on the narrative that demonized and delegitimized Gaddafi as a negotiating partner, portrayed him as a 'criminal', and re-inforced their goal of a military victory over the regime. It is hardly surprising that the opposition's insistence to overthrow the regime militarily entrenched the regime's own resolve to continue fighting. And in this context there was little room for talk of a political solution. As Mohamed Eljarh (2013c) explains, with the Court's intervention, the opposition

had the feeling that the battle had been won and it was just a matter of time. The idea changed – these are now criminals on the run, what we're doing is trying to catch them and it's just a matter of time before we do. So it had an effect on opposition forces. It reinforced the opposition. The intervention made sure that one side had to win over the other. It ended any prospects of coming back together, trying to find a solution. It made sure both sides had to fight to the end.

In short, the judicial intervention of the ICC and military intervention of NATO made the rebels' demand for regime change more feasible and defensible, allowing the NTC to hold steadfast to Gaddafi's removal as a precondition to any negotiated solution. The Security Council's decisions – both to refer Libya to the ICC and to authorize military intervention – galvanized the opposition. According to one scholar, “the resolutions may have actually facilitated an *increase* in violence by opposition forces, as the rebels would have likely interpreted the recognition by the Security Council as validation of their cause from the international community.” (Amditis 2012, 16). In contrast to the arguments made by observers outlined at the outset of the chapter, it wasn't Gaddafi who was emboldened by the ICC to continue fighting, but rather the Libyan opposition.

#### IV. From Civil War to a Peace Process?

While an official peace process was never initiated in Libya, it remains worthwhile analyzing the ICC's effects on a number of dynamics that could have contributed to the conflict entering a negotiation phase. As per the analytical framework, three key issues and decisions can be affected prior to the onset of negotiations: where to hold peace negotiations; the timing of peace talks; and the mediation strategies employed to get the parties to the negotiation table. There is no evidence that any thought was given about where to hold official peace talks. However, the creation of a ripe moment as well as the mediation strategies to get the regime and the opposition to negotiate peace are relevant to this analysis.

##### *(i) Mediation Strategies and Gaddafi's Fate*

From the outset, efforts to establish negotiations were hampered by the international community's response to the unrest in Libya. Rather than seeking to instigate mediated negotiations, the international community reacted to the uprising by turning almost immediately towards coercive measures: economic sanctions, a referral to the ICC and military intervention. This may be explained by the speed of events and the broad consensus that coercive action against Gaddafi was justified. Some, however, believe that the turn to aggressive policies was an extension of the West's ultimate aim of regime change, leaving the AU's subsequent mediation attempts – which *followed* rather than preceded the Security Council's approval of coercive measures – hopeless (Roberts 2011; de Waal 2013c; see also discussion below). Despite this, various efforts to mediate between the rebels and Gaddafi were made. The most crucial barrier faced by potential mediators was finding an agreement on Gaddafi's role and fate. This section explores the attempts by potential mediators and key actors to deal with this dilemma and how the ICC may have affected two possible outcomes in particular: exile for Gaddafi and a Security Council deferral of the ICC's investigation.

Reflecting the importance of Gaddafi's personal fate to resolving the war, the possibility of him going into exile was a key topic of contention. As noted above, the AU took a leading mediation role. In doing so, explored options for both internal and external exile (de Waal 2013b). So too did the intervening states. In the midst of a conference on the future of Libya in March 2011 Paul Koring (2011) observed that “[t]he tough talk of relentless pressure aimed to oust the unpredictable and brutal despot who has ruled Libya for 41 years didn't entirely drown out hints of possible exile and the possibility of avoiding a war crimes trial.” States were divided over whether to offer Gaddafi a way out and to guarantee him immunity from potential prosecution at the ICC (Wintour 2011). It was reported

that both the US and the AU were quietly identifying states willing to provide Gaddafi with safe haven (see de Waal 2013b; Sanger and Schmitt 2011). Until at least July 2011, states were torn between efforts to convince Gaddafi to move into exile and a deal that would allow him to relinquish power but remain in the country.

Throughout the conflict, it was reported that numerous governments had offered Gaddafi exile, including Uganda, Chad, Malawi, Venezuela, Zimbabwe, Qatar and Saudi Arabia (see Barry 2011; Biryabarema 2011; Sanger and Schmitt 2011; Smith 2011a). Because some of these states were members of the Court<sup>49</sup>, de Waal (2013b, 71) argues that issuing arrest warrants against Gaddafi, Saif and Senussi “threatened to close the door on any solution that involved Gaddafi going quietly into exile.” Perhaps as a consequence, during later stages of the war, Western states were focused on non-ICC member-states as possible exit targets for Gaddafi. Amidst Turkish attempts to ignite peace talks between the rebels and the Gaddafi regime in July 2011, it was reported that NATO had privately acknowledged that they would approve of Gaddafi's exile to a non-ICC-member state such as Belarus or Zimbabwe (Black 2011a).

Gaddafi himself refused to accept any deal that included his departure from the country, despite apparent pleas from his closest advisors that he consider exile (see, e.g. Fahim 2011a). Until his death, Gaddafi never appeared to seriously consider leaving Libya. His last will was telling in this regard:

Let the free people of the world know that we could have bargained over and sold out our cause in return for a personal secure and stable life. We received many offers to this effect but we chose to be at the vanguard of the confrontation as a badge of duty and honour. (see BBC 2011j).

A second option available to mediators and intervening powers was to guarantee that Gaddafi would not be prosecuted at the ICC. Resolution 1970 explicitly included a preambular reference to Article 16, explaining that it could be invoked by the Security Council in order to suspend an ongoing investigation or prosecution by the ICC for up to 12 months (renewable yearly) if the investigation or prosecution constituted a threat to international peace and security. Notably, the reference to Article 16 in Resolution 1970 was included in order to assuage the concerns of states that the ICC could complicate attempts to negotiate a political settlement to the conflict (see Sudan Tribune 2011; du Plessis and Louw 2012). In this context, the prospect of an Article 16 deferral of an investigation or prosecution could be seen as a potential 'carrot' in efforts to negotiate peace.

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<sup>49</sup> Chad, Malawi, Uganda and Venezuela are all ICC member-states.

In July 2011, the African Union (2011) officially requested the “Security Council to activate the provisions of Article 16 of the Rome Statute with a view to deferring the ICC process on Libya, in the interest of Justice as well as peace in the country”. By that point, however, the AU had little leverage as a mediator. Moreover, in response to the potential invocation of a deferral, concerns were voiced among human rights groups. For example, Dicker (2011) argued that “diplomats may be thinking of using a possible escape hatch contained in the I.C.C.’s treaty....This truly unfortunate provision authorizes political interference in a judicial proceeding, and it should be used only in exceptional circumstances.”

There is no evidence that the Security Council contemplated invoking Article 16. Even if the Security Council had offered a deferral, it seems unlikely that it would have affected Gaddafi's willingness to enter negotiations. It would not have resolved questions over his fate and whether he would receive internal or external exile. Again, an Article 16 guarantee requires that the Security Council renew its pledge to defer investigation or prosecution every twelve months. With no guarantee of renewal, deferrals are thus a temporary and unstable incentive. Indeed, previous practice seems to suggest that guarantees against prosecution are often revoked in time.<sup>50</sup> It should also be noted that the temporary nature of an Article 16 deferral presents leaders such as Gaddafi with perverse incentives. In order to guarantee that a deferral is consistently renewed rather than allowed to expire, it is in the interest of leaders to retain sufficient capacity for violence in order to leverage it for prolonged impunity. This is worth noting as it suggests that bypassing an ICC investigation or prosecution via an Article 16 deferral could threaten to prolong violence.

In the end, neither offers of exile nor a UN Security Council deferral under Article 16 of the Rome Statute were able to address the role and fate of Gaddafi in a negotiated settlement. Importantly, while the intervening powers and the opposition may have considered circumventing the ICC's mandate in Libya, there is no evidence that the ICC affected Gaddafi's decision-making in rejecting any offer of exile or protection from prosecution. Indeed, the first speculation from within the regime that Gaddafi had recognized any effect of the ICC on his situation only came after the war. In a description of his last days, Mansour Dhao, Gaddafi's chief of security said the Libyan leader

paced up and down in a small room, writing in a notebook. We knew it was over.

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<sup>50</sup> The example of former President of Liberia Charles Taylor being granted asylum and protection from prosecution in Nigeria from the Special Court for Sierra Leone was raised by observers. See, e.g., Vinjamuri and Snyder (2011), Serwer (2011)

Gaddafi said, 'I am wanted by the International Criminal Court. No country will accept me. I prefer to die by Libyan hands'. (see Adler 2011).

Whether or not Dhao's account is accurate, by this point Gaddafi had rejected exile. And in the end, he kept his word and died in Libya, at the hands of its citizens.

*(ii) A Ripe Moment and Mutually Hurting Stalemate?*

In the summer of 2011 it could have been argued that that a “ripe moment” for negotiation had crystallized. The conflict between Gaddafi loyalists and the rebels had reached an impasse. It appeared that neither side would emerge victorious. As Vandewalle (2012, 206-7) describes: “it had become clear that a military victory for the rebels would perhaps prove elusive and, simultaneously, that the loyalists' options were being increasingly degraded.” The east of the country was largely in the hands of the rebels while Gaddafi loyalists held much of the West and, crucially, the capital, Tripoli. It was during this period of time that the intervening powers, seeking options that would avoid a long drawn-out conflict, appeared most keen to support negotiations. Additionally, as de Waal (2013b, 71) notes, the AU identified the apparent military stalemate as an opportunity to “make both sides accept the need for a negotiated solution.” However, any stalemate that emerged was certainly not one that was *mutually* hurting – or hurting *enough* – to produce or sustain the conditions necessary for a successful political settlement.

The belligerents' insistence that they would continue fighting, in spite of periodic suggestions that they were prepared to negotiate, as well as their unwavering insistence regarding Gaddafi's fate, belied the fact that both sides believed they could be victorious. In other words, the condition wherein *both* sides *mutually* could not have imagined ultimate victory was never met. Moreover, the NATO intervention had a significant impact on any potential stalemate to emerging. But, as Ayat Mneina (2013) observers, “since the UNSC granted the no-fly zone and NATO went in, there was no discussion – they were going to overthrow the regime... Had they attempted negotiations a lot earlier on [from military intervention] then maybe the regime stood a chance but since we as Libyans saw France, UK and the US jump at the opportunity to do this, why would you negotiate?”

Gaddafi's eventual overtures to negotiate indicate that he viewed negotiations as a potential alternative to his demise. But by the time serious offers were made, the end of his regime was a matter of *when*, not *if*. Additionally, as noted above, the military stalemate that characterized much of the conflict was eventually broken by rebels' capture of Tripoli. With it the chances of a negotiated peace process evaporated. In the context of a unilaterally hurting stalemate, no “ripe moment” for

negotiations could have emerged. As Greig and Diehl (2012, 109) write: “A one-sided hurting stalemate would leave a situation in which the unconstrained side may continue fighting and reject any settlement attempts.” And so the Libyan opposition did.

## V. Negotiation Impossible

Throughout a period of “strange envoys and failed mediations” (Chorin 2012, 239), very little traction for a peace process was achieved and whatever momentum was gained was quickly squandered. It has been argued that the ICC bolstered the resolve of the Libyan opposition to refuse negotiations with the Gaddafi regime and thus committed them to regime change via military means. It might therefore be tempting to conclude that the ICC ruined the possibility of a negotiated settlement in Libya and that critics in the “peace versus justice” debate who argue that the ICC is deleterious to peace have been vindicated. However, in order to claim that it was the ICC that ruined the prospects of a negotiated peace in Libya, it must be shown that the Libyan civil war could feasibly have been settled through peace negotiations. An examination of the attitudes, behaviours and positions of five key actors which could have led to a negotiated peace – (i) the Libyan opposition, (ii) Gaddafi, (iii) Saif al-Islam Gaddafi, (iv) the African Union, and (v) the intervening NATO forces – demonstrates that factors *other* than the ICC spoiled any potential peace talks between the Libyan regime and opposition. Attempts to initiate peace negotiations would fail – irrespective of the ICC's intervention.

### *(i) The Opposition*

When asked whether it would have been possible to reach a negotiated, political solution to the crisis in Libya, El Gallal (2014), was unequivocal: “no way.” The NTC consistently reiterated their precondition that Gaddafi be permanently excluded from power. For another member of the NTC (confidential interview 2014d), “it wasn't so much a political negotiation. It was a political resolution and a way out for Gaddafi.”. An oft-repeated refrain was that “any political initiative that does not condition the departure of Gaddafi and his children is, for the people of Libya, completely rejected... if the political initiative does not include this issue, then it is not even worth looking at!” (see Asharq Al-Awsat 2011b). This demand that Gaddafi leave immediately condemned any prospect of getting an official peace process underway (International Crisis Group 2011a, ii). So was the NTC ever interested in a peaceful solution to the conflict?

Let us assume that the NTC was amenable to a political solution that compromised on the issue of Gaddafi's role and fate. In this instance, they would have to 'sell' a potential deal to opposition fighters and to the Libyan public. The suggestion that the NTC had full authority in determining the outcome or terms of a negotiated settlement would be easy – but wrong. Rather, as has become even more clear since the conclusion of the war, Libya's rebel militias have had a “stranglehold” on the country since the civil war erupted (Amnesty International 2012a ). By some accounts, some 125,000

Libyans fought against the regime, many comprising “groups [that] do not see themselves as serving a central authority.” (International Crisis Group 2011b, i). Once the revolution had begun and the calls for regime change amongst anti-Gaddafi factions had consolidated, that Libyan militias and their supporters would never have supported any deal that saw Gaddafi remain in power. As the NTC's Foreign Minister al Issawi proclaimed, “we will not look at or respond to any political initiative that does not include the departure of Gaddafi and his children.” (see Asharq Al-Awsat 2011b). The NTC felt “intense pressure from Libyans in rebel-controlled territory to reject any deal that does not include Qaddafi’s departure.” (Barfi 2011). Even those instances when the NTC suggested it might be inclined to negotiate with the regime may have actually been attempts by the opposition to further the goal of removing Gaddafi rather than negotiating a settlement with him (Eljarh 2013c). Complicating matters further was the lack of unified positions within the NTC itself. As Tarhuni (2013) argues, the NTC “couldn't agree with negotiations themselves. It was hard enough for them to consider it themselves. It would have been extremely difficult” for the NTC to convince rebel factions that a negotiated settlement was in their interests.

In response to a question about whether negotiations could have occurred between the opposition and Gaddafi, one senior NTC official (confidential interview 2014d) states:

Definitely not if what you mean is negotiating with the regime that somehow Gaddafi and his family can stay and share power. That was never, ever put on the table of the agenda. The NTC was willing to negotiate a safe passage for Gaddafi and his family to leave the country... That's it. No offer of power-sharing whatsoever.

When we learned that South African President Zuma was visiting Gaddafi, we hoped that the only message Zuma was bringing to Gaddafi is: “it's time for your to leave.” But obviously that did not happen, the Libyan people had to do it the hard way.

El Gallal (2014) insists that some within the NTC were interested in negotiating with the regime – but not out of a commitment to peace but because the regime had “all the documents to humiliate them... They had interests [and] wanted to negotiate to protect them and the information about them.” Others never wavered: “Those who were committed 100% were not interested – because we know Gaddafi. Either we win or we will die.” (Ibid.)

The NTC's and NATO's endorsement of regime change certainly complicated any potential peace process, especially one that would have included any form of transitional power-sharing arrangement. But the popular demand for regime change was not *imposed* on Libyans by the international community or the NTC itself. Once Libyans made regime change a primary political objective, they never yielded. The ICG (2011a, ii) accepted this reality, stating that the view that

Gaddafi “can have no role in the post-Jamahiriyah political order is one thing, and almost certainly reflects the opinion of a majority of Libyans as well as of the outside world.”

In the hypothetical instance where a negotiated settlement was accepted by the NTC and the Gaddafi regime, it is all too easy to imagine that they would have been seen as conspirators who had never been truly loyal to the Revolution. For such charges one could easily pay with their life.<sup>51</sup> Even if Gaddafi had been willing to negotiate a political settlement, the opposition was unable and unwilling to do so. And the ICC may have played a minimal role. Fred Abrahams (2013) has concluded likewise:

Even if Gaddafi had wanted to negotiate or was open to it, the other side wasn't - both the Libyan opposition *and* the international community - because a decision was made, by the US and France and more broadly, that Gaddafi had to go. I would find it very hard to imagine that the anti-Gaddafi coalition locally and internationally would have accepted or would have been open to a political conversation. In that sense, you could argue that the [ICC] indictment didn't matter because the political and military decision had been made and they were streaming ahead.

*(ii) The Colonel*

As argued above, Gaddafi showed virtually no inclination to surrender, but could he have been convinced of the utility of a negotiated settlement and could he have been genuinely interested in its terms which, as noted above, had to include his stepping aside?

Ambassador Miles (2013) argues that it depends on how one judges Gaddafi's personality. The Libyan leader's four-decade long rule had time and again demonstrated the regime's “absolute commitment to its own survival.” (Wright 2010, 220). Pargeter (2012, 235) adds that “anyone who believed that the threat of international action would force Qaddafi to back down clearly did not know him.” She argues that his position may have been pathological:

With his unstinting Bedouin pride and uncompromising self-belief, there was no way the Colonel was going to step aside and walk away from power gracefully – let alone flee the country. He was not simply a head of state – he was the very embodiment of the Jamahiriyah. He *was* Libya. (Ibid. 226).

Miles (2013) adds that Gaddafi “simply dominated everyone around him – a trait that must have had an effect on him. He thought he could win and he believed it.” It is reasonable to assume that Gaddafi believed it was within his power to hold out and survive. His previous rehabilitation conferred the message that the Colonel was never beyond the pale and his treatment of Libyan citizens had little-to-

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<sup>51</sup> Abdel Fatah Younes, a Gaddafi-era general who defected to the rebels during the conflict, was killed on suspicions of his allegiances to the Gaddafi regime. See Booth (2011)

nothing to do with the how the international community would deal with him.

That Gaddafi refused to leave Libya despite numerous offers of exile and that the opposition did not trust that he would ever relinquish power should come as no surprise. Given what is known about Gaddafi's psychology and his conflation between his own survival and the Libyan state, it seems he would never have ceded the type of influence necessary for a negotiated settlement to succeed – regardless of whether the ICC indicted him or not.

### *(iii) Saif al-Islam Gaddafi*

Prior to the civil war, it was widely believed that Saif was eager to transform Libya from a pariah state and integrate the country into the international community. Gaddafi's son “held out the possibility, in the minds of some, that Libya might one day chart a happier course.” (Sands 2011b). He had been instrumental in Libya's rapprochement with the West and, as Hilsum (2012b, 156) writes, in the 2000s, “it became clear that he was his father's heir apparent, and anyone who wanted to do business in Libya had to do business with him.”

In the years preceding the Libyan uprising, Saif had attracted a wealth of liberal, democratic and reform-minded Libyans to work with the regime and led efforts to open up the country. His efforts, somewhat ironically, contributed to the onset of the uprising (Pargeter 2012, 229). As Miles (2013) asserts, revolutions like that in Libya, “happen not when the screw is tightened but when it's loosened.” Saif's reforms had the consequence of making protests and rallies to express grievances increasingly common. Pargeter (2012, 229) even argues that Saif was blamed by his family for *causing* the uprising.

When the Libyan revolution broke out, hope remained that Saif might side with the protestors who were agitating for many of the reforms he had promised. There was some belief that he could moderate the regime's response, perhaps even play the role of a transitional leader. As the so-called Arab Spring rattled Tunisia and Egypt, Saif, who was in London at the time, was reportedly supportive of the protestors (Sands 2011b). There were reports that Gaddafi's son was prepared to give a speech that would have apologized for the regime's crackdown in Benghazi, promised a new constitution and would have lent support to real reform and a transition towards constitutional democracy. Some believed that “this was Saif Al-Islam's moment and his chance to turn his well-worn promises into reality,” (Pargeter 2012, 227) and emerge as “the peacemaker” (Verini 2011).

Many were consequently dismayed when Saif fervently sided with his father in his defiant speech televised on 21 February 2011. Saif chose “to ride the black horse over the white horse.” (Miles 2013). Evoking his father's unyielding rhetoric, Saif defiantly declared: “We will fight to the last

minute, until the last bullet.” (see Al Jazeera 2011a). With time, Saif appeared to become only more fanatical in his support of the regime. As James Verini (2011) observed, Saif had “become the new spokesman for a congenital strain of Qaddafian dementia.” Video footage showed him inciting a crowd loyal to the regime to attack the country's growing opposition, whom he called “bums, brats and druggies”. (See CBS 2011). Recordings also emerged which seemed to indicate that Saif had given direct orders to kill (McElroy 2012).

The argument that Saif was interested in brokering a political settlement between the regime and the NTC assumes that Saif's decision to side with his father was tactical, giving him leverage from within the regime to push for peace. Virtually every 'liberal'-leaning figure from the Gaddafi regime, many of whom had worked with Saif previously, defected to the rebel side (Gallal 2014). Saif apparently sought to mediate between them and his father and was disappointed that reformers “turned on him” (Verini 2011). This raises two questions: was Saif serious about negotiating peace and would he have been accepted as a negotiation partner?

In early April it was reported that Saif had reached out, via intermediaries and confidantes, to the international community, offering a peace settlement which would result in Gaddafi stepping down and his taking power (see Haynes et al 2011; Karon 2011; McElroy 2011; Chorin 2012, 241). Saif also apparently contacted the NTC and stressed his previous role in endorsing and pushing for democratic reform: “People close to Seif [sic] are doing their best to ingratiate him with the rebels and Western powers by telling reporters that he’s been trying to achieve the same goals as the rebellion from within the regime but has been frustrated.” (see Karon 2011). According to one report, Saif's proposal included holding elections (in which he would run for President) and “a 'reconciliation process' put in place in an attempt to heal the bitter wounds between the regime and its opponents.” (Sengupta 2011).

The notion that Saif would be a negotiating partner was not entirely baseless. Some states allegedly “had at one stage envisaged a transition to representative government in Libya with Saif in charge” (ibid.) and, as Julian Borger (2011) reported, numerous Western states had “hoped the London School of Economics-educated Gaddafi son's contacts to London could be a conduit for talks.” As a result, ICC staff (confidential interview 2013c) have suggested that some intervening states were “disappointed” that the Court indicted Saif. Still, reading this fact as being evidence of a willingness on the part of intervening states to negotiate a peace settlement with Saif is misleading. There is no evidence of genuine negotiations between Saif and NATO states. It is more likely that their disappointment stemmed from an interest in preserving the *possibility* of negotiations insofar as doing so was useful to avoiding becoming mired in a military stalemate.

It is also unclear whether Saif would have been accepted by the Libyan opposition as a negotiation partner. Views on the matter are mixed. Many of those interviewed believe that Saif could have presented himself as a genuine negotiator but that, in the words of one senior diplomat (confidential interview 2013h), “what clinched it was his ridiculous speech”. With his speech, Saif “lost all credibility. People put him in the same category as his father” (Gheblawi 2013). According to Hassan al-Amin (2013), while Saif could have been a “viable” negotiator, he “[l]ost any chance for [the] West to have him in a solution.” Comments by Libyan Ambassador to the UN, Ibrahim Dabbashi (2013) further demonstrates the mixed, perhaps contradictory, sentiments regarding Saif’s potential role:

No one within the regime can negotiate. Everyone is afraid of Gaddafi. No one can represent Gaddafi. Saif could want to play a role. It was the first day. When he spoke on February 20. He should say something completely different if he wants to play a role. Unfortunately he said exactly what his father wants him to say. [It was] really a crazy man making a statement on the TV and it was completely against all the factors on the ground.

If it could be established that Saif was genuinely able and interested in brokering peace between the rebels and his father’s regime, then there is an argument that his indictment by the ICC complicated the potential to establish peace by delegitimizing perhaps the only individual who could legitimately partake in a power-sharing agreement with the NTC. But the argument that Saif was truly committed to a peace process is dubious. Even after his initial speech, Saif made no public efforts to appear moderate or present himself as a potential player in a peace process. And, for one simple reason, it was not the ICC that drove Saif to lash out and side so vehemently with his father’s regime: Saif’s speech was made almost a week *before* the Security Council referred the situation in Libya to the ICC.

As compelling as it is to think Saif was truly interested in a negotiated settlement, there is evidence that his commitment to the regime was solidified by a feeling of betrayal by Western forces. Indeed, Saif apparently told his friends: “We gave up our nukes and they screwed us.” (See Hastings 2011). It was telling when Saif responded to the ICC’s warrants against him by describing the institution as “a Mickey Mouse court” and, echoing his father, once again committed himself to a military victory and remaining in Libya:

We live here, we die here, so we are very patient. We may win tomorrow, in one week or in one year, but one day we’ll win. One day the French will go back to Corsica in France, the Italians will go back to Sicily in Italy, the Danish will go back to Denmark, the Canadians will go back to Toronto and Libya will go back to the Libyans. (See Smith 2011b).

The ICC's indictment had little effect on keeping Saif out of any potential negotiated transition. Rather, it was Saif's decision-making, his belligerent support for his father and his threats to Libyans which condemned his role in any potential peace process.

*(iv) The African Union*

The African Union was an obvious choice as a third-party mediator. While three member-states (Gabon, Nigeria and South Africa) voted in favour of UN Security Council Resolution 1973 which authorized NATO's intervention, the AU was not a member of the alliance of intervening states – even if some AU member states played active roles in the conflict (see de Waal 2013a, 365-379). A degree of trust between Gaddafi and some AU member-states could have been expected on the basis of Gaddafi's purchase of political support throughout the continent (see Vandewalle 2012, 194-198). Gaddafi counted Nelson Mandela amongst his close friends (see BBC 1999), and there existed a relationship with some African leaders to whom Gaddafi might listen (Roberts 2011). As de Waal (2013b, 69) notes, “only African leaders could make the case to Gaddafi that he should both stop his assault on civilian populations and step down, with any credibility.”

The AU's greatest advantage, however, was also its gravest weakness. The close relationship of some of its member states and leaders to Libya meant that the African Union High-Level Panel also gave the widespread appearance of being a cynical move by governments indebted to Gaddafi: “Africa's reluctant and qualified support for foreign intervention in Libya was explained as misguided historical loyalty at best, and hypocritical at worst” (Alberts 2011; see also Al Jazeera 2011e). Unsurprisingly, the rebels and the NTC never viewed the AU delegation as an impartial and trustworthy mediator. El Gallal insists that South Africa was a poor choice to mediate any negotiated settlement “because they were not neutral. They were with Gaddafi – they couldn't see the whole picture, so they couldn't do it.” (Gallal 2014). The selection of states to negotiate on behalf of the AU was also misguided, insofar as it was left to a select group of states, “many of which had, or appeared to have, specific political interests in the outcome.” (de Waal 2013b, 77). It thus made “sense [that] the dictator was eager to meet the AU leaders, while the [NTC] was cool toward the initiative.” (Barfi 2011).

The AU delegation was also hobbled by their lack of a clear and consistent position on the fate of Gaddafi. Its member-states were sharply divided and some of its members actively detested Gaddafi. The Libyan leader “had become at best out of step, and at worst loathed, by other African leaders. He was neither respected nor trusted, but barely tolerated.” (de Waal 2013b, 64). Some condemned the regime. Rwandan President Paul Kagame (2011), for example, drew a direct parallel between Gaddafi's

actions and the 1994 Rwandan Genocide. The lack of unity within the AU reached an apex when, in June 2011, some members of the AU mediation team gave up hope of getting an agreement that included a role for Gaddafi. Mauritanian President Mohamed Ould Abdel Aziz declared that “[w]hatever happens, there will be a negotiated solution, even later. In any case, [Gaddafi] can no longer lead Libya. His departure has become necessary... [Gaddafi] must be made to leave without causing more damage.” (See AFP 2011). Even though the AU insisted that it had convinced Gaddafi to step down from power, it was never able to fully clarify how this would happen and where Gaddafi would end up.

While the view that the AU offered to mediate a political settlement out of a sense of blind loyalty is simplistic and pejorative, it is also true that its mediation efforts were suspect from the outset. In its lack of unity and coherency regarding the fate of Gaddafi, the AU could not have successfully brought both parties to the negotiation table, let alone brokered a peaceful resolution to the conflict. At the same time, prospects for a settlement mediated by AU member-states certainly weren't helped by the lack of interest on the part of intervening NATO forces in the Union's mediation efforts.

#### *(v) The Intervening Forces*

Chorin (2013) maintains that the stalemate in the conflict produced a brief period when Western powers, especially the US, considered the possibility of a negotiated settlement: the “US was getting antsy just before Tripoli fell and was seriously contemplating [negotiated] solutions to the war... It seems like there was a period from June – early August where US was willing to consider some kind of negotiated solution or compromise. Things weren't going anywhere but worse.” But was NATO willing and able to negotiate a settlement?

The inclination of NATO member states to avoid becoming engulfed in a military stalemate was clear and there is no evidence to suggest that it was disingenuous. From the outset, key member-states – particularly the US – had expressed hesitation towards participating in 'another Middle East war', especially one that might result in putting troops 'on the ground' (Hastings 2011; see also Chesterman 2011). There is also little reason to doubt that, amongst at least some NATO states, there was an interest in keeping the *potential* of a negotiated settlement between the NTC and the Gaddafi regime alive. Still, this interest did not amount to any concerted or consistent effort to find a negotiated solution. Indeed, with the exception of Turkey's attempts to broker negotiations with its two-stage “roadmap”, there is no evidence that NATO member states achieved anything more than preliminary talks about talks. Moreover, no NATO state retracted or softened the pre-condition that the Gaddafis be completely

removed from power, hindering potential negotiations.

There is little-to-no evidence that the states that eventually intervened in Libya took a negotiated settlement seriously prior to authorizing military intervention. Ahmed Gebreel (2013), who worked with the NTC during the revolution, maintains that an opportunity to resolve the war through peaceful means was lost:

I think it was a window of opportunity during the conflict, especially in the first few months to end the conflict and reach a peaceful solution that serves the whole country. But some countries, especially the European countries – France and the United Kingdom and the United States – were not willing to support any peace process and they were determined to overthrow Gaddafi's regime by force.

At the same time, intervening states showed no interest in working with, or lending support to, the AU initiatives. In fact, NATO states undermined the AU's initiatives by leaving the AU out of the Libya Contact Group (de Waal 2013b, 68). As de Waal (ibid., 67) writes, “the U.S., France and Britain were following a different track, and driving UN policy... Sarkozy [for example] had no patience for the AU and its diplomatic approach.” (See also Roberts 2011). This is also borne out in comments from Gebreel (2013), who observed that:

When [the] African Union visited and tried to negotiate a peaceful solution to broker a peaceful solution with the two parties, some countries that had participated in air strikes didn't just not support [the AU initiative] but threatened, behind [closed] doors to withdraw their support to the opposition if they accepted intervention by the African Union. They were not willing at all to reach a peaceful solution to the conflict.”

Having refused to take AU's efforts seriously, it is difficult to argue that there was any interest amongst NATO states for a political solution.

The intervening states' intimated interest in a potential peaceful resolution to the war did not have the effect of igniting peace talks. But it did send a clear signal to the Libyan opposition and their military backers in Qatar and elsewhere that NATO support was limited and that it was a matter of urgency that the military stalemate be broken. The rebels heeded that warning. Just weeks after the suggestion that Gaddafi might be negotiated with, Tripoli fell. Within four months, Gaddafi was killed and the civil war came to an end.

## V. Conclusion

This chapter examined the effects of the ICC on four key dynamics which affected the potential to resolve the Libyan civil war through peace negotiations: the narratives and understandings of the conflict itself; the attitudes and incentives of the rebels, the NTC and Gaddafi towards peace negotiations; mediation strategies and the role and fate of Gaddafi in a post-conflict settlement; and the potential of a ripe moment for peace talks.

The most evident effect of the ICC was its impact on shaping the narratives and understandings of the Libyan war. The Court's intervention contributed to an understanding of the conflict as a war of 'good' rebels versus a 'evil' and 'criminal' Gaddafi regime; it helped to justify the goal of regime change; and it obfuscated both the causes of the conflict as well as the West's political rehabilitation of the Gaddafi regime in the years preceding the war. These effects on the conflict's narrative, in turn, had implications on other dynamics, notably on reinforcing the opposition's claim that Gaddafi's departure from power was a necessary precondition to any negotiated settlement and encouraging their insistence to secure a military victory. As a result, it may have contributed to preventing the emergence of a mutually hurting stalemate and ripe moment for peace talks, adding fuel to the regime's insistence to continue fighting.

But the effects of the ICC on the conflict should not be overstated. The dynamics of conflict were also deeply influenced by the military intervention by NATO. Moreover, there is little evidence that the ICC's intervention affected Gaddafi's attitude towards entering peace negotiations, the defection of key regime officials, or the possible mediation strategies aimed at resolving Gaddafi's fate.

While the ICC may have “raised the barriers” (Martin 2013) to a negotiated solution by bolstering the resolve of the rebels, the above analysis of the internal positions, attitudes and behaviour of key actors makes clear that a peace settlement was never a feasible option to ending the civil war in Libya – for reasons other than the ICC's intervention. If attempts to achieve a peaceful solution were either fundamentally flawed or disingenuous, then the ICC can't be said to be responsible for a failed political settlement to the war.

## **Chapter 7 - Justice after the Revolution: The ICC and Post-Gaddafi Libya**

*Libyans will likely find that winning the war was the easy part. It is not the war but the peace that will define post-Qaddafi Libya* – Ronald Bruce St John (2011, 295)

### **Introduction**

The second research question of this thesis asks what the effects of ICC interventions are on peace, conflict and justice processes. In the case of Libya, there have been various post-conflict justice processes on which the ICC could potentially have had an effect – directly and via its contribution to the conflict narrative. In Chapter 3, it was argued that the conflict narrative and the manner in which a conflict ended would both shape the decision-making of states regarding post-conflict justice and accountability. This is certainly true of post-Gaddafi Libya, where the limits of the ICC's ability to positively influence post-conflict accountability have been on display.

Vandewalle (2012, 207) observed that a negotiated settlement to the Libyan civil war “represented perhaps the most promising path for the future of the country, and certainly would minimize – but not eliminate – the dislocations and potential infighting some of the other scenarios entailed.” However, such a settlement was not to be. Instead, with the backing of NATO, the Libyan opposition achieved an outright military victory. Consequently, there were no negotiated post-conflict justice mechanisms to implement. The country's approach to justice can be described as one-sided, selective, victor's justice and an extension of how the conflict ended. As Ian Martin (2013) the former head of the UN Mission to Libya argues, victor's justice is the almost inevitable product of any conflict that concludes with regime change.

The ICC's effects and impact on post-conflict Libya have primarily been the result of what it has *not* done rather than what it has: *not* prosecuting alleged crimes committed by Libyan rebels during the civil war and, consequently, *not* challenging the dominant post-conflict narrative of one-sided justice. The Court's inability to hold accountable those it indicted or affect the achievement of justice for other international crimes committed in Libya has been compounded by the prominence of the Libya's conflict narrative, the rebels' one-sided military victory and the continued dominance of rebel militias, or '*thumar*', intent on punishing and, in some cases, purging figures associated with the Gaddafi regime. Post-conflict Libya has consequently been characterized by furious and, at times, violent demands for revenge against Gaddafi supporters in combination with a belief that those who had participated in the regime's demise should be protected from accountability for crimes committed during the conflict. The conflict narrative, bolstered by NATO's military intervention and the ICC's judicial intervention, was about purging Gaddafi and his supporters. So too has been the narrative of

post-conflict Libya. The ongoing violence in Libya, the lack of justice for international crimes and the judicial mechanisms introduced since the end of the civil war expose the limitations of the ICC to produce positive effects on impartial justice and peace.

The chapter proceeds as follows. The first section examines the debate of who should try the two surviving ICC indictees – Saif al-Islam Gaddafi and Abdullah al-Senussi. It delves into the debate about where they should be tried, focusing on the Office of the Prosecutor's position supporting Tripoli's intentions to prosecute Saif and Senussi in Libya by Libyans and the failure of the Prosecutor to explore options other than a trial by the ICC in The Hague or a trial by Libyans in Tripoli. This is where the ICC should have the most direct effect. However, the ICC has been unable to ensure that Saif or Senussi are brought to justice – in Libya or The Hague. Section two examines non-investigated international crimes committed by Libya's opposition forces, focusing on the cleansing of Tawergha and the killing of Gaddafi. The analysis makes it clear that the ICC has been unable to positively affect the pursuit of justice in Libya or the maintenance of peace. The final section examines two 'transitional justice' mechanisms implemented by Libya: a blanket amnesty for revolutionaries and the Political Isolation Law. This section demonstrates that the post-conflict narrative, bolstered by the ICC's asymmetrical intervention in Libya, continues to thrive in post-Gaddafi Libya.

## **I. Trying Saif and Senussi - In Libya or The Hague?**

The most direct impact of the ICC on debates about justice in post-Gaddafi Libya has been on the fight over the fate of Saif al-Islam Gaddafi, who the Court viewed as Libya's "*de facto* prime minister", and Abdullah al-Senussi (see *The Prosecutor v Saif al-Islam Gaddafi and Abdullah al-Senussi* 2011). Libya has not ignored the question of accountability. Rather, it has engaged with the ICC since the end of the war with the intention of having the Court endorse its aim of prosecuting Saif and Senussi in Libya, by Libyans. This section examines the role and impact of the ICC on the debate over where Libya's two remaining ICC indictees should be tried.

During the concluding phases of the war, Saif attempt to flee Libya. In October, Moreno-Ocampo suggested that Saif had contacted the Court, via intermediaries, to discuss his potential surrender (Chulov and Smith 2011). It was also reported that mercenaries were seeking to move Saif to a non-ICC state (*ibid.*; see also Moreno-Ocampo 2011, 3). Saif, however, later claimed that Moreno-Ocampo's statement was "all lies" and that he'd "never been in touch with them." (see Gumuchian 2011). It remains unclear whether these calls were actually made or not or by whom. Regardless, on the night of 19 November 2011, a small convoy carrying Saif was stopped by a group of rebels from Zintan near Obari (*ibid.*). The rebels arrested Saif and, on 20 November 2011, Saif and his captors landed in Zintan where they were met by impassioned crowds. Saif was taken to an unknown location in the city. An NTC spokesperson greeted Saif's capture by declaring that it marked the "final act of the Libyan drama." (See Gumuchian 2011). In many respects, however, the drama was just beginning.

While Saif has been held by the Zintani militia that captured him ever since, his uncle and fellow ICC indictee, Abdullah al-Senussi, was eventually captured and surrendered to Libyan authorities in September 2012. Little is known about Senussi other than the outline of a shadowy career owed to his personal proximity to Gaddafi. Senussi was a key member of Gaddafi's most trusted circle of advisors, serving as both Libya's external and internal intelligence chief. As one observer suggests, "Senussi's association with the worst excesses of the Libyan regime stretch back to the early days of Col. Gaddafi's dictatorial rule." (See Sherlock 2011). Senussi is widely believed to bear responsibility for the infamous 1996 Abu Salim Massacre and the Lockerbie bombing in 1988. Due to his intimate knowledge of the internal machinations of Gaddafi's rule, Senussi has been described as the regime's "black box" (Hilsum 2012a). Because of his position as the gate-keeper of the regime's secrets, Geoffrey Robertson (2011a) called Senussi the "crown jewel" of justice in Libya. The ICC issued an arrest warrant against Senussi as an "indirect perpetrator" of two counts of crimes against humanity – murder and persecution – pertaining to his role in crushing the Libyan uprising.

In March 2012 it was confirmed that Senussi had been arrested in a joint operation between French and Mauritanian officials in Nouakchott, Mauritania. Senussi was subsequently held in a luxury villa, treatment which, according to an official, indicated that “Senussi has protectors in high places” in Mauritania (Mark 2012). It was reported that intelligence officials from numerous states, primarily from the West, interrogated Senussi while in detention (See Hilsum 2012a; Prieur 2012; RNW 2012b). Senussi's arrest triggered a “three-way custody battle” (Mark 2012) and “extradition race” (Hirsch 2012) between Libya, France and the ICC. France had long sought custody of Senussi for his role in the 1989 bombing of UTA Flight 772 in which 170 passengers, including 54 French citizens, perished. It maintained that its role in capturing Senussi gave it a privileged position in requesting that Senussi be surrendered to France (Prieur and al Shachi 2012).

In the wake of Senussi's arrest, Libya sent a delegation, headed by then Deputy Prime Minister Mustafa Abu Shagour, to persuade Mauritania to extradite Senussi (RNW 2012a). Despite periodic statements by Libyan authorities that Senussi would be extradited to Libya (Al Arabiya 2012), it was only in early September 2012 that Senussi was extradited to Libya “on the basis of guarantees given by the Libyan authorities”. (See Harding and Black 2012). Senussi's transfer reportedly cost Libya \$200 million (see Sydow 2012).

It was always unlikely that the ICC would gain custody over Senussi. David Bosco (2012) argued that “[p]acking their prize catch off to the Hague [sic] will earn the country a slap on the back from Human Rights Watch, but probably little else.” Notably, Mauritania is not a member-state of the ICC and, while UNSC Resolution 1970 (2011) “urged” the international community to cooperate with the Court, Mauritania had no clear legal obligation to surrender Senussi to the ICC. Whether or not such an obligation existed, however, is irrelevant given that the OTP showed no interest in obtaining custody of Senussi. The OTP was lackadaisical. On a visit to Libya, Moreno-Ocampo made it clear that his office had made no contact with Mauritanian authorities to request Senussi's surrender and declared that the NTC was entitled to request Senussi's extradition to Libya (see Libya Herald 2012). Libya, it seemed, would be allowed to proceed with Senussi and Saif as they wished. Moreno-Ocampo would not demand that they be transferred to the ICC.

The debate on where to try Saif and Senussi began as early as August 2011, when the collapse of the regime was inevitable and the prospect of prosecuting senior Libyan officials became a real possibility (see, e.g., Bosco 2011; Jillions 2011). The debate has been characterized by a polarizing battle between proponents of trying Saif and Senussi in Libya on the one hand, and those who believe that only the ICC can do so impartially and legitimately, on the other. Within these camps, however, is a

rather curious constellation of actors. Predictably, Libyan authorities have made clear their intentions to try Saif on Libyan soil with Libyan judges while international human rights NGOs have generally insisted that Gaddafi's son be tried in The Hague (see, e.g, Amnesty International 2011b; Parliamentarians for Global Action 201). However, the OTP acquiesced to Libya's claims to try Saif and Senussi, while others, including the ICC's Office of Public Counsel for the Defence (OPCD) has vociferously worked to demonstrate that a fair trial in Libya is all but impossible.

From the outset, the NTC maintained that Saif and Senussi would be tried in Libya. Doing so, they argued, was essential to re-establishing the country as a sovereign member of the international community. In October 2011, a month prior to the arrest of Saif, Colonel Ahmed Bani, the military spokesman for Libya's interim rulers stated:

We will not accept that our sovereignty be violated like that... We will prove to the world that we are a civilised people with a fair justice system. Libya has its rights and its sovereignty and we will exercise them. (See Chulov 2011).

This position was reiterated by other Libyan officials. In April 2012, the government again declared that trying Saif (and Senussi) was “a matter of the highest national importance, not only in bringing justice for the Libyan people but also in demonstrating that the new Libyan justice system is capable of conducting fair trials (that meet all applicable international standards) in complex cases.” (See CNN 2012).

At the same time, a trial of Saif and Senussi has been perceived in Libya as a crowning moment for the Revolution: “The Libyan government has adopted the same defiant stance, vowing to try the men on Libyan soil as testament to the country’s successful transition from dictatorship to democracy.” (see Hauslohner 2013). There is also a concern that Saif could be found innocent or even released after serving a short sentence if tried at the ICC, the result of a combination of the relatively minor charges against him at the ICC, his young age (42 years-old as of writing) and the possibility of a relatively lenient sentence. Robertson (2011b) has argued that if tried at the ICC, “Saif has the makings of an arguable defense... [H]is conviction on the basis of proof beyond reasonable doubt would by no means be a foregone conclusion.”

Libya may *need* to convict and punish Saif and Senussi as a means to see the conflict – and its narrative – through. According to the Libya Working Group, an assembly of experts on Libya, it would be politically impossible for the Libyan government to allow Saif to receive an innocent verdict because it would be seen to “betray the revolution” (see Chatham House 2012a, 3). And the revolution and the conflict narrative was, above all, about ridding Libya of the Gaddafi regime and family. Libya's insistence on trying Saif and Senussi should thus be understood within the context of prevalent fears

that surrendering Saif or Senussi to the ICC could undermine the revolution and potentially destabilize the country by incensing the country's militias.

This has not prevented concerns regarding the impartiality of Libya's justice system from being raised. But despite these, the OTP has generally sided with Libya's insistence to try Saif and Senussi itself, a leniency that is unprecedented. During his November 2011 visit to Tripoli, Moreno-Ocampo capitulated to the inevitability of the NTC's demands to try Saif:

The standard of the ICC is that it has to be a judicial process that is not organised to shield the suspect... and I respect that it's important for the cases to be tried in Libya... and I am not competing for the case. (See BBC 2012a).

Rather than holding up the orthodox standard of complementarity, whereby a state has to convince ICC judges that it is actively able and willing to prosecute the same individuals for the same crimes, the Prosecutor's office seems to have calculated that it is best positioned to argue that it contributed positively to Libya's pursuit of accountability.<sup>52</sup> There are a number of plausible reasons for this leniency.

First, the OTP's position can be seen as means of paying respect to the obvious interest and willingness of Libyans – not just the government – to mete out justice themselves. As some members of the OTP (e.g. confidential interview 2013f) have pointed out, there is a strong sense of “national pride” regarding the trials. In this context, denying that Libya has any right to investigate or prosecute Saif or Senussi outright may be tantamount to declaring that Libya's interest and efforts are irrelevant. It could also mean losing any hope of contributing to or positively influencing potential proceedings. In other words, siding against Libya would reaffirm the view that *no* state which emerges from decades of autocratic rule, where an independent judiciary is non-existent, can be judged able and willing to prosecute key figures itself. In such contexts, the state will be expected to simply 'flip' individuals indicted by the ICC over to The Hague at the earliest possible opportunity. If the state refuses, the country risks being judged in contravention of its obligations under international law and castigated by the international human rights community. There is a risk of conflating the previous, autocratic regime with the new transitional one. But as one observer commented, “Libya continues in this appeal process to prove that it wants to be part of the international community. The old Libya would not have bothered.” (See Al Shalchi 2013).

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<sup>52</sup> It should be noted that, in response to Libya's admissibility challenge, the OTP has expressed concern about the fact that Saif is not in the custody of Libya. See, e.g., Office of the Prosecutor (2012).

Fred Abrahams (2013) of Human Rights Watch suggests that the ICC's stance is “coming from a few things: a legitimate, genuine and helpful view towards complementarity (let's give the Libyans a chance to do it); the other is more problematic – whether they fear that they don't have the case, that they don't have the goods.” As suggested above, it is not a given that the OTP would be able to successfully convict Saif. The Libya Working Group noted in February 2012 that “[t]here is speculation that the ICC does not want Saif to be put on trial in The Hague as they do not have a strong case against him.” (See Chatham House 2012b, 6). Others suggest that the ICC's performance may undermine the perception that it would be an effective tool for bringing Libyan perpetrators to justice. Ghazi Geblawi (2013) argues that “people know [the] ICC doesn't have a strong record. They fear that they will get away with it but people are not ambiguous – they have a verdict in their mind that they are guilty.”

Timothy William Waters (2011) has argued, alternatively and persuasively, that Moreno-Ocampo's acquiescence was a pragmatic response aimed at ensuring the cooperation of Libyan authorities so as “to have any hope of influencing the process.” In this context, it is important to note that the ICC has received scant support from the UN Security Council which set the ICC's intervention in Libya in motion (see Arbour 2014; Kersten 2014c). The Council has appeared largely uninterested in the pursuit of post-Gaddafi accountability, periodically reaffirming that the ICC and Libya should cooperate but that it is ultimately up to Libya to decide the fate of Saif and Senussi. Some have even suggested that the OTP has faced diplomatic pressure to not alienate Libya by pushing for the two ICC indictees to be surrendered (see Bosco 2014, 170). The ultimate effect of the international community's lack of interest in having Gaddafi's son and former spy chief surrendered to the ICC has been the endorsement of Libya's intent to prosecute them (see Lynch 2011; McGreal 2012). Without political will from powerful states, demands by the OTP to have Saif or Senussi surrendered would be futile. This lack of political support serves to limit the capacity of the ICC to affect post-conflict justice in Libya and has shaped the OTP's position towards accountability in Libya.

Not long after the civil war concluded, the OTP shifted its focus away from seeking custody of Saif or Senussi towards framing the Court's role in Libya as contributing to “positive complementarity” (confidential interview 2013f; see also Stahn 2011). In this context, Moreno-Ocampo argued that “the ICC is still providing an important service, because we will ensure justice in Libya, whoever will do it.” (See Papenfuss 2012). Moreno-Ocampo, moreover, appeared on numerous occasions with NTC leaders, reaffirming the perception that his role is to provide support, rather than compete with, Libya. More recently, current Chief Prosecutor Fatou Bensouda declared that trying Saif and Senussi in Libya

could represent the country's "Nuremberg moment", implying that Libya should conduct the trials in Libya and reap its benefits – "seal the primacy of the rule of law, due process and human rights for future generations" (see UN News Centre 2014). She has also declared that the Court would continue to "work with the Government in trying to address as many cases as possible" and that "Libya through its active involvement in related proceedings before the Court is setting an example of how States can invoke complementarity to protect their sovereign right to investigate and prosecute their nationals." (see Seventh Report of the Prosecutor 2014; Statement of the Prosecutor 2014b). Emphasizing the Court's role in positively influencing domestic trials may, as Waters suggests, reflect a pragmatic decision on the part of the OTP. Claiming some responsibility for bringing both Saif and Senussi to justice in Libya by couching arguments in the rhetoric of positive complementarity may soften the blow – and deflect criticism – of the ICC appearing impotent in contributing to accountability in Libya. Indeed, it seems self-evident that the Court would be criticized and blamed if the OTP consistently demanded that Saif and Senussi be surrendered to The Hague, only to be actively ignored by Libya.

The attitude of the OTP has not been shared by all organs of the Court. The Office of Public Counsel for the Defence (OPCD) has sought to ensure that Saif and Senussi be tried in The Hague. In doing so, the OPCD has questioned the Prosecution's acquiescence to Libya's demands to prosecute Saif and Senussi on a number of occasions. Just days after Saif's arrest, on 28 November 2011, the OPCD asserted that the OTP was employing double-standards with regards to its conception of complementarity and was "applying a more relaxed standard in the present case due to the apparent coalescence of Prosecution and State interests." (See OPCD Request 2011, 5). The OPCD also took issue with Moreno-Ocampo's public comments and appearances with members of the NTC which, as noted above, gave the impression that the Court had sided with Libya and wasn't interested in prosecuting rebel crimes. In May 2012, the OPCD filed a motion with the ICC's Appeals Chamber to disqualify Moreno-Ocampo from the Libyan case due to "an objective appearance that the Prosecutor is affiliated with both the political cause and legal positions of the NTC government." (See Request to Disqualify 2012, 4) While the motion was ultimately unsuccessful, just four days before the end of Moreno-Ocampo's tenure at the Court, the Appeals Chamber (2012, 17) issued a scathing ruling which claimed that the Prosecutor's

behaviour was clearly inappropriate in light of the presumption of innocence. Such behaviour not only reflects poorly on the Prosecutor but also, given that the Prosecutor is an elected official of the Court and that his statements are often imputed to the Court as whole, may lead observers to question the integrity of the Court as a whole.

On 1 May 2012, Libya filed an admissibility challenge with the ICC regarding the case of Saif

and, on 2 April 2013, Libya filed a similar admissibility challenge regarding Senussi. Their application affirmed that the Libyan government had an interest in having the ICC and the international community endorse Libya's efforts at achieving retributive justice. The Libyan government argued that it was actively investigating and willing to prosecute Saif and Senussi and that, under the principle of complementarity underpinning the Court, the ICC had an obligation to rule in favour of Libya's admissibility challenge. Specifically, Libya argued that (See Application on Behalf of the Government of Libya 2012, 3). The fact that, while an admissibility challenge was *ongoing*, Libya had a legal obligation to surrender Saif and Senussi to the ICC was largely neglected.

At the same time, Libya sought to publicly demonstrate its preparations to try Saif. It unveiled a refurbished courtroom in Tripoli (Al Shalchi 2012) and a prison for Saif, described as having “luxurious conditions, [and] which will include a private mosque, personal chef, 24-hour medical cover and satellite television.” (Stephen 2012b). Still, despite numerous pronouncements suggesting that Saif would be transferred from Zintan to his personal prison in Tripoli, the Libyan government has been unable to attain custody of Gaddafi's son, significantly complicating its ability to claim that it is “actively” investigating and able to prosecute Saif. The OPCD (Public Redacted Version of the Corrigendum 2012, 80-82) and legal scholars (Heller 2012) have put this argument forward in claiming that Libya's admissibility challenge had to be rejected.

It became clear that the key to the admissibility challenges was not the quality or nature of justice that Saif or Senussi would face but whether Libya could demonstrate that it had custody of the accused. As Alex Whiting, a former prosecutor at the OTP, insisted: “The big issue is that [Saif is] not under the control of the government. That's the thing that's so odd about the Saif case. If that could be solved, it would be a big win-win for everybody -- the Libyan government, Libyan people, the ICC, international community, and the international criminal justice project. If the government gets its hands on the guy and does a reasonably fair trial of him, that would be an incredible victory. Nobody loses.” (See Caryl 2013).

With Senussi in the detention of the Libyan government and Tripoli having begun proceedings against the former intelligence chief, the judges in Pre-Trial Chamber 1 ruled that the case against al-Senussi was inadmissible before the ICC (Pre-Trial Chamber I Decision 2013a). The Chamber found that “the same case against Mr Al-Senussi that is before the Court is currently subject to domestic proceedings being conducted by the competent authorities of Libya - which has jurisdiction over the case - and that Libya is not unwilling or unable genuinely to carry out its proceedings in relation to the case” (ibid., p 151). In response, one of Libya's legal representatives declared that the ruling

“vindicates the efforts it [the Libyan government] has made to give effect to the principle of complementarity, which allows Libya to conduct the trial of Mr Senussi if it satisfies the court, as it has done, that it can conduct a fair trial.” (see BBC 2013).

Libya was unable to replicate their success with the admissibility challenge in Saif's case. Tripoli's failure to gain custody of Saif ensured that the admissibility challenge failed. On 31 May 2013, ICC judges ruled that Saif's case was admissible before the Court since Libya was *unable* to prosecute Saif so long as he remained outside the custody of Libyan authorities:

the Chamber is of the view that its national system cannot yet be applied in full in areas or aspects relevant to the case, being thus “unavailable” within the terms of article 17(3) of the Statute. As a consequence, Libya is “unable to obtain the accused” and the necessary testimony and is also “otherwise unable to carry out [the] proceedings” in the case against Mr Gaddafi in compliance with its national laws, in accordance with the same provision. (Pre-Trial Chamber I Decision 2013b, 84-85).

In response, Libya's Justice Minister declared “[w]e will give what is needed to convince the ICC that Libya is capable of conducting a fair trial in accordance with international standards.” (see Gumuchian and Shennib 2013).

Libyan authorities were given a 'long leash' to demonstrate that they could, in fact, bring Saif into custody. Saif was eventually put before judges in Tripoli – along with a dozen other senior figures, including Senussi – but via videolink (Stephen 2014). After almost a year of deliberation by the ICC's Appeals Chamber, Libya's appeal of the admissibility challenge was rejected (see The Appeals Chamber Judgement 2014). Saif remains in Zintan. And the Zintani brigade has benefitted from leveraging its custody of their prized prisoner. Indeed, Zintani Defense Minister, Osama al-Juwali's surprise appointment to his post was linked to the political leveraging of Zintan's custody of Saif (Stephen and Harding 2011).

The polarizing battle between proponents of a trial in Libya versus those advocating a trial in The Hague obfuscated legal and political options where the interests of both the ICC and the Libyan government could have been met. Two distinct options existed which could have satisfied the interests of both the ICC and Libya: an *in situ* trial and a sequencing of trials. Neither were sufficiently explored, helping to reaffirm the dichotomous debate over where the trial should be held. More importantly, it has had the effect of leaving the pursuit and narrative of post-conflict justice in Libya outside of the realm of compromise and the ICC unable to positively influence the prosecutions of Saif and Senussi.

Under Article 3(3), the Rome Statute envisages the possibility of the Court holding an *in situ* trial, to international standards, outside of The Hague “whenever [the Court] considers it desirable”.

The potential of holding trials away from The Hague has been explored by the ICC in both the DRC and Kenya. Such trials have numerous advantages: being in close proximity to the victims, witnesses and evidence; greater facility in demonstrating that justice was achieved; contributing to the building of the rule of law in Libya by training Libyan lawyers and providing a material legacy; and maintaining international criminal justice, due process and human rights standards (see Kaye 2011; Kersten 2011a).<sup>53</sup> The latter point was particularly salient amidst growing concerns that Libyan authorities would invoke the death penalty against regime officials (see Reuters 2011b).

The OTP initially saw the option of an *in situ* trial favourably and presented it to the NTC during a visit in November 2011 to discuss the fate of Saif. ICC spokesperson, Fadi El Abdallah, suggested that a trial by ICC judges in Libya was indeed a viable option (see Murphy 2011) and the OTP subsequently reported that it had offered such an option to the NTC (see Office of the Prosecutor 2011). Holding an *in situ* trial in Tripoli (or perhaps even Zintan) could have satisfied the need for Libya and Libyans to retain their sovereignty, demonstrate a commitment to international law and to fair trials standards, and achieve retribution against Saif and Senussi. The ICC would have been able to avoid being left 'empty-handed' and demonstrate that it was willing and able to be politically sensitive and bolster the intentions of Libya to see justice served where the crimes occurred. Nevertheless, the NTC rejected the possibility of an *in situ* trial and stated that it would only accept a trial in Libya, by Libyan judges (see Stephen 2012a). Rather than defending the option of an *in situ* trial, endorsing compromise over competition and presenting its benefits to the Libyan public, the possibility of an ICC trial in Libya appears to have been subsequently ignored by the OTP.

During their November meeting, the Prosecutor also suggested that the ICC and the NTC could sequence prosecutions. Sequencing, envisioned under Article 94 of the Rome Statute, would have entailed Libya trying Saif and Senussi and subsequently transferring them to the ICC to be tried over the alleged crimes outlined in their indictment (or vice versa) (see Stahn 2012, 325-349). The sequencing of trials could have been “settled on a negotiated basis, i.e. through consultation and agreement” (ibid., 340). Importantly, the trial at the ICC would have given time for Libya to stabilize the country and build an independent judiciary capable of subsequently trying Saif and Senussi domestically for crimes beyond the ICC's warrant against them (Robertson 2011b). Moreover, sequencing could have ensured that alleged crimes committed before *and* after 15 February 2011 were

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<sup>53</sup> Not all agree that an *in situ* trial would be advisable. Roach (2013, 516), for example, writes that an *in situ* trial would “highlight or symbolize the foreign presence and legal occupation of the country’s affairs.”

investigated and prosecuted. Again, however, sequencing was ignored after the NTC rejected it as a feasible compromise.

Of course, neither an *in situ* trial nor a sequencing of trials are risk-free options. There would be obvious concerns regarding the security of judges, staff and witnesses. In order to effectively sequence the trials, Libya's use of the death penalty would have had to be addressed. Otherwise, in the words of former Ambassador Miles (2013), the country “might have to send the head and the body separately.” Nevertheless, sequencing and holding an 'in situ' trial were real options which could foreseeably have avoided the current animosity between parties over the fate of Saif and Senussi by potentially satisfying the interests of all actors involved – not to mention the interests of justice.

While Libya may not have ever looked upon any option other than a local trial favourably, the ICC itself had very little leverage to push Libyan authorities towards compromise. During the conflict, the Court did very little to communicate or demonstrate its work locally or to establish any kind of local presence (see Chatham House 2011, 10). Without having done any on-the-ground investigations during the uprising or civil war, the ICC appeared alien: “People... did not understand why, for example, the BBC was in Libya but the ICC was not.” (See remarks by Elham Saudi, *ibid.*).

It was thus inevitable that Libyans would be hesitant to surrender their prized prisoners to a Court that had a minimal presence during their struggle against Gaddafi. But there should be no confusion: the polarizing nature of the debate regarding where to try Saif and Senussi was not inevitable. It was an extension of the OTP, international human rights groups and the international community not effectively communicating the existence of other options. As Elham Saudi, Director of Lawyers for Justice in Libya (LFJL), added:

It is not an either or of having a trial in The Hague or a trial in Libya. There's a multitude of options in between as well and that's where the education is lacking and the ICC is failing because they have an active responsibility and a positive duty to inform Libyans of all their options and to assist them in achieving those options. (See BBC 4 2012).

These alternative options were not sufficiently explored. While the Libyan government has sought the ICC's approval to prosecute Saif and Senussi, the lack of interest in compromise solutions has allowed the post-conflict narrative of purging and punishing anyone associated with the Gaddafi regime to consolidate – and flourish. And the Court has been left unable to positively influence bringing Saif or Senussi to justice.

A minimal expectation of the Court should be that it seeks to prosecute those it indicts or that, when it

does not, the situation state does so itself. This expectation has not been met and the Court has not been able to positively influence Libya's ability to prosecute Saif or Senussi. In other words, the OTP's pursuit of "positive complementarity" in Libya has failed. Libya has experienced a return to a state of political violence so severe that, in July and August 2014, the UN, along with numerous embassies and aid groups pulled their staff out of the country (see IRIN 2014). In a statement to the UN Security Council in July 2014, Libya's Foreign Minister, Mohamed Abdelaziz declared that the country suffers ongoing instability, the absence of a functioning judiciary and that "you cannot talk about democratic institutions and democratic transformation in the absence of a humane, effective and strong criminal justice system" (see Mohamed Abdelaziz 2014). In this context, it is difficult to see how the ICC has or will succeed in positively influencing post-conflict peace *or* justice in Libya – at least in the near future.

## II. The Limits of Justice: Impunity for Opposition Crimes

The ICC has had no discernible effect on accountability for crimes committed by Libyan opposition forces during the civil war. On the contrary, clear cases where investigation and prosecution is warranted have been generally ignored by the Court and the Libyan government. In December 2011, the International Commission of Inquiry on Libya concluded that “war crimes and crimes against humanity were committed by rebels, or *thuwar*, and that breaches of international human rights law continue to occur in a climate of impunity.” (see Report of the International Commission of Inquiry on Libya 2012, 197).

The clearest case for an ICC investigation is the forced expulsion of Tawergha by the Misratan rebels in retaliation for the Tawerghans' allegiance to Gaddafi. Kevin Jon Heller (forthcoming) has suggested that “[i]t is at least arguable that the Misratan *thuwar* committed genocide against the Tawerghans.” Heller's view is supported by assertions, cited in the International Commission of Inquiry on Libya, that the Misratan rebels openly declared that Tawergha deserved “to be wiped off the face of the planet.” (See Report of the International Commission of Inquiry on Libya 2012, 130). With regards to the expulsion of Tawerghans, they added that “[t]he Misrata *thuwar* have killed, arbitrarily arrested and tortured Tawerghans across Libya. The destruction of Tawergha has been done to render it uninhabitable.” (See Report of the International Commission of Inquiry on Libya 2012, 13; see also Kafala 2011). Despite assertions that it may still investigate events in of Tawergha, no official investigation has taken place (see, e.g., The Office of the Prosecutor 2014, 5). On the contrary, the Misratan militia received praise from then Chief Prosecutor Luis Moreno-Ocampo during a visit to a museum commemorating the revolution:

I am honored to visit this museum. It is showing the courage and determination of Misrata people. They freed the city, the country and are an example for the world. The office of the Prosecutor of the International Criminal Court will present a case exposing the responsibility of those who ordered all these crimes. [Signed -] The Prosecutor with great admiration for Misrata.<sup>54</sup>

The killing of Muammar Gaddafi also warranted investigation and prosecution as a potential war crime. However, to date no one has been held responsible for the Colonel's death. Libya's interim Prime Minister Mahmoud Jibril was quick to declare that Gaddafi had been killed in cross-fire between regime loyalists and rebel fighters. Most, including members of Libya's NTC, however, asserted that he was killed by the rebels as an act of vengeance (Gaynor and Zargoun 2011) and Libya's chief

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<sup>54</sup> Photograph of note written by Luis Moreno-Ocampo on file with author.

pathologist reported that the cause of death had been a bullet to the head.

Gaddafi's death marked the end of the civil war. Informed of Gaddafi's demise, US Secretary of State Hilary Clinton joked: "we came, we saw, he died." (See Corbett 2011). But, in calling for an investigation into the circumstances leading to Gaddafi's death, Christof Heyns, the UN Special Rapporteur on extrajudicial, summary or arbitrary executions declared that "[t]he Geneva conventions are very clear that when prisoners are taken they may not be executed wilfully and if that was the case [with Gaddafi] then we are dealing with a war crime." (see Al Jazeera 2011g). Navi Pillay, the UN High Commissioner for Human Rights also called for an investigation (see Cumming-Bruce 2011). On the ground, the attitudes could not have been more divergent. Many Libyans articulated a sense of relief that Gaddafi was dead and appeared baffled by the subsequent debate and international concern. One Libyan remarked: "I don't care, so long as he's dead." (Walt 2011; see also Black 2011b). Some, however, expressed regret that Gaddafi had not been put on trial. As one Libyan lawyer declared: "I was sorry that his life ended so easily. He should have been brought to justice and faced the families who suffered." (see Black 2011b). Jibril similarly stated that "I wish [Col Gaddafi] was alive. I want to know why he did this to the Libyan people. I wish I were his prosecutor in his trial." (see BBC 2011i). NTC leader Mustafa Abdel-Jalil was more stern, declaring that "[t]hose who have an interest in killing him before prosecuting him are those who had an active role with him." (See Gamal 2011).

Bowing to international pressure, the NTC set up a committee to investigate Gaddafi's death. To date, however, nothing has come of the commission's investigation and the UN Commission of Inquiry on Libya was barred by authorities from properly investigating the Colonel's death. Moreover, the blanket amnesty issued by the NTC for any acts committed in the name of Libya's revolution is likely to preclude any effective investigation of Gaddafi's death (see below). Despite former ICC Prosecutor Luis Moreno-Ocampo's statement that Gaddafi's death "creates suspicions" that a war crime had been committed, the Court has also been uninterested in investigating the Libyan leader's death (see Reuters 2011c).

Since the end of the conflict, dozens of former Gaddafi regime officials have been assassinated by the *thuwar*. These acts have set the tone for post-conflict justice based on selective vengeance. To date, neither the ICC nor the Libyan state has been able (or perhaps willing) to prosecute these crimes. In July 2014, as fighting between rival militia groups in the capital of Tripoli escalated, Libya's Justice Minister visited the OTP to explore the possibility of the ICC prosecuting the *thuwar* (Moutaz 2014). It is likely that the decision by Libyan authorities to contact the ICC with regards to militia violence demonstrates their interest in utilizing a potential investigation as a *threat* rather than reflecting a

genuine intention to have the Court prosecute rebel crimes. Moreover, Libya's complaint regards current violence and the destruction of civilian infrastructure rather than alleged crimes pertaining to the civil war (Statement of the Prosecutor 2014a).

Lending further credence to the fact that militia crimes are unlikely to be investigated is Libya's 2013 Transitional Justice Law which considers transitional justice to mean addressing “severe and systemic violations of the basic rights and liberties to which the Libyans were subjected *by state affiliated apparatus under the former regime*.” (see Law No.29 of 2013 on Transitional Justice 2013). While the law does stipulate that a truth commission would be set up to investigate “human rights violations after the fall of the Qadhafi regime” and “accompanying the 17 February Revolution”, there is no mention of militia or opposition crimes or human rights abuses (ibid.).

Despite Libya's unwillingness or inability to prosecute rebel crimes from either the conflict or post-conflict period, there is no indication that the ICC itself will do so. On the contrary, the Court appears interested in pursuing enemies of the Libyan state who currently reside *outside* of the country (See Statement of the Prosecutor 2013). The Court thus remains interested in potentially prosecuting additional individuals responsible for committing atrocities in Libya. Indeed, subsequent statements by the Prosecutor requesting states to provide telephone intercepts and information regarding the transfer of funds “to establish the whereabouts and movements of persons under investigation” suggest that the Court's investigations are advanced (See Statement of the Prosecutor 2013). However, there is no indication that the targets of such investigation or prosecution will be former rebel or current militia groups.

The slate of unprosecuted crimes as well as ongoing violence illustrates the severe limitations of the ICC to produce positive effects on post-conflict justice and peace in Libya. This has had the effect of entrenching the conflict narrative in Libya's post-conflict context. Perhaps this was no accident. Some believe the ICC and Libyan government's selective approach to justice in Libya is a reflection of the wider political context. To hold rebel perpetrators to account would have undermined the conflict narrative which insisted that the regime be toppled and requires that those associated with the previous regime be eliminated. As Mohamed Eljarh (2013c) notes: “going after people now would assume that the new regime is as criminal as Gaddafi was. [That is] not the message the UK, US and others want to send.”

### III. 'Justice' Through Amnesty and Isolation

Following the end of the Libyan civil war, the NTC passed a blanket amnesty (Law 38) while the General National Congress (GNC), elected in July 2012, passed the Political Isolation Law. These policies emerged from a context in which the former Libyan opposition forces ensured through coercion not only that they would escape investigation or prosecution but would be protected from prosecution. Both fit within the post-conflict narrative, accented by ICC inaction to investigate or prosecute rebel crimes, that Libya must marginalize, isolate, punish and purge individuals associated with the Gaddafi regime whilst shielding militias from accountability. They also expose, once again, the limitations of the ICC in positively affecting post-conflict peace and justice in Libya.

#### (i) *Law 38: A Blanket Amnesty*

Passed in May 2012, Law 38 *On Some Procedures for the Transitional Period* granted a blanket amnesty for any “military, security or civil actions dictated by the February 17 Revolution that were performed by revolutionaries with the goal of promoting or protecting the revolution.” (see Human Rights Watch 2012b). Crimes such as torture and rape are excluded but other crimes, including murder and forced displacement, are not explicitly omitted from the amnesty law (Human Rights Watch 2012c). Moreover, in practice, all rebel crimes have been *de facto* amnestied. The implication and reasoning behind Law 38 was clear to the Libya Working Group, which argued that the NTC's laws “were not just in the public interest but rather served the interests of other groups (such as protecting members of the NTC from future prosecution and appeasing militia groups)” (Chatham House 2012a, 11). In other words, the amnesty would protect those militia groups that retain the ability to threaten peace in Libya.

The implications of Libya's blanket amnesty have been to entrench selective justice and impunity on the part of the country's emboldened *thuwar*. As the International Crisis Group (2013, 28-29) noted in a report on Libya's judiciary:

The NTC in effect gave legal sanction to impunity in May 2012 when it amnestied those who had committed crimes – including murder and forced displacement – during the uprising. The broader impression that action taken in defence of the new order is *de facto* legitimate has emboldened armed groups, many of whom justify ongoing illegal activity as necessary to safeguard the '17 February revolution'.

It is difficult to imagine how the killing of Gaddafi could be prosecuted by Libya given the existence of Law 38, especially insofar as the civil war and its legitimating conflict narrative were based on

expunging the Gaddafi regime. Moreover, the forced expulsion of the entire population of Tawergha by Misrata rebels in August 2011 appears unlikely to be investigated or prosecuted by Libya even though, as noted above, it may amount to ethnic cleansing and arguably even genocide.

The amnesty is a formal demonstration that Libya is unwilling to prosecute pro-revolution militias who may have committed serious crimes under the jurisdiction of the ICC. The Commission of Inquiry on Libya has detailed alleged war crimes and crimes against humanity committed by the *thumar* and observed that “breaches of international human rights law continue to occur in a climate of impunity” and that it is “deeply concerned that no independent investigations or prosecutions appear to have been instigated into killings committed by *thumar*.” (see Report of the International Commission of Inquiry on Libya 2012, 21; 10). Some groups have increased their calls on the OTP to investigate and potentially prosecute Libyan militia leaders. In the wake of Law 38’s passage, Richard Dicker of HRW (2012c), for example, argued that “[w]ith the NTC now openly trying to shield militia leaders from justice, it falls to the ICC prosecutor to vigorously examine these crimes.” However, despite periodic suggestions that the OTP may open an investigation into the events in Tawergha (see UN News Centre 2012) and a declaration by Moreno-Ocampo that Law 38 was not binding on the Court and could not prevent an investigation or prosecution by the ICC, there is no evidence that such a prosecution is forthcoming (See Press Conference by Prosecutor 2012). On the contrary, whilst Moreno-Ocampo stated that “my office takes note of Law 38” he was broadly supportive of Libyan efforts at achieving post-conflict justice, maintaining that “My Office understands that the Government of Libya has committed to a comprehensive strategy to address all crimes and end impunity in Libya.” (see ICC Prosecutor Statement 2012). The result of Law 38 remains the entrenchment of one-sided justice, impunity and the authority of militias. The ICC has been powerless to challenge it and has decided not to attempt to take accountability for militia crimes upon itself.

#### *(ii) Lustration in Libya: The Political Isolation Law*

In May 2013, Libya's GNC overwhelmingly passed the Political Isolation Law (PIL). The PIL's passing represented a far-reaching attempt to prevent members of the Gaddafi regime from holding public office during the country's transition. But, like the amnesty law, the decision also appeared to fit a precarious pattern of post-conflict vengeance and one-sided justice aimed at those associated with the defeated regime.

Libya's PIL is a lustration law – a form of vetting citizens to discern whether or not they can or

cannot – hold public office on the basis of their relationship with a prior, delegitimized and defeated regime (See Ellis 1996; David 2003; Horne and Levi 2003; Mayer-Rieckh and de Greiff 2007; David 2011). The passage of official and legally sanctioned lustration laws as a mechanism of transitional justice is typically attributed to the experience of post-communist states in Eastern Europe where states such as Poland and Czechoslovakia instituted lustration policies to prevent former communists from holding political office (see Michnik and Havel 1993; David 2011). The impetus behind these laws goes directly to the struggle characteristic of societies confronting and grappling with a recent past characterized by human rights violations.

In principle, the PIL is generally popular with Libyans, although they would prefer a more restrictive mandate than it was given (National Democratic Institute 2013, 25). It is also notable that international and local human rights groups did not necessarily view the PIL as being, in and of itself, illegitimate. Rights groups argued instead that it should not be vague or violate human rights (See Human Rights Watch 2013a; Human Rights Watch 2013c; Lawyers for Justice in Libya 2013). The Libyan government did not – or perhaps could not – heed their calls.

The passage of the law reflected political and violent pressure applied by the country's powerful militias as well as groups that had been so marginalized under Gaddafi that lustration could not affect them (Amirah-Fernández 2013). Since the end of the Revolution, Libya has struggled mightily to reign in various regional militias, many of which have acted as a law unto themselves, challenging and undermining the Libyan government's capacity to exert central authority over key cities and regions (see Amnesty International 2012a; Amnesty International 2012b; Pack and Barfi 2012). Following the conflict, “militias that had taken up arms against the former regime.... held on to them to fill the security vacuum after it collapsed accumulated weapons and consolidated control over entire neighbourhoods and areas.” (International Crisis Group 2013, 21). Pro-PIL groups maintained that the government had to be purged of virtually anyone and everyone who had ties to the previous regime. As the GNC was debating the merits and specifics of the PIL, the militias stormed and took over the Foreign and Justice ministries in Tripoli, demanding that the bill be passed (Jawad 2013).

Despite former Prime Minister Ali Zeidan's proclamation that “we will not surrender to anyone or bend to anyone and no-one can twist our arm” (see Jawad 2013), the militias successfully ensured the law was passed on 5 May 2013. In its rushed and final form, the law is broad and unspecific, seemingly aimed at *anyone* associated with the Gaddafi regime and not simply those who were complicit with, or responsible for, Gaddafi-era corruption and crimes (see Libya Herald 2013). Foreseeing their political demise, some respected Libyan officials have already stepped down from

public office.

Since the conclusion of the Libyan Revolution and civil war, Libya has been characterized by *selective* impunity. Libya's PIL and the blanket amnesty are symptomatic of Libya's post-conflict narrative of ridding the state of anyone associated with Gadadfi – even those who were instrumental in guaranteeing the rebels' and NTC's victory in the civil war. Both are the result of the ongoing ability of militias to affect Libyan policy-making through violence and threatening the country's fragile peace. Both are also stark reminders of the limitations of the ICC in affecting a post-conflict context in which impunity is ended and peace and security are restored.

### III. Conclusion: The ICC and Post-Gaddafi Libya

The Libyan civil war was about the 'good' rebels and NTC deposing the 'evil' Gaddafi regime. Post-civil war Libya has seen the extension of this narrative into the realm of post-conflict justice, embodied by the passage of both Libya's blanket amnesty and the Political Isolation Law. Reflecting the influence of the *thumar* and their violent demands that Libya be purged of those associated with the former regime while militia crimes be amnestied or ignored, accountability has been conflated with selective retribution and punishment of those associated with Gaddafi – even those who had worked to topple the regime. Post-Gaddafi Libya has been “characterized by a revenge-seeking mindset instead of a disciplined and legal transition.” (Nesira 2013). Justice in Libya is victor's justice.

Ultimately, the ICC's effects on post-Gaddafi Libya and post-conflict justice have been primarily a result of what the Court and, in particular, what the OTP did *not* do rather than what it *has* done. In deciding not to prosecute alleged militia atrocities during the civil war or since its conclusion, the Court has confirmed Libya's conflict narrative. Ongoing violence and crimes also demonstrate the limitations of the ICC to produce positive effects on post-conflict justice, accountability and peace. It has not been able to positively influence the prosecutions of those it indicted. The Court has largely confirmed that the Libyan government was able and willing to genuinely investigate and prosecute Saif and Senussi. Even in the case of the admissibility challenge regarding Saif, the Court's most significant point of contention was the Libyan government's ability to retain custody of Saif – and not its genuine ability or willingness to prosecute him. Middle ground options have been neglected and it remains unclear what – if any – positive impact the ICC can or will have on any prosecution of Saif or Senussi.

While it is important to recall Rama Mani's (2002, 99) observation that the ICC isn't a panacea for post-conflict transitions and that the mere fact that the Court has intervened does not mean that the implementation of post-conflict justice will go smoothly, the case of Libya clearly demonstrates that the capacity of the ICC to produce positive effects on post-conflict peace and justice is limited.

## **Chapter 8: The ICC as an Actor – Negotiating Interests, Selecting Targets, and Affecting Peace**

*Whether states or the UN security council choose to confer jurisdiction on the ICC is a decision that is wholly independent of the court. Once made, however, the legal rules that apply are clear and decidedly not political under any circumstances. In both practice and words, I have made it clear in no uncertain terms that the office of the prosecutor will execute its mandate, without fear or favour, where jurisdiction is established and will vigorously pursue those – irrespective of status or affiliation – who commit mass crimes that shock the conscience of humanity. – ICC Chief Prosecutor Fatou Bensouda (2014)*

*Now you and I are part of the same tribe, the ICC tribe. – Former ICC Chief Prosecutor Luis Moreno-Ocampo to Ugandan President Yoweri Museveni<sup>55</sup>*

### **Introduction**

The thesis began by arguing that the claims currently made about the effects of the ICC on 'peace' are empirically and theoretically problematic and provide no clear resolution of the “peace versus justice” debate. Drawing on insights from literature on conflict resolution and negotiation theory, the analytical framework developed in Chapter 3 provided the grounds for a more nuanced understanding of the empirical effects of the ICC on peace, justice and conflict processes. Using this framework as a guide, the preceding four chapters examined and assessed the effects of the ICC in northern Uganda and Libya. This analysis, however, begs the question: *why* does the ICC have the effects that it does? In order to answer this question, the Court needs to be analysed as an actor in its own right. After all, the Court is a complex international legal institution and not simply a robotic indictment-issuing machine. This chapter therefore analyses the institutional interests, political forces and key contextual features of each situation that shaped the Court's decision-making and determined the effects it had on peace, justice and conflict processes in Libya and northern Uganda.

A key weakness in the “peace versus justice” debate is that it typically assumes similar behaviour irrespective of context and of key factors including: *how* the ICC intervenes; *who* the ICC targets and *who* it does not; and *who* the Court's work in specific contexts benefits and legitimates. This chapter seeks to address these issues, arguing that they shape how the ICC affects peace. Specifically, the chapter delineates the relationship between the ways in which the ICC is requested to intervene in ongoing conflicts, the decision-making of the Office of the Prosecutor (OTP) in determining which parties to prosecute, and the effects of the ICC on peace, conflict and justice processes. It is argued that the ICC is guided by a negotiation between its own institutional interests and the interests of the

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<sup>55</sup> According to a confidential interview with a former ICC staff member (2014c).

political actors upon which the Court depends. This negotiation of interests has resulted in a proclivity within the OTP to selectively investigate and prosecute parties to a conflict. Ultimately, the selective prosecution of non-state actors (i.e. rebels) or state actors (i.e. government officials) is a key determinant of the Court's effects on peace processes in Libya, northern Uganda and beyond.

The chapter proceeds in three sections. In section one, the ICC's referral mechanisms are put into political context. It is argued that self-referrals lead the Court to prosecute non-state actors whilst Security Council referrals have a tendency to primarily lead the OTP to seek the prosecution of government officials. However, it is insufficient to conclude that the ICC works at the behest of political actors that refer situations to it. Rather, as demonstrated in the second section, the ICC's decision-making, especially as it pertains to selecting cases, is an extension of a negotiation between the Court's institutional interests and the interests of the political actors upon which its effectiveness and continued existence depend. Three institutional interests are outlined: the ability to collect evidence on the ground or from actors able to provide it; cooperation leading to the enforcement of arrest warrants and the surrender of suspects to the Court; and recognition of the ICC as a relevant and effective institution in international politics. In section three, the chapter revisits the two cases at the heart of this thesis, northern Uganda and Libya, and shows that the processes of decision-making, negotiation of interests and selectivity were instrumental in determining the ICC's effects on peace, justice and conflict processes in both cases.

## **I. Directing Justice: From Political Referrals to Prosecutorial Targets**

As the Court's caseload has increased and the number of investigations the OTP conducts has grown, scholarship on the ICC has begun to scrutinize the politics of referral types (see, e.g., Tiemessen 2014). To date such analyses have focused primarily on how different referral types politicize the ICC and affect the independence and legitimacy of the Court. The core contention of this chapter is that the way in which a situation is referred has implications on how the ICC affects conflict and peace processes. It does so by narrowing the range of actors that are targeted by the Court for prosecution as well as the actors that are legitimized by its intervention. This, in turn, shapes conflict, peace and justice processes in the given conflict situation. This is evident in both ICC interventions that the thesis has examined.

Chapter 1 of this thesis described the Court's trigger mechanisms and noted that states have relied on self-referrals and UN Security Council referrals to initiate ICC interventions into ongoing conflicts. During its first years, the ICC had to find ways in which to promote its work by presenting itself as a viable institution that was deferential to the interests of those political actors which could potentially threaten its existence. As a result, the Court selected those cases that would produce a record conducive to better relations with major powers and the UN Security Council, while avoiding interventions into situations where it could potentially shed light on alleged crimes committed by major powers or on its allies (see Bosco 2014). But the nature of the negotiation between the Court's interests and the interests of political actors has not only determined the situations that were selected for negotiation but the specific individuals that were targeted for prosecution.

Within the “peace versus justice” debate, it is deemed largely irrelevant *who* is targeted by the ICC. This may come as a surprise given the centrality of particular individuals to conflict narratives (re)produced by ICC interventions. However, analyses of the Court's effects on peace processes generally neglect what *type* of actor is targeted by the Court. This is likely the result of the recycled claims characteristic of the discourse that strip the ICC's decision-making and specific conflict situations of context and replace them with the dichotomous proposition that the ICC can ultimately only help or hinder peace. Within the debate, the theorized incentives and disincentives produced by ICC interventions are seen as applying equally to government figures as well as rebels; they are taken to be equals who will have the same motivations and behaviours. It is thus possible to see the argument, as previous chapters have detailed, that ICC interventions will force both Kony and Gaddafi to fight to the death, to refuse to negotiate peace or, alternatively, marginalize and deter both from committing atrocities. That one is the leader of a rebel group and the other a leader of a government is considered irrelevant.

At the same time, engagements with the “peace versus justice” debate have focused primarily on those parties who are ultimately targeted by the ICC, neglecting how interventions by the Court affect those who are not. This is not to say that non-targeted parties are entirely ignored in scholarship on the effects of ICC interventions. As suggested in the preceding chapters on Libya and especially northern Uganda, there is some recognition that the political legitimacy of warring parties is bolstered if they avoid being targeted by the Court but their adversaries are indicted. Still, non-targeted parties are primarily considered in critiques of the selective or biased nature of the Court's interventions – in others words, within arguments that non-targeted parties *should* be targeted. What is needed is better analyses of how the behaviour of non-targeted parties changes with ICC interventions or how such interventions promote their interests *vis-a-vis* peace, conflict and justice processes.

The previous chapters considered the effects of the ICC on non-targeted parties, suggesting that the Court not only bolstered their sense of legitimacy but affected their attitudes and incentives towards, and decision-making within, peace processes (see also below). But this raises the question: how does the ICC decide who to investigate and prosecute? The argument that follows suggests that who is targeted and who is not targeted for ICC prosecution is ultimately determined not only by their alleged responsibility for crimes but by the way in which a conflict is referred to the ICC and the consequent, and not simply subsequent, political decision-making within the OTP.

**Table 8.1:** Mapping ICC Referral Type and Targeted / Non-Targeted Parties at Time of Arrest Warrant

State	Referral Type	Government (or Government Affiliated) Actors Indicted	Non-Government / Rebel Actors Indicted
Uganda (2003)	Self-Referral	0	5
Democratic Republic of Congo (2004)	Self-Referral	0	5
Central African Republic (2004)	Self-Referral	0	1
Darfur / Sudan (2005)	UNSC Referral	4	2
Kenya (2010)	Proprio Motu	3	3
Ivory Coast (2011)	Proprio Motu	3	0
Libya (2011)	UNSC Referral	3	0
Mali (2012)	Self-Referral	---	---

To date, in every case of a self-referral by an ICC member-state in which arrest warrants have been

issued, the OTP has exclusively targeted non-state actors. None have resulted in arrest warrants for officials from the referring government (see Table 8.1). As early as 2006, Antonio Cassese (2006, 436) worried about this apparent link between self-referrals and myopically targeting rebels:

The striking feature in all three self-referrals lies in the fact that in each case the referring state asked the Prosecutor to investigate crimes allegedly committed by *rebels* fighting against the central authorities... [T]he practice of self-referrals by states beset with civil war is of concern. It might lead to states using the Court. (Emphasis in original; see also Heller 2008, 675).

In the Democratic Republic of Congo, for example, the OTP has decided not to request arrest warrants for any government official closely allied to President Joseph Kabila, focusing instead on rebels such as Thomas Lubanga as well as former political figures who have fallen out of favour with the President, such as Jean-Pierre Bemba (notably for his role in alleged atrocities in the Central African Republic and not the DRC). To a certain degree, this is to be expected. After all, it is unlikely that a state would refer itself or a situation on its territory to the ICC if it believed its officials would be prosecuted by the Court. As one OTP staff member (confidential interview 2013b) notes: “states aren’t stupid, so if states refer, they think there is no reason why they should be brought to account or that they can avoid it.” But in many (if not most) cases, responsibility for political violence does not lie starkly on one side of a conflict and not the other. And there is a difference between a state being confident that it will not be investigated or prosecuted because its officials are innocent, and a government knowing that it is not in the Court’s interests to pursue prosecutions for state-perpetrated atrocities. But states will not only want to avoid coming under the ICC’s gaze but may also judge the Court’s work to be politically useful in attributing responsibility and guilt to their adversaries. As Schabas (2007, 145) notes in his analysis of self-referrals, “in reality the States concerned did not intend that prosecution be directed against themselves... [but rather] sought to induce the Court to prosecute rebel groups operating within their own borders.” In some instances, such as in the case of the GoU’s referral of the LRA to the ICC, this also pertained to rebels operating outside of the states’ borders, in neighbouring countries.

In contrast to self-referrals, UN Security Council referrals have tended to result in the OTP focusing on the alleged perpetration of crimes by government actors (see Table 8.1). Following UN Security Council Resolution 1593, the primary focus of the OTP has been on the complicity of the Sudanese government and, in particular, of President Omar al-Bashir for his alleged role in the commission of atrocities in Darfur. While non-state actors involved in the war in Darfur have also been targeted, it is notable that *only* Bashir has been indicted for genocide, the so-called “crime of all crimes” (see, e.g. Schabas 2009), and no other individual involved in the conflict has received nearly as

much attention from the international community or civil society groups (See Mills 2012). In Libya, as discussed at greater length below, the focus of OTP investigations has been exclusively on the Gaddafi regime.

In short, despite the small sample size, a pattern between referral types and the selection of targets by the OTP emerges: the actor that refers a situation to the ICC does so in order to have the Court target its adversaries and/or those who are no longer in political favour. There is a clear correlation between referral type and the type of actor that is likely to be pursued for prosecution by the OTP: Security Council referrals lead the Prosecutor to target state and government officials; self-referrals lead the Prosecutor to target non-state actors and rebels. This is in line Alana Tiemessen's (2014, 450) research which suggests that “[o]nce a situation is referred, the UNSC, and especially States Parties, have generally directed the Court’s attention to crimes committed by only one side of the conflict. In so doing, they have ensured impunity for themselves or their allies.”

As suggested in the above quote by Cassese, it is important to note that different referral types can lead to different types of political instrumentalization of the Court. As noted in Chapter 1, it is often noted that the biggest threat to the ICC is politicization. The fear of politicization manifests itself primarily through the discourse on the Court's independence. Since the Rome Statute negotiations, supporters have sought to ensure that the Court be created – and remain – an institution independent of the political interests of states. In other words, for the Court to survive, it must keep its distance from overt political machinations and avoid being instrumentalized or manipulated by state actors. Despite this anxiety about being instrumentalized and losing its independence, when the Court intervenes selectively into ongoing conflicts, it opens itself to manipulation by warring actors and, more specifically, by the non-targeted parties to a conflict. As Branch (2011, 186) writes:

The ICC's need to accommodate itself to political power leads to a number of detrimental consequences for peace by setting the stage for the Court's instrumentalization. It can be instrumentalized by Western states, African states, or even non-state political forces such as rebel groups or local elites who seek to appropriate for themselves the mantle of savior so as to legitimate their violence.

Citing the examples of Uganda, the Central African Republic and the Democratic Republic of Congo, Phil Clark (2011) adds that “[s]ome African governments have been all too willing to assist the ICC in exchange for insulating their officials from prosecution.” It is difficult not to be left with the impression that the ICC does the bidding of at least some states. But the ICC may view being used by states as beneficial to its mandate and of service to its own interests. What is less clear is *why* the ICC is selective and *what* factors determine its selectivity.

## II. ICC Decision-Making and Institutional Interests

It can seem as though the ICC's work is beholden to political interests: where the interests of states point towards cooperation and engagement with the ICC, the Court's work will be supported; where state interests are in conflict with the Court, the ICC's mandate will be undercut. This is a particularly realist argument, dependent as it is on state preferences determining the functioning of international institutions and it is, at times, characteristic of international relations scholarship which, as Michael Barnett and Martha Finnemore (2004, 23) observe, has not given sufficient attention to how international organizations “actually behave” and has stripped international institutions of their influence (see also Bosco 2014, 17). International institutions have institutional interests which shape their actions and behaviour and which are aimed at their legitimation and preservation. This was argued by Barnett (2003) in his seminal work on the United Nations' (lack of) response to the 1994 Rwandan Genocide. Barnett showed how staff treated the UN as a “church” and viewed themselves as the institution's guardians and protectors. As a consequence, officials were reluctant to have the UN intervene in situations which were unlikely to further the UN's desired perception as a guardian of international peace and security:

Roughly translated, the UN was interested in picking 'winners,' those places that had stability on the ground, and avoiding 'losers,' those places where stability was absent and humanitarian nightmares were present. This development not only was a pragmatic recognition of the possible but also was justified by a principled defence of the UN... Helping those who could not help themselves could suffocate the organization... The desire by the UN decision makers in New York to pick winners and to avoid failures meant that the UN was as interested in its own security as it was in human security. This represented an important shift in the discourse of peacekeeping, as officials in and around the UN took greater care to protect the organization's interests, reputation, and future. These rules represented an epoxy that bound together the desire to help with the desire to defend the organization and its ideals. Rwanda was born in these uncertain circumstances (Barnett 2003, 47-8).

It is therefore insufficient to claim that the UN responds or doesn't respond to a particular crisis simply as an extension of the preferences or interests of its member-states – or as a result of the extent of humanitarian suffering. Contrary to claims that the UN had lost legitimacy for its lack of response to the genocide in Rwanda, UN officials saw their recalcitrance as a means to protect the UN's legitimacy. Any understanding of the decision-making within the UN must take into consideration a negotiation between the expectation that the UN respond to emerging crises (e.g. the genocide in Rwanda) and the institution's interests (preservation by not becoming embroiled in Rwanda and legitimation by avoiding “losers”). It should be expected that international institutions such as the UN or the ICC will not take actions which threaten their ability to function effectively and / or their long-term viability.

Scholarship on international criminal law and justice has generally neglected any systematic analysis of the ICC's interests or how these interests are acted upon and interact with the interests of states and other international organizations. The argument that follows is simple: the ICC's decision-making reflects a negotiation of the Court's own interests with the interests of those political actors it depends upon. The Court may be used and instrumentalized by states and organizations such as the Security Council. But an analysis of OTP decision-making must take into account the fact that the Court has an interest in being instrumentalized by states and by the Security Council, insofar as it believes that where the interests of such political actors overlap with the interests of the Court, its legitimacy and standing in international politics will be promoted and strengthened – and its mandate may be successfully implemented. Despite functioning as a judicial body, the Court is itself a political institution with its own set of political interests which influence its decision-making. This negotiation of interests is most pronounced in the selection of prosecutorial targets.

### *Defining ICC Institutional Interests*

In 2008, Phil Clark briefly analyzed the OTP's record in selecting certain cases, highlighting that it was not only external political forces determining the Prosecutor's course of action but internal interests:

the ICC has been fundamentally motivated by self-interested pragmatic concerns, avoiding the fraught task of investigating and prosecuting sitting members of government who are responsible for grave crimes, while also overlooking the capacity of domestic jurisdictions to address the atrocities concerned. Such pragmatism reflects a new global institution that needs to get legal runs on the board in order to build support among its states parties and to be perceived as an established global actor in the fight against impunity (Clark 2008, 44).

Clark's analysis points to an inherent tension within the OTP between “idealism” and “reality”, a tension it manages and negotiates via “self-interested” “pragmatism”. This pragmatism emerges in the OTP's decision-making with regards to specific selectivity – who to target for prosecution. This is reflected in the response of the current ICC Deputy Prosecutor, James Stewart, to allegations that the OTP has tended to focus on only one side of a conflict:

The Prosecutor, for example in the case of Cote D'Ivoire, has always made it clear that she intends to look at all sides of the conflict. Sometimes you just can't do everything at once. You have to make a choice between action and paralysis and between pragmatism and ideals. And I think if you choose pragmatic action, you really shouldn't be criticized. But in the end, I suppose history will tell us whether or not the OTP has acted appropriately. (See Kersten 2013).

Serge Brammertz, the current Prosecutor at the International Criminal Tribunal for the Former

Yugoslavia (ICTY) and the ICC's former Deputy Prosecutor maintains that this approach is indeed appropriate, stating that there is a need for the OTP to sequence cases and start with one side before targeting the other.<sup>56</sup> This amounts to an admission of selectivity as an institutional strategy within the OTP. But at the heart of their comments is an attempt to explain how the ICC can and should conduct investigations and prosecutions in the context of highly politicized situations and in such a way that preserves the interests of the Court. However, their comments do not tell us what specific factors determine and shape the ICC's institutional interests.

Three key issues can be ascertained about the core of the Court's interests from the above comments. First, as Stewart argues, the ICC's Prosecutor wants to examine the culpability of all sides of a conflict. Assuming that there are very few violent political conflicts in which only one side bears responsibility for atrocities, it follows that, ideally, the Prosecutor would target all parties to a conflict. Second, the OTP is unable to target all sides at the same time. In Stewart's words, "you just can't do everything at once." In other words, the OTP has calculated that targeting both sides simultaneously is unwise and would have a negative impact on the Court. In other words, targeting everyone at once risks paralysis – no one being prosecuted, no one being surrendered to The Hague and no justice being served. And third, when the OTP faces the dilemma of targeting only one side of a conflict, it views selectivity as a pragmatic position which is likely to translate into a temporally staggered approach – prosecute one side first, the other side (maybe) later; governments first rebels later – or vice versa depending, as per the analysis above, on the source of a referral. Together, this is strong evidence that the OTP's political calculus in deciding who to target for prosecution takes into account what is good for the Court – i.e. the ICC's institutional interests.

But what specific elements of the Court's institutional interests determine *how* the OTP charts a "pragmatic" course, negotiates selectivity and decides who to target? The research carried out for this thesis suggests that there are three particularly important institutional interests.

The first two institutional interests pertain to cooperation between political actors and the ICC to gather evidence and to enforce arrest warrants. Cooperation will depend, in part, on the manner in which the ICC intervenes. Kenneth Rodman (2014 6-19) describes the challenges of the ICC in attaining cooperation in what he terms "adversarial" and "cooperative" relationships. The former relates to investigations where the ICC is investigating crimes by official actors (i.e. government officials) and is typically the product of Security Council referrals. Because the ICC is intervening

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<sup>56</sup> Comments made by Serge Brammertz at *Building a Legacy Conference*, Nuremberg (November 2013)

against an entrenched political entity, in such cases, prosecutors will likely require cooperation from external sources. Cooperative relationships, on the other hand, result primarily from self-referrals, where the targets of ICC investigation are non-state actors. In line with the analysis above on self-referrals, Rodman (*ibid.*, 7) maintains that, while cooperation here is likely to be higher than in adversarial relationships, cooperative relationships pose an ever-present risk that the state in question will instrumentalize the Court's intervention in order to delegitimize and marginalize their adversaries – without improving their own human rights record.

Because the ICC's resources in terms of budget and staff are limited, the OTP needs states (as well as non-state actors) to bolster investigations by allowing investigations to take place on their territory or by volunteering evidence for specific cases. Evidence must be strong enough to convince judges to issue arrest warrants for prosecutorial targets. Prosecutors must subsequently seek sufficient evidence for a conviction. The process of evidence-gathering from states is not politically neutral. States are able to choose which evidence they provide and which they retain in an attempt to shape the OTP's investigations. At the same time, in order for the OTP to investigate allegations where the crimes occurred, they need to not only have the acquiescence of the state on whose territory the crimes allegedly took place, but also the protection of state security, police or military forces. Where this isn't possible, as in the case of Darfur and Libya, investigators are forced to rely on evidence and testimony from third-party sources (including states and NGOs) or witnesses outside the affected situation. The OTP, then, has an interest in assuring that it receives cooperation from those states within which it is carrying out investigations or, when this is not possible, from those states which may hold evidence gathered on the ground. We should expect that the OTP will pursue strategies that enhance rather than undermine case-building cooperation with relevant states.

A second form of cooperation pertains to enforcing arrest warrants. Once arrest warrants have been issued, prosecutors have a vested interest in suspects being surrendered to the Court. In order to function effectively and to be perceived as a viable institution, the Court needs the cooperation of states to put suspects in its dock. After all, the ICC does not have a police force of its own and therefore is unable to enforce any warrants of arrest it may issue (see Moreno-Ocampo 2005; Grono 2008). If suspects do not surrender themselves voluntarily, then the ICC requires state cooperation in order to detain and surrender indictees to The Hague.<sup>57</sup> The prospects of arrest are key for the Court because, in

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<sup>57</sup> Even in instances where suspects surrender themselves, the ICC still may require state cooperation. This was the case with the surrender of Bosco Ntaganda, who turned himself in to the US embassy in Kigali, Rwanda and requested to be transferred to the ICC. Two non-member states, the US and

the words of one OTP official (confidential interview 2013a), “suspects at large damage the credibility of the Court.” A Court with an empty dock is a Court empty of legitimacy and purpose. In its first years, the OTP was under pressure from within to present cases it would be able to prosecute. In a curious decision, ICC judges were elected *before* the Prosecutor, meaning that they had little to do until the OTP was set up and requested the issuance of arrest warrants. According to OTP staff (confidential interview 2013a), Judges put pressure on Moreno-Ocampo to produce a case as soon as possible. One told him: “just give us a Tadic!” – a reference to the first case at the ICTY. In short, it should be expected that the OTP is guided by an institutional interest to receive cooperation from states and will avoid making decisions that preclude cooperation – contemporaneously or in the future. As Bosco (2014, 19) writes, “[p]ursuing an ideal apolitical form of justice by ignoring the need for state support would only sap the institution's credibility.”

While the two institutional interests outlined above can be placed under the umbrella of 'cooperation', they should not be conflated. Cooperation to achieve evidence and investigate in-country requires different political relations with potentially different actors than cooperation to achieve the enforcement of arrest warrants which relies, above all, on coercive power.

In addition to the ICC's institutional interests to receive cooperation from political actors, there is an 'impact factor' which weighs heavily on the Court. This third, reputational, interest is at least partly related to the fact that the Court is still establishing itself within the international system. It bears repeating – although not as an excuse – that the ICC is a relatively young institution and much of what the Court does is 'invented' for the first time when it does it. As such, the ICC clearly has an interest in its own viability as well as the perception that it is viable. This reputational interest also relates to the consistently reiterated, if poorly defined, notion that it is insufficient to 'do justice' and that justice must be “seen to be done” (see Kerr 2004 92-114), as well as the heightened expectations that the Court will act swiftly and have a positive impact on the establishment of a sustainable peace (see Whiting 2009). Just as the ICC has an interest in its justice being “seen to be done”, the Court also has an interest in giving the appearance of having a positive impact on the conflicts in which it intervenes (see, e.g. Bensouda 2013a). Here, we return to the claims discussed in Chapter 2. Amongst the ICC's potential impact factors will be its ability to argue a deterrence factor, a positive influence on 'peace', and that it marginalizes those actors it targets.

The ICC has an interest in capturing global public attention and recognition. The reputation of the ICC suffers when there are demands for international justice that are unmet – as in the case of Syria

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Rwanda, played critical roles in having Ntaganda transferred to The Hague.

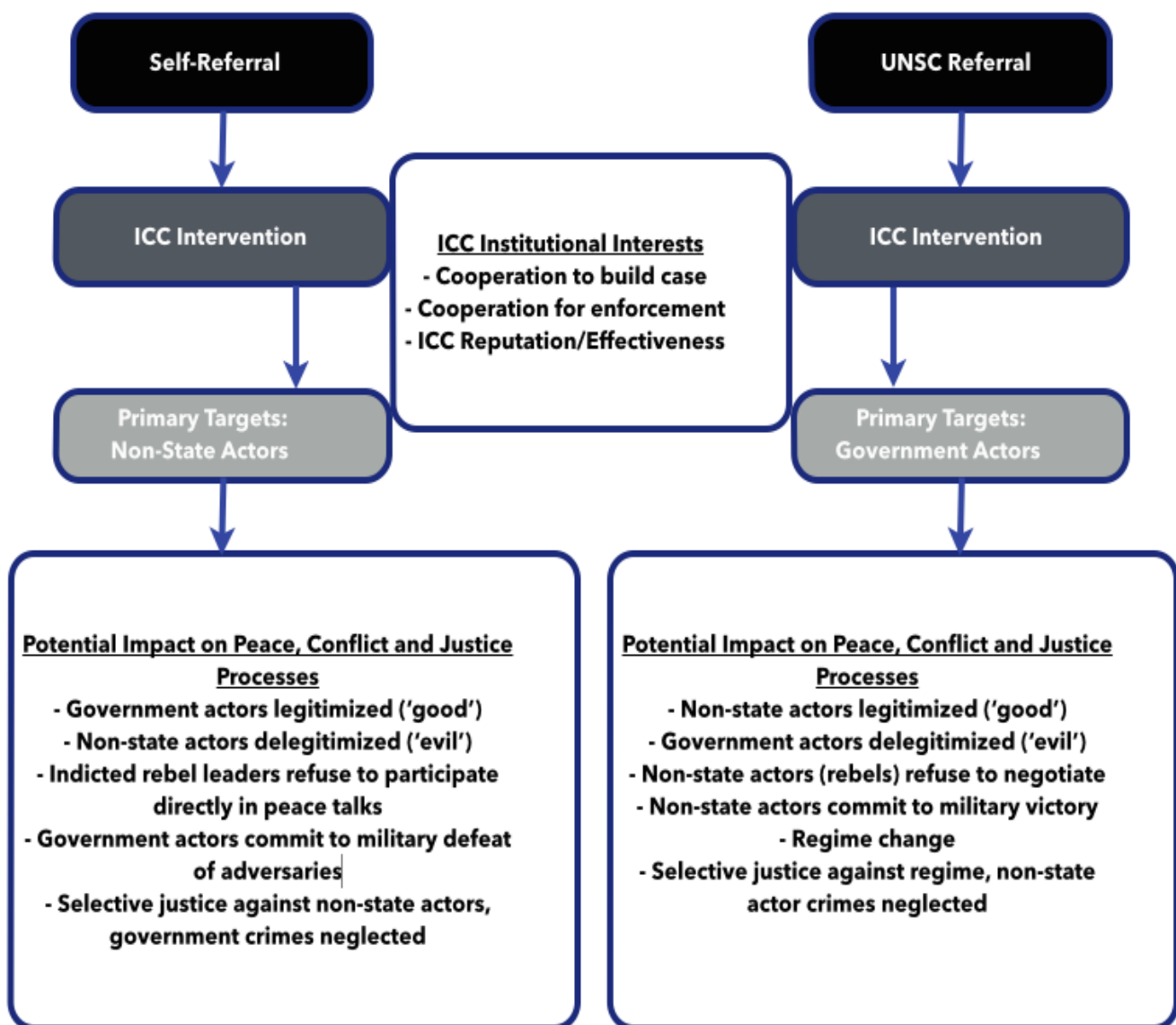
– yielding an expectations gap. This interest in capturing attention and fulfilling expectations predisposes the ICC to intervening while conflicts are ongoing. If an ICC intervention is delayed or neglected for conflicts, like Syria, where there is a clear case for judicial intervention, the reputation of the Court may suffer. Consequently, when the Court gets an opportunity to deliver on its promise, it can be expected that it will embrace the opportunity – even if it comes at some cost to its political independence.

Together, these issues of cooperation and reputation constitute the core elements of the ICC's institutional interests. The OTP wants to present compelling cases to judges – requests for warrants built on strong evidence as well as cases that can be won. They also want to ensure that those they target stand a good chance of being surrendered to the ICC. At the same time, it is important for the Court to appear to be an active and effective institution with high-profile cases. It should be expected that the OTP will seek to make decisions that can further these interests whilst avoiding those that will undermine them. It is important to note here that the decision of whether an investigation of a particular situation or a case should proceed ultimately rests with the Prosecutor and his or her interpretation of the Court's institutional interests (see Schabas 2010, 541). The prosecutor may use nebulous concepts such as “gravity” and the “interests of justice” to determine whether or not a case should proceed. Because they are poorly defined, both of these concepts help to justify political decisions vis-a-vis selectivity via legal language. In the case of gravity, for example, Schabas writes (2012, 89) that “[t]he gravity language strikes the observer as little more than obfuscation, a laboured attempt to make the determinations look more judicial than they really are... to take a political decision while making it look judicial.” This, as Alana Tiemessen (2013) argues, is deeply problematic as it leads to selective prosecutions of only one side of a conflict and risks perpetuating rather than filling “impunity gaps”.

### III. ICC Institutional Interests in Northern Uganda and Libya

In the eight situations in which the ICC has intervened, the sources of referral, especially in the case of the Security Council and self-referrals by member-states, have directed the ICC with regards to which parties to target for prosecution. Security Council referrals tend to lead to the Office of the Prosecutor to focus on government officials and adversaries of Council member-states. Self-referrals lead the OTP to target rebel groups and officials out of favour with the referring government. This is not an accident. Deciding which parties to a conflict to prosecute is the result of a negotiation between the political interests of referring powers and the institutional interests of the ICC.

**Chart 8.1:** Referrals, Institutional Interests and ICC Effects on Peace, Justice and Conflict Processes



The decision-making that flows from this negotiation of interests determines the effects the Court has on conflict, peace and justice processes (see Chart 8.1). This can be seen in both cases at the core of this thesis: northern Uganda and Libya. Both have followed the trajectory of decision-making, negotiation of interests and selectivity elaborated above. Predictably, this has had a significant impact on peace, conflict and justice processes in both and provides an additional and important layer to our understanding of how and why conflict, peace and justice processes unfolded the way they did in both cases.

*(i) The ICC Intervention in Northern Uganda*

According to staff within the OTP (confidential interview 2013a), during the first years of the Court's existence, Moreno-Ocampo was facing significant pressure from external actors, including human rights NGOs and judges within the Court, to open a first case. Moreno-Ocampo's inclination was to open an investigation into alleged crimes committed in the Ituri region of the Democratic Republic of Congo because the crimes were grave, recent, the DRC was a State party, and the prosecutor was advised specifically to do so by different actors (*ibid.*). He eventually did so in 2004, following a self-referral from the country's President Joseph Kabila for the whole of the DRC. However, he was also advised that the conflict in the eastern DRC was too complex and complicated for a young, inexperienced institution to delve into for its first case (*ibid.*). The field conditions were extremely difficult and dangerous for ICC staff and witnesses. A running joke within the Court was that Moreno-Ocampo would “end up like Che Guevara, another Argentinian stuck in the Congo.” (*ibid.*).<sup>58</sup>

The DRC posed logistical challenges as well. To appropriate Barnett's phrasing, it did not represent an obvious “winner” for the ICC. Other situations were more appealing. Whilst struggling to come to a decision on whether or not to proceed with an intervention into the DRC, Moreno-Ocampo was approached by Payam Akhavan who was representing Uganda on a case in front of the International Court of Justice. Akhavan asked whether Moreno-Ocampo would be interested in a self-referral from Uganda (see also Akhavan 2005, 403). According to OTP staff (confidential interview 2013a), in response Moreno-Ocampo:

got overly excited with that prospect because it was the ticket out of the Congo. Furthermore, LRA crimes were extremely grave and cruel, Kony and his commanders were notorious perpetrators about whom it should not be too difficult to prove a case, the LRA was considered a terrorist group by the USA (which would help managing the

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<sup>58</sup> The joke refers to fellow Argentine, Che Guevara's failed attempt at initiating revolution in the Congo in the 1960s.

USA at a point when they were hostile towards the Court), and the Ugandan government was expected to give full cooperation for the investigation. The Court needed a first successful case on a notorious situation, sooner rather than later, and Northern Uganda appeared to be the better candidate for that purpose.

Rodriguez (2009, 219) adds that, in comparison to the DRC, “investigating the perpetrators of the conflict of Northern Uganda seemed less complicated to the ICC...Besides, Uganda, unlike Congo, had more functioning infrastructures.” The OTP did not need to create a popular narrative of an evil LRA. It already existed. “Because the situation could be described with simplicity, it seemed clear that the LRA was the villain, and that the government of Uganda had tried their best to protect the population and fight the LRA.” (Ibid.). In other words, not only did the ICC embolden and entrench the narrative of a good GoU against an evil LRA which, as shown in Chapters 4 and 5, had important implications on the peace process in northern Uganda, but its decision-making was itself shaped by this pre-existing conflict narrative. The dominant 'good' versus 'evil' discourse justified the ICC's intervention and also served the Court's interests. In turn, the ICC's intervention reaffirmed that narrative and served the interests of those who benefitted from the narrative remaining unchallenged – the GoU.

In line with the analysis offered above, the ICC's decision-making in Uganda “can be explained by considering its institutional interests at the time of the referral.” (Nouwen and Werner 2010, 953). For the ICC and for Moreno-Ocampo, Uganda was seen as an important opportunity to demonstrate the vitality of the Court. The ICC needed to prove its mettle. It wanted to be noticed and it needed to demonstrate that it was more than the paper tiger its critics claimed it was. The situation in Uganda was seen as an ideal case. Akhavan (2005 404) writes: “For the ICC, the voluntary referral of a compelling case by a state party represented both an early expression of confidence in the nascent institution’s mandate and a welcome opportunity to demonstrate its viability.” (see also Lanz 2007, 7). According to Branch (2011, 187), Uganda's self-referral met two requirements for the Court: it was a voluntary referral from the GoU and thus “feasible on the local level” and it did not conflict with the interests of any major powers. The ICC and its supporters thus welcomed the referral. Senior Canadian politician and diplomat, Lloyd Axworthy and Uganda expert Erin Baines (2005) wrote that “[i]f it works, it will install a very potent instrument of justice.” Others saw Uganda it as a “litmus test” (Akhavan 2005, 404; Apuuli 2008, 804) for the Court.

As Nouwen and Werner (2010, 949) point out, the GoU did not refer itself to the ICC “out of a conviction about law and justice” but rather “as part of a military strategy and international reputation campaign.” Museveni made the referral not because Uganda was unable or unwilling to *prosecute* senior LRA commanders but because the Ugandan military, Uganda People's Defense Force (UPDF),

had been unable to arrest them (Apuuli 2008, 805).<sup>59</sup> As noted in Chapter 5 and recalled by Ugandan Judge Alfonse Owiny Dollo (2011), the Government consciously attempted to first refer the “LRA situation” to the Court but the ICC refused in order not to give the appearance of partisanship. The Court cannot accept referrals of specific perpetrators or groups but only “situations”.

Moreno-Ocampo did attempt to give the appearance that his office was, in fact, impartial and would investigate all sides. The Prosecutor (successfully) requested that the referral be interpreted as a referral of “the situation in northern Uganda” rather than “the situation concerning the Lord's Resistance Army” (see Decision Assigning the Situation in Uganda 2004). Moreover, observers and ICC staff argue that the Prosecutor was deferential to efforts to establish an official peace process (see AMICC 2006). Matthew Brubacher (2010, 274), a former OTP staff member, maintains that the OTP carefully and politically calculated the timing of its request for arrest warrants, with Moreno-Ocampo waiting to make his application when “the LRA capacity to inflict violence was low relative to the ability of the Ugandan government to provide security.” Additionally, Sarah Nouwen (2013, 213-214) observes that the OTP was clear that, with the exception of those LRA leaders it had indicted, it had no intention of undermining the provision of amnesties in northern Uganda. From the outset, however, the Prosecutor gave the impression that his office was allied with the Government of Yoweri Museveni (Nouwen 2013, 230). Clark (2011) has found that the Prosecutor's office had been engaged in negotiations with GoU as well as DRC government officials for at least one year before either referral was made. He adds that “Only when the Ugandan and Congolese governments were certain that an ICC intervention would serve their interests did they request the Court’s involvement. The suspicion among many Ugandan and Congolese actors is that deals were struck and promises made to convince their governments to cooperate with international justice.” (Ibid.). The perception of bias was most dramatically evidenced when Museveni and Moreno-Ocampo appeared, side-by-side, in a London hotel room at a press conference announcing that Uganda had referred itself to the Court. It is very unlikely that this was simply an oversight or blunder that could be attributed to a young Court going through growing pains. Given that negotiations had been going on for over a year, it is far more likely that Moreno-Ocampo had been advised not to appear with Museveni and told that it would give the OTP the impression of being biased.

That the Prosecutor targeted only the LRA can be explained by the fact that the OTP needed the cooperation of the GoU in order to conduct any investigations. As one former senior ICC member

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<sup>59</sup> This point was also reiterated by numerous interview respondents including Justice Alfonse Owiny Dollo and Lt. Col. Felix Kulayigye.

(confidential interview 2014b) recalls:

At this moment, [the Prosecutor] is trapped. Yes it is a referral of a situation but if he wants the support of the country, information, documentation, [then] he needs to operate in the country. If you say: “we are going to look at UPDF, allegations against UPDF”, what kind of document do you have to have? That's the issue. How are you going to be able to make your case against the country, against the power, against the head of state who actually is able to block all the documents [so] that you can't have any information about these cases. One of the main things for international criminal justice is to have support of the states. If Moreno-Ocampo said I will investigate not only LRA but UPDF, he will not have support from Uganda. All of what you need to investigate, you will not get.’

The result of this 'trap' was a decision to target only the LRA, leaving GoU and UPDF crimes outside the remit of international criminal justice.

The ICC intervention delivered benefits to the GoU. Museveni rightly calculated that requesting the intervention of the ICC would add to the ongoing marginalization of the LRA and legitimization of its war against the rebels. According to Branch (2007a, 183), it was an “excellent strategy” in criminalizing and further delegitimizing the LRA. As Werner and Nouwen (2010, 950) add: “While branding the LRA as humanity’s enemy, the referral portrayed the Ugandan government as a defender and friend of mankind.” Similarly, as Olara A. Otunnu (2006) writes, “[t]o keep the eyes of the world averted, the government has carefully scripted a narrative in which the catastrophe in northern Uganda begins with the LRA and will only end with its demise.” The ICC's intervention legitimated the GOU, further castigated the LRA and likely bolstered the GoU's commitment to military solutions to the war.

The OTP attempted to dispel criticism that it was biased by arguing that the UPDF's crimes have been investigated but did not meet the Court's gravity threshold (See Statement by the Chief Prosecutor 2005; Moreno-Ocampo 2007b). In a statement in the wake of the unsealing of the five arrest warrants, Moreno-Ocampo stated: “Crimes committed by the LRA were much more numerous and of much higher gravity than alleged crimes committed by the UPDF. We therefore started with an investigation of the LRA.” (See Statement by the Chief Prosecutor 2005, 2-3) This conception of gravity has apparently precluded the OTP from requesting arrest warrants for any GoU or UPDF officials. But it was poorly received by a population that had suffered from crimes perpetrated by both sides and, according to Branch (2011, 188), reflected “the Prosecutor's public acceptance of the official discourse on the conflict” which “assumes the absolute malevolence of the LRA and, by implication, the benevolence of the Ugandan government”. Gravity seemed an odd reason to neglect the crimes and human rights abuses perpetrated by the UPDF and, as Finnström (2008, 227) writes, gave “the court procedures a high degree of arbitrariness when imposed upon Ugandan realities... [T]he Court's

mandate and principle of gravity makes little sense to my Ugandan friends.” In the case of Uganda, the political decision was to take sides: to indict LRA commanders and leave the UPDF and GoU free to proclaim their innocence.

The effects of the ICC on peace, justice and conflict processes in northern Uganda were, in large part, a result of the ICC's selective prosecution of the LRA. As explored in Chapters 5 and 6, the arrest warrants for the senior LRA officials propelled a narrative of a tyrannical LRA fighting a benevolent GoU. While the LRA sought to challenge this asymmetrical narrative at the Juba peace talks, negotiations were hindered because Kony and Otti would not lead the LRA's delegation and because both sides – the LRA and the GoU – never appeared to genuinely commit to peace negotiations. The dominant conflict narrative has been left largely unchallenged and permeates post-conflict justice in northern Uganda.

The political interests of the GoU and the institutional interests of the ICC converged in 2003. As a result, the Court intervened but did so selectively, pursuing only the LRA while neglecting UPDF crimes. But this convergence of interests did not last forever. Divisions emerged during the Juba talks when the GoU publicly toyed with the idea of negotiating away the arrests warrants for the LRA senior command. Moreover, President Museveni has recently been amongst the most vociferous of the ICC's critics, exclaiming that it is a neo-colonialist institution bent on unfairly targeting African states. This has left many in the OTP “furious, not only because they risk seeing their historic first case reduced too far, but because they launched the inquiry at the request of the Ugandan government, which is now accusing the ICC of neo-colonialism.” (see McGreal 2007; Bosco 2014, 126).

Given the OTP's decision-making, it seems impossible that the ICC would target the GoU now for crimes committed during the war in northern Uganda. Doing so would give the Court the appearance of having purposefully not targeted the UPDF – and investigators would receive no cooperation from a belligerently anti-ICC Museveni.

#### *(ii) The ICC Intervention in Libya*

Few could have foreseen that Libya would emerge as a target for an ICC intervention or that, within just three months of being asked to investigate alleged atrocities in the country, the Court would issue arrest warrants against its head of state, Muammar Gaddafi, his son and heir apparent Saif al-Islam Gaddafi and the country's head of intelligence, Abdullah al-Senussi. In fact, the ICC itself was unprepared with poor Arabic language outreach and a shortage of Arabic-speaking lawyers (See ICC Launches Campaign 2011). The Court's lack of preparedness was hardly without reason. The idea of an

Arab or Middle Eastern state becoming a situation under the ICC's jurisdiction did not seem feasible prior to the Arab Spring of 2011. Since the Court's creation, the relationship between the Arab world and the ICC had been one of the more neglected subjects in the study of international criminal justice.<sup>60</sup> This changed with surprising speed.

The ICC was eager to accept the Security Council's referral of the situation in Libya, an act which was seen as an opportunity to capture international attention and to have an impact on an ongoing conflict. According to one senior official (confidential interview 2013f), the OTP “focused on what we saw as an incredible step of a unanimous referral... [it] felt like a legitimizing step.” As noted in Chapter 6, UN Security Council Resolution 1970, which referred the situation in Libya to the ICC, was passed with the backdrop of unprecedented regional and state support for action against the Gaddafi regime in Libya. The referral was seen as a legitimizing act for the ICC and was roundly praised by proponents of the Court. Observers highlighted, in particular, that it had been passed with unprecedented efficiency and was authorized unanimously by all members of the Security Council (see, e.g., Amnesty International 2011a; Coalition for the International Criminal Court 2011; Human Rights Watch 2011a; RNW International Justice 2011). Amnesty International (2011a), for example, exclaimed that the unanimous “referral of Libya to the International Criminal Court marks a historic moment in accountability for crimes under international law,” while Geoffrey Robertson called it a “great milestone in international criminal justice.” (See Chatham House 2011, 3). For advocates and champions of the Court, Resolution 1970 no doubt contained many important advances for the ICC. A number of key powers who were not ICC member-states, including China, Russia, the United States and India, voted in favour of the Resolution. The United States not only voted in favour of referring Libya to the ICC but co-sponsored the Resolution.

Still, Resolution 1970 had deeply political contours. As detailed in Chapter 4, the referral included provisions barring the Court from investigating citizens of non-ICC member-states, a reference to the Security Council's ability to intervene and stop any ICC investigation or prosecution via Article 16 of the Rome Statute, and restricted the Court from investigating any alleged atrocities prior to 15 February 2011. Moreover, the referral saddled the ICC with any and all costs incurred by its investigations in Libya. But these issues were not a source of apprehension for the OTP. Christian Wenaweser, the former President of the Assembly of States Parties, stated that there was “pretty much everything wrong” with the language in Resolution 1970<sup>61</sup> while his predecessor, Bruno Stagno Ugarte

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<sup>60</sup> For a notable exception, see Roach 2006, 137-158.

<sup>61</sup> Comments by Christian Wenaweser at conference, *Through the Lens of Nuremberg – The*

(2012) wrote that language in both Resolutions 1593 and 1970 was “inimical to the integrity of the Rome Statute.” However, as one OTP source (2013f) explains: there were “few concerns” within the office over the terms of Resolution 1970. The OTP was not blind to the conditions imposed in Resolution 1970, but to complain would be “like getting great gift on birthday and then complaining about the wrapping paper.” (ibid.). Others felt that to complain would be tantamount to political advocacy. As one OTP staff member (confidential interview 2013c) explains,

If we advocate politically for a broader referral from the Council, in terms of territorial jurisdiction (more than Darfur) or temporal jurisdiction (earlier than 15 February 2011, as with Libya) or personal jurisdiction (not excluding any nationals of non-States Parties, for example), where do we draw the line in our advocacy? We have to be very careful about what we advocate for, lest we be accused of playing a political role.

In accepting the referral and opening an investigation, the Prosecutor could also “demonstrate unity with the international community.” (ibid.). One former OTP staff member (confidential interview 2014c) recalls that the office was “abuzz” about the opportunity of playing an active role in ongoing events in Libya.

If the ICC was going to have any impact on the situation in Libya and thus prove its utility to the international community, it had to proceed expeditiously. The Court had to capitalize on the Council's referral – and the nominal unity behind its purpose. As a matter of prosecutorial strategy, the OTP deliberately chose to proceed rapidly. According to a staff member (confidential interview 2013f), the Prosecutor “thought that he had to [move quickly] because the international community came to us first... [I]f we sit on it, then it's pointless. The signal was to do something... [and] the Prosecutor felt we could marginalize the main perpetrators.” At the same time, the Prosecutor understood that international support for the Court was unlikely to be permanent or steadfast. Any benefits to the Court had to be captured within a narrow window of opportunity. The “idea was, if we act quickly, that we would have an effect and support in international community was fragile and fleeting.” (ibid.).

From the moment that it accepted the UN Security Council referral, the OTP moved with unprecedented speed to open a formal investigation and to request that the Court's Pre-Trial Chamber issue arrest warrants. On 3 March 2011, just fifteen days after receiving the referral from the Security Council, ICC Prosecutor Moreno-Ocampo declared that crimes under the jurisdiction of the Court had been perpetrated in Libya. Two months later, Moreno-Ocampo declared that “[c]rimes against humanity have been and continue to be committed in Libya, attacking unarmed civilians including

killings and persecutions in many cities across Libya” (ICC 2011). Just days after, Moreno-Ocampo requested that the ICC Pre-Trial Chamber issue arrest warrants for Gaddafi, Saif and Senussi, and on 27 June, less than four months after the OTP opened its formal investigation, the Court had issued arrest warrants for all three.

While the speed with which the Prosecutor proceeded surprised some human rights advocates (Abrahams 2013), the decision to proceed so expeditiously reflected the desire of the OTP to have an impact on a fast-developing conflict. But to have the *desired* effect, the Prosecutor also judged that he would have to target NATO's adversaries in Libya – i.e. key figures of the Gaddafi regime. Moreno-Ocampo was very quick to name his targets. During a press conference announcing the opening of an official investigation, the Prosecutor exclaimed:

We identify some individuals with de facto or formal authority who have authority, authority on the security forces who allegedly committed the crimes. They are Muammar al-Gaddafi, his inner circle including some of his sons who had de facto authority. (See Libya Situation 2011).

This early invocation of the responsibility of Gaddafi, his sons and key officials was legally questionable (Knoops 2012) and was subsequently raised by defence counsel at the ICC (See Keïta (2011). Moreover, according to Fred Abrahams (2013), Moreno-Ocampo's public focus and “proclivity for media dramatics, in my view, undermined his credibility as a Prosecutor.” Abrahams (2013) further criticizes the timing of the warrants, suggesting that the haste with which they were issued left the Court vulnerable to criticisms that the ICC was being manipulated by the intervening forces in Libya:

The timing of the indictment was problematic and Ocampo's dramatics were problematic. Because it happened so fast, it opened the Court and more broadly, international justice mechanisms, up to criticisms of politicization because the speed with which it happened and the quick indictments against a targeted enemy of major western powers had that impact... [It is] a tricky [situation] because if they've got the goods, they should do it – they shouldn't pull punches. But in this case, one has to recognize that it is one of the side effects that the ICC could more easily be criticized for serving a political interest.

Moving so expeditiously also appears to have locked the OTP into targeting Gaddafi officials. As an OTP member of staff (confidential interview 2013f) states, the Prosecutor was interested in “charging someone where the narrative makes sense” and it did with the “long history of Gaddafi's criminal conduct.” Again, the conception of the Gaddafi regime as being 'evil' preceded the ICC's intervention. And while it should be conceded that Moreno-Ocampo (see Libya Situation 2011) also declared that “if opposition groups commit crimes, their leaders will also be investigated,” his statements ultimately

contributed to the framing of the conflict as one in which the key perpetrators were to be found within the Gaddafi regime.

The Prosecutor's selectivity fits within the above analysis regarding the ICC's institutional interests and, more specifically, the desire to be seen as effective and to be legitimized by the Security Council. As one former senior ICC official argues, targeting individuals or groups supported by the Security Council and NATO – i.e. the rebels or the National Transitional Council – could have undermined the Court's interests. The Prosecutor's selectivity in Libya “has to do with the desire to illustrate to the Security Council that this can be a good thing .... [I]f you start to indict those that permanent members say are wonderful and are the future of the country, then perhaps you won't demonstrate how good of a court you are.” (Confidential interview 2013e). In response to a question regarding the case selection, another ICC staff member (confidential interview 2013f) explained: “in all these decisions, you need to think about building our legitimacy.”

The ICC's selectivity in only targeting the Gaddafi regime had important effects on the conflict narrative and the attitudes and incentives of the warring parties towards peace. The regime was delegitimized, Gaddafi once again considered 'evil' and beyond the pale of redemption – or negotiation. The legitimacy of rebels and their political wing, the National Transitional Council, was bolstered and they were also able to tap into the rhetoric provided to them by an internationally ostracized regime in their refusal to hold peace talks with Gaddafi. They could not negotiate with the regime because, after all, it was now led by a tyrannical international criminal. This further legitimized calls – by NATO states as well as the Libyan opposition – for regime change and military solutions to defeat the Gaddafi regime (see Kersten 2014a). This 'good' versus 'evil' narrative has continued into the post-conflict period in Libya where individuals affiliated with the regime are the targets of assassinations and laws such as the Political Isolation Law. Crimes committed by opposition forces, however, have not only been largely ignored; the rebels and militia have been absolved from responsibility via a blanket amnesty covering acts committed in the name of the Revolution.

As for the OTP, it was soon left in a very difficult position. As noted in Chapter 6, it is not clear how strong the Court's cases against Saif or Senussi were. Abrahams (2013) observes that the “difficulty of conducting investigations in Libya makes it possible that their dossier is thin.” Evidence could have been provided by the third-party states which were intervening in Libya. However, it quickly became clear that powerful actors would not lend it support if it pursued the surrender of Saif or Senussi. At almost the same time as the warrants were issued, NATO states had made it known that justice was up to Libyans to achieve (see Kersten 2014a and 2014c). The farthest these states went in

supporting the Court's mandate was to claim that they “encourage Libya to continue cooperating with” the ICC (Kersten 2014c). As one former ICC staff member notes (confidential interview 2013e), impressing the Security Council didn't work in Libya. In the end, “[i]t didn't work at all. The Council stopped being interested in [the ICC].” In response, and as noted in Chapter 7, instead of pushing for the cases, the OTP was remarkably lenient, generally siding with Libya that it should prosecute Saif and Senussi. The OTP has sought to frame its work in Libya in the context of positive complementarity, whereby it sees its role as contributing to rather than competing with Libya's pursuit of accountability. Positive complementarity provides the means with which to save face – as well as to support the Libyan people's desire to have perpetrators prosecuted in Libya, by Libyans. These developments fit well within Sarah Nouwen's (2013, 13-14) analysis of when the OTP will encourage domestic proceedings and when it will push for trials in The Hague:

In accordance with what it perceives to serve its institutional interests (legitimacy and, what it prioritises even more, effectiveness), [the OTP] has encouraged domestic proceedings in those situations and cases in which cooperation is unlikely to be forthcoming, in which intervention would upset an international great power and in which it has not yet invested many resources. But it has discouraged domestic proceedings in situations and cases where it could count on essential cooperation, which have obtained the blessing – or at least a no objection certificate – from the world's great powers and in which it has invested its resources.

At the same time and as noted in Chapter 7, the OTP has moved on from the Libya situation and avoided opening any new cases in Libya. Despite some statements suggesting the ICC may still investigate alleged crimes committed by Libyan militias (see, e.g., Statement of the Prosecutor 2013), there is no sign that those investigations will result in the opening of an official investigation, let alone arrest warrants.

The referral of Libya signalled an unprecedented, albeit temporary, convergence of interests between the Security Council (and especially the NATO states that intervened) and the ICC. When the ICC received the Council's referral, Moreno-Ocampo calculated that the Court had to seize the moment. Whether it was an extension of his discretion or external political expectations (and most likely some combination of both), the Prosecutor did precisely what the UN Security Council and Libyan rebels would have wanted: he moved quickly to target and criminalize their opponents – the Gaddafi regime. What followed were failed attempts to get the parties to the negotiating table, a loss of interest in the ICC's mandate to prosecute Saif and Senussi in The Hague, and, after the UNSC loss of interest in Libya, an attempt by the OTP to frame its effects on Libya through the lens of positive complementarity.

#### IV. Conclusion: Behind the Veneer

How the ICC affects peace, justice and conflict processes is determined by who the Court targeted for prosecution and who it didn't. *Which* side of a conflict is targeted for investigation and prosecution by the ICC is a determining factor in the effects of the Court's interventions on ongoing and active conflicts. In northern Uganda, only non-state actors (the LRA) were targeted, despite widespread acknowledgement that the Government and the Ugandan military were also responsible for atrocities. In doing so, it propelled an asymmetric conflict narrative, galvanized the LRA's interest in peace talks, impacted the LRA's delegation at Juba, and affected the choice of Juba for peace negotiations. In Libya, only Gaddafi regime figures were pursued by the ICC, while the alleged crimes committed by rebels have been left uninvestigated. This too (re)produced an asymmetric conflict narrative, one which legitimated a military solution to the conflict, the opposition's rejection of negotiations with the regime and the ultimate aim of regime change. The ICC would not have had these effects on peace, justice and conflict if *both* sides of the conflicts in Libya and northern Uganda had been targeted.

More broadly, the specific selectivity that flows from self-referrals and Security Council referrals risks creating particular types of asymmetry in how a conflict is understood and, in turn, affects how peace processes can (or can't) move forward (see Chart 8.1 above). This chapter has sought to explain from where this selectivity derives, arguing that the selection of prosecutorial targets is linked to how situations are referred to the ICC and the consequent negotiation between the interests of referring parties to have their adversaries targeted by the Court and ICC's own institutional interests: cooperation for case-building; cooperation for the enforcement of arrest warrants; and the desire to be perceived as an effective institution.

This chapter should not be read as a criticism of the ICC. Acknowledging the politics of the Court or that the OTP considers the Court's institutional interests in deciding who to prosecute is not an indictment of its decision-making but an attempt to understand it. Without considering how its decision-making would affirm its legitimacy and standing in international politics, the Court would not survive for very long.

The purpose of the above analysis was to answer the question: *why* does the ICC have the effects that it does on the conflicts in which it intervenes? What followed was a critical examination of the Court in an attempt to understand and explain the reasons for its decision-making, what factors determine the OTP's selection of targets, and how this decision-making determines its effects on peace, justice and conflict processes. The ICC's effects stem from decisions made within the Court on *how* to intervene in ongoing and active conflicts and, specifically, *who* to target. This is an important finding as

it points to the fact that different decisions within the Court can have different impacts on peace, justice and conflict processes. The effects of the Court are not invariable.

## **Chapter 9 – Conclusion**

*If you have a system of international justice you've got to follow through on it. If in some cases that's going to make peace negotiations difficult that may be the price that has to be paid. The international community must keep a firm line and say are we going to have a better world because of the international court or not.* – Richard Goldstone (quoted in McGreal 2007)

*The ICC indisputably forms part of a broader, global diplomatic network of international politics* – Antonio Cassese (2006, 8)

### **Introduction**

While there is no doubt that the ICC has complicated efforts to peacefully resolve active and ongoing conflicts, it remains unclear whether the ICC is ultimately a help or hindrance to peace processes. Still, it is possible to offer some concluding reflections about the ICC's impact.

This thesis has sought to answer three questions:

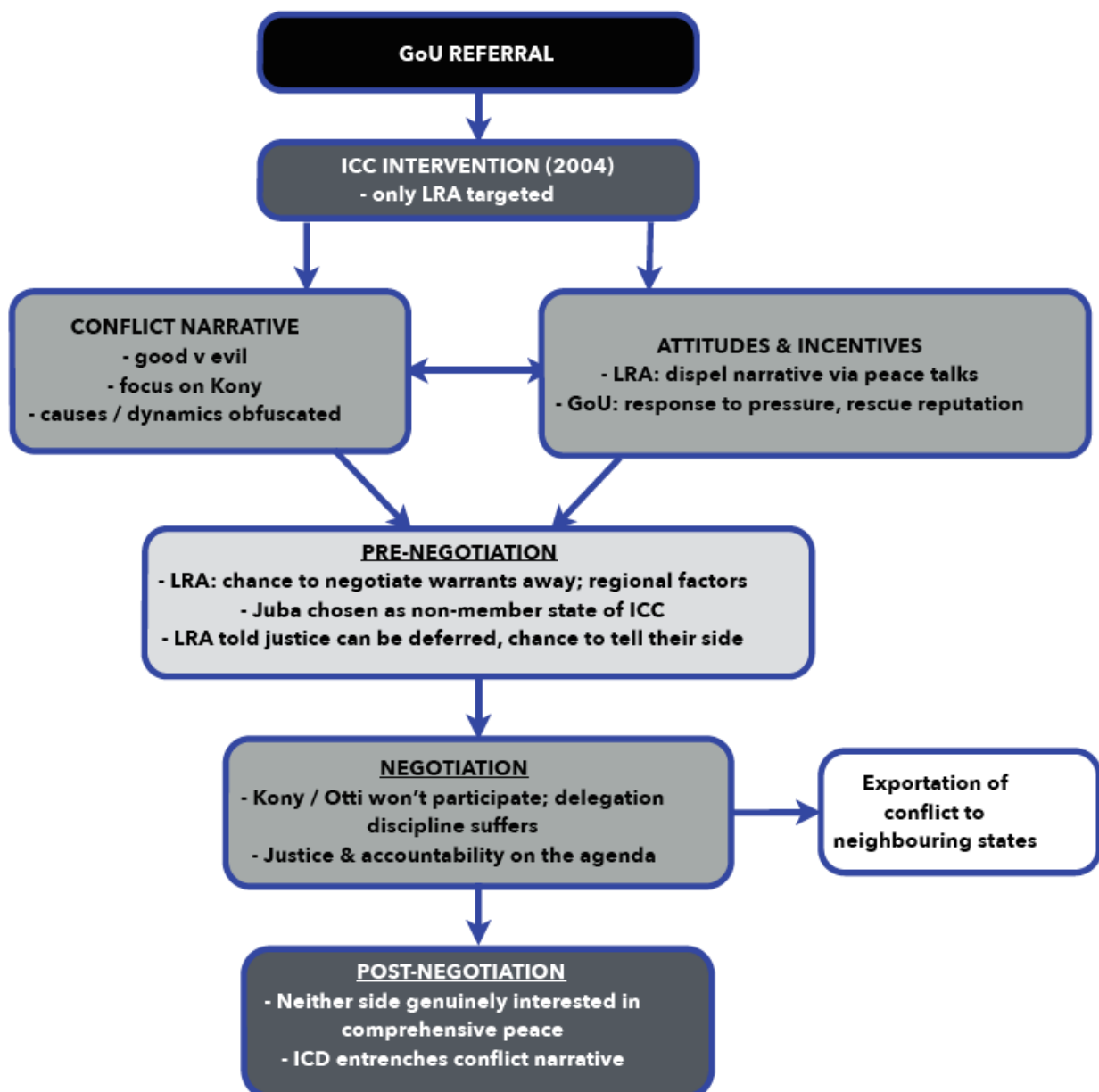
- (i) *How* should we study the effects of the ICC on the conflicts in which it intervenes?
- (ii) *What* are the effects of the ICC on peace, justice and conflict processes in northern Uganda and Libya?
- (iii) *Why* does the ICC have these effects on peace, justice and conflict processes?

This concluding chapter revisits how the thesis answered these research questions. In the first and second sections, the key empirical findings of the thesis are outlined. The primary effects of the ICC's interventions in Libya and northern Uganda are summarized in this section as well as in Charts 9.1 and 9.2 respectively. These sections also briefly consider the current state of affairs in Libya and northern Uganda as well as prospects for further ICC involvement. In lieu of a traditional comparative analysis, the third section of the chapter draws on insights from both the Libyan and northern Ugandan cases to reflect on each aspect of the thesis' analytical framework, highlighting where future research should be focused as well as offering some practice-oriented conclusions.

## I. The ICC in northern Uganda

The ICC's intervention into northern Uganda has had mixed effects on peace, justice and conflict processes (see Chart 9.1). The Court's intervention, insofar as it targeted only the LRA and not the GoU, entrenched an already potent narrative that the conflict was caused by the LRA and that Joseph Kony was personally liable for the crimes and atrocities committed during the war. The political causes and dynamics were obfuscated in favour of a view of the conflict as humanitarian crisis for which the LRA was solely responsible. This benefitted the GoU and delegitimized the LRA.

**Chart 9.1:** The Effects of the ICC's Intervention in northern Uganda



Unlike the prediction of critics that the ICC dissolves the incentives to negotiate peace, the LRA high command responded to the ICC's intervention by exploring negotiations and saw peace talks as an opportunity to challenge the dominant conflict narrative. There is also evidence that they also saw the relative calm of peace talks as a opportunity to regroup and rearm. The GoU, on the other hand, was compelled to demonstrate a commitment to the Juba negotiations for reasons other than the ICC. In particular, the GoU needed to rescue its image which had been stained by its inability to resolve the war with the LRA as well as images of large-scale suffering in the north.

How to achieve justice and accountability received privileged attention in the Juba talks' agenda. This was particularly noteworthy as it had not formed part of previous rounds of negotiations between the LRA and the GoU. Both delegations agreed to the creation of a division of Uganda's High Court which could investigate and prosecute international crimes relating to the conflict. As noted in Chapter 6, this was done, at least in part, as a potential means to confront the ICC warrants via a complementarity challenge. But there is no evidence that either Kony or the LRA high command accepted the creation of the War Crimes Division and there is every indication that it was set up to prosecute only the LRA – and not UPDF perpetrators. This division in what the LRA delegation negotiated and what the LRA high command approved is symptomatic of the divide between the two. From the outset of the Juba talks, the representativeness of the LRA delegation was in question. Citing their fears over being arrested and sent to the ICC, both Kony and LRA second-in-command Vincent Otti refused to participate directly at Juba. During the talks, many delegates sought to pursue their own interests and delegation discipline suffered. The talks received a severe blow when Otti was killed on suspicion that he was privately negotiating with the GoU. While the negotiations produced several agreements between the delegations, neither Kony nor President Museveni ultimately decided to sign the comprehensive peace agreement. Questions remain as to whether they ever intended to do so – irrespective of the ICC warrants.

There is strong evidence that the GoU was never fully or genuinely committed to negotiating a comprehensive peace with the LRA. Figures within the Government and the UPDF benefitted significantly from their continued conflict against the LRA – both monetarily and in terms of the legitimacy bestowed upon them for fighting 'evil' terrorists. Engaging in negotiations painted the GoU as a willing partner in peace and may have helped restore its reputation. But it is clear that its primary intentions were to resolve the war through military means, an approach it quickly returned to upon the termination of peace talks (see Atkinson 2009). The Government's ability to legitimize such action was only abetted by its ability to blame the LRA for the failure of the peace talks.

There is also evidence that the LRA may likewise have been uninterested in negotiating a settlement. The LRA 'bought time' under the veneer and relative security of peace negotiations. Moreover, the killing of Otti – who many believe was genuinely interested in finding a lasting peace – signalled a death knell for the talks. Even if the ICC warrants were lifted, many insist Kony would not have 'come out of the bush'. Crucially, what his fate would be post-Juba was never clarified. In explaining why they could not continue to negotiate or sign a comprehensive peace agreement with the GoU, the rhetoric of “peace versus justice” was particularly useful for the LRA. Because neither the GoU nor the LRA were genuinely committed to a conclusive peace to their war, it cannot be concluded that the ICC undermined the potential for peace at Juba. A comprehensive peace was simply not on the table.

The conflict has not been resolved. Instead, it has been exported to Uganda's neighbours, where the LRA remains active. But despite the failure to achieve a final peace agreement, northern Uganda is enjoying an unprecedented period of stability. There have been no reported LRA attacks on northern Ugandan soil since the conclusion of the Juba negotiations. Thus, the ICC's intervention did not prevent peace in northern Uganda, at least insofar as peace can be understood in its negative variant – the absence of large-scale physical violence (Galtung 1969). This period of peace may also explain the lack of fear that Uganda's first-ever war crimes trial, of former LRA commander Thomas Kwoyelo at the International Crimes Division (ICD), would undermine stability in the north. However, Kwoyelo's trial is also indicative of northern Uganda's asymmetrical conflict narrative being extended into the post-Juba context. As made clear in Chapter 5, in practice, the ICD will only prosecute the LRA.

Today, local interest in the ICC's role in northern Uganda has withered. Other issues, including land appropriations (see Mabikke 2011; IRIN 2012), education and development are much higher on the political agenda than international justice. According to Atkinson and Titeca (2014), the LRA is present in small groups in the CAR, DRC and South Sudan and, since 2010, has “splintered into ever smaller, increasingly uncoordinated bands totaling probably less than 200 fighters.” 2010 also marks the date of the rebels' last large-scale attack (Ibid; HRW 2010).

The relationship between the GoU and the ICC has soured. Museveni is now amongst the most virulent critics of the Court (Mao 2013; Mutaizibwa 2013). This is perhaps not surprising. The Ugandan President has always had a schizophrenic approach to international justice (see Kersten 2013a). With the Court's 2010 intervention into Uganda's regional ally and economic power Kenya and its targeting of current President Uhuru Kenyatta, Museveni has identified an opportunity to curry favour with Nairobi by opposing the ICC. Most ironically given his direct role in negotiating the

Court's intervention into northern Uganda, he has insisted that “[t]he ICC in a shallow, biased way has continued to mishandle complex African issues. This is not acceptable.” (See Mugisa 2013).

The prospects for a return to peace negotiations are unclear. As Finnstrom (2008, 85) observed: “The rhythm of the war in northern Uganda has always been an uneven one.” There is a lull now but without a comprehensive peace, there is no promise that the current stability and order will last forever, especially if underlying factors are left unresolved and unchallenged. In contrast to Atkinson and Titeca, the ICG has warned that the LRA may only be sleeping (see Lesueur).

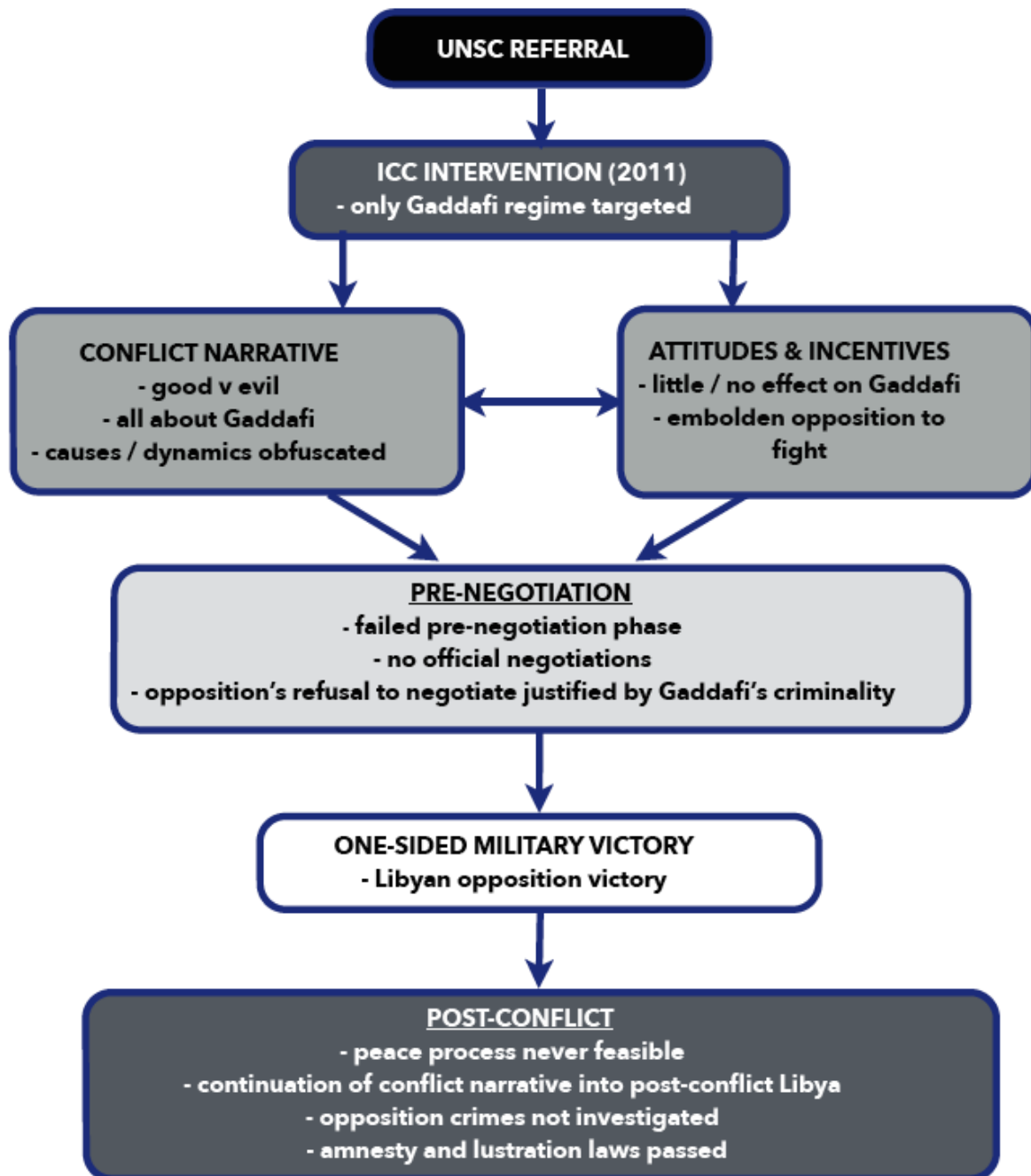
To date, efforts to resolve the war through dialogue have been propelled by a particularly statist view of the conflict where the ultimate aim is to get a comprehensive agreement between the LRA and the Government of Uganda. Chapters 4 and 5 of this thesis reiterated the importance of regional actors, especially Sudan and South Sudan, but also the DRC and CAR in achieving a lasting peace. A broader approach to building peace, one which captures the diversity of actors responsible for both the continued crisis and any potential peace, is required. Some of the structural issues in the region – especially related to “poor governance” – need to be resolved (Schomerus et al 2011). Moreover, the apparent incentives on the part of the GoU to continue its military conflict with the LRA, as discussed in Chapter 6, need to be acknowledged – and challenged. As Doom and Vlassenroot (1999, 31) rightly noted, “it may be wondered whether a kind of no-peace/no-war situation is not in their favour.” While it is common to hear or read about the fact that the conflict between the LRA and the GoU has lasted a quarter of a century, perhaps the more telling point is that it has been ongoing almost exactly since Museveni came to power. The GoU continues to benefit from this war, in the form of international attention and, more recently, a 100-troop force of US soldiers which provide the UPDF with non-lethal military aid for the 'hunt for Kony' (Fisher 2011; Keating 2011). To date, these efforts have been futile (see Economist 2014b) and, despite rumours that Kony is prepared to surrender, there is no compelling evidence that he is planning to do so (see Ronan 2013). Indeed, there is no strong evidence that he remains alive.

Ultimately, if a lasting peace is to succeed, the conflict narrative in northern Uganda must be challenged. It does not appear that this will occur any time soon. Indicative of the staying power of the conflict narrative, two of the most respected northern Uganda observers describe the current 'hunt for Kony' as the product of “framing the LRA issue as a personal and technical military problem, rather than a political one” and one with “a single goal... to catch Kony.” (Titeca and Atkinson 2014). The response to Invisible Children's Kony 2012 is also indicative of how stubborn this narrative is (see Finnström 2012). Unfortunately, the conflict retains the same narrative – and the same narrators.

## II. The ICC in Libya

Few could have foreseen an ICC intervention in Libya in 2011. The regime of Muammar Gaddafi had previously been ostracized but, since the early 2000s, had undergone a remarkable political rehabilitation. Gaddafi had emerged as an economic ally and partner in the global war on terror. In February 2011, however, his forty-year reign began to crumble and civil war erupted.

**Chart 9.2:** The Effects of the ICC's Intervention in Libya



The ICC's intervention in Libya had a diversity of effects on the uprising, civil war and post-conflict / post-Gaddafi period (See Chart 9.2). As noted in Chapter 8, it was made clear, from the outset of its intervention, that the OTP would focus on Gaddafi and his senior officials. In doing so, the former Prosecutor, Luis Moreno-Ocampo, contributed to framing the conflict as one between 'good' (the Libyan opposition and NATO forces) and 'evil' (the Gaddafi regime). As such, it justified both the recalcitrance of the Libyan opposition in refusing to negotiate with Gaddafi as well their insistence that the regime had to be defeated militarily. It also justified NATO's intervention. This came at some cost. The responsibility for rehabilitating Gaddafi and the nefarious political relations of major Western states (including the UK and the US) with him have been neglected. The initial cause of the conflict – socio-economic and political grievances – were ignored in favour of a view that perceived Gaddafi and his regime as the root of all evils in Libya which needed to be excised. The current volatile and violent situation in Libya would suggest that the problems within Libya run much deeper than the regime itself (see Kirkpatrick 2014).

While no official negotiations between the Libyan opposition and the regime took place, a number of overtures were made by an array of actors – including the African Union and Turkey – to kick-start peaceful dialogue between the warring parties. However, Gaddafi at no point indicated any significant interest in negotiating peace and consistently reiterated that he would fight until the death. There is no evidence that his attitude towards peace talks was affected by the ICC's intervention. Rather, Gaddafi likely viewed the conflict as an existential threat to Libya and himself – which he viewed as one and the same. In other words, the direct threat to him was a threat to Libya. The threat from the ICC ranked low on his list of concerns in relation to NATO's intervention and his forces losing ground to the opposition. The NTC, on the other hand, was able to consistently reject negotiating with the 'criminal' Gaddafi. The ICC's intervention appears to have helped them justify their position. In rejecting negotiations, the Libyan opposition forces – backed up by NATO – were able to achieve an outright military victory over the regime.

As argued in Chapter 7, it is unlikely that mediated negotiations could have taken place. The interests and behaviour of key actors – the African Union, the Libyan opposition, the intervening forces, Saif al-Islam Gaddafi and Colonel Gaddafi – in committing to a negotiated peace process were insufficient and / or never coalesced. Their preconditions and strategies towards the conflict and potential peace talks spoiled any potential peace process. As with northern Uganda, then, it cannot be concluded that the ICC ruined or foreclosed peace negotiations between Gaddafi and the Libyan opposition.

The war in Libya ended in the one-sided military victory of the Libyan opposition. The conflict narrative that backlit their victory, and to which the ICC's intervention contributed significantly, has been extended into post-conflict / post-Gaddafi Libya. The limitations of the ICC to positively affect post-conflict peace or justice have been revealed. Libya is currently mired in a renewed round of violence between rival militias. No opposition groups have been held liable, despite evidence of war crimes and crimes against humanity. Moreover, two transitional justice mechanisms passed since the end of the civil war illustrate Libya's severely asymmetrical approach to post-conflict accountability: the provision of a blanket amnesty to rebel groups and militias for any acts deemed necessary in furthering the Libyan revolution and a lustration law – the Political Isolation Law (PIL) – to rid the country of any and all public figures associated with the Gaddafi regime.

As with northern Uganda, it appears likely that the ICC will be left empty-handed following its Libya intervention. Middle-ground options such as an *in situ* trial by the ICC in Tripoli or a sequencing of prosecutions were neglected. Ultimately, judges granted Libya's request to prosecute Abdullah al-Senussi and, while they ruled that Saif al-Islam Gaddafi's case was admissible at the Court and that the accused should be surrendered to The Hague, Saif remains in the custody of a Zintani militia which has showed no inclination to hand him over – to Tripoli or the ICC. That is not likely to change. As one senior diplomat based in Libya (confidential interview 2013g) insists: “I can't see them giving up their big card unless it is a big, big reward or they are pummelled into giving him up, but I don't see that happening.”

This is not to suggest that there are no positive signs or that there are no officials committed to ensuring more even-handed justice, respecting human rights and challenging the *thuhwar*. For example, when the NTC passed Law 37 in May 2012, which criminalized the “praising or glorifying Muammar Gaddafi, his regime, his ideas or his sons” (see ABC 2012), it was challenged by human rights lawyers and repealed by the country's Supreme Court for being unconstitutional. More recently, the country's Justice Minister, Salah Bashir Margani, was remarkably forthright and honest in his response to a very critical assessment of the country's human rights situation by HRW, stating that “the new Libya has so far failed expectations of the Libyan people who revolted against the tyranny of the Gaddafi regime in the hope that the new Libya would never allow human rights abuses unchecked.” (See Statement by Justice Minister of Libya, 2013). Still, positive developments are few and increasingly rare. Original grievances continue to be ignored. Three years after the Arab Spring, “the upheavals have so far failed to address the demands of millions of ordinary citizens who had clamored for change — for jobs, food, health care and basic human dignity. If anything, their grievances have worsened.” (Hubbard and

Gladstone 2013).

Today, Libya is likely more unstable than any time during the Gaddafi regime prior to 2011. A return to civil war is a distinct possibility (Kirkpatrick 2014; Economist 2014a). The promise of a revolution leading to the ouster of Gaddafi in combination with a lasting peace has not come to fruition: “Libya should have once again achieved peace and stability. Instead, the country, of more than six million people, seems to have been fatally destabilized by the war to remove its dictator, and it is increasingly out of control.” (see Andersen 2013). And the former regime isn't entirely to blame. While “[t]here is no doubt that Qaddafi’s legacy is largely responsible for the post-Qaddafi authorities lacking the institutional capacity, leadership style, or collective will to face down their opponents”, “the Libyan government’s appeasement of its many adversaries is the root cause of most of Libya’s security, economic, and political problems.” (Pack et al 2014, 1, 6).

Today, it is common to hear Libya described as “lawless” (see, e.g. Chothia 2014). In reference to Chinua Achebe's 1958 classic, a recent report on Libya by the Economist (2014c) was entitled “Things Fall Apart”. In addition to former regime officials, human rights advocates have been assassinated (Hilsum 2014). Torture and arbitrary detention by various militias is common-place and, according to the ICG, Libya's “trial by error” approach to post-conflict justice has triggered “more grievances, further undermining confidence in the state.” (ICG 2013). As noted in Chapter 6, during its forty years in power, the Gaddafi regime had systematically eroded the roots of state institutions. When the regime collapsed, those institutions had to be rebuilt. Doing so has proven remarkably difficult and has been undermined by the continued political prominence of militias and criminal networks (Shaw and Mangan 2014). As Hisham Matar (2013) argues, “Libyans used to be afraid of a brutal state; now they are afraid of the absence of the state.”

### III. The Effects of the ICC on Peace, Conflict and Justice Processes

In identifying and analyzing the effects of the ICC's interventions on peace, conflict and justice processes, it becomes clear that certain aspects are made *more* relevant than they otherwise would be and that, in many cases, the key issues which scholars focus on are not as positively or negatively affected by the Court as typically portrayed. The ICC can have a multiplier effect, heightening the importance and bringing hitherto relatively minor or less considered issues to the fore. Not all of the ICC's effects are direct. Some of the Court's impacts, such as its effects on post-conflict narratives in Libya and northern Uganda and on delegation discipline in the case of the LRA may be indirect. At the same time, it is critical not to over-read or over-state the effects of the Court. There is an ongoing risk of inappropriately isolating ICC decisions and ascribing causal effects to them. The thesis has sought to take into account not only instances where the ICC may have minimal or no impact (such as how it affected Gaddafi's strategic thinking and potential commitment to peace negotiations), but also where the ICC's effects need to be considered alongside other developments (such as the Court's effects on bringing the LRA to the negotiating table in the wake of the Comprehensive Peace Agreement between South Sudan and Sudan).

In addition to amplifying the relevance of certain dynamics and issues, it is also evident that the ICC's effects on peace, justice in conflict processes are shaped, even determined, by who is targeted for prosecution – and who isn't. There is very little understanding of why the ICC has the effects that it does and what drives its decision-making. Chapter 8 sought to outline the institutional self-interests of the ICC in order to explain the Court's tendency to intervene against one side of an ongoing conflict. But there is a continued need to go behind the veneer to ascertain why the OTP, in particular, does what it does – namely, why it selects specific situations to investigate (and not others) and why it selects specific individuals or parties to prosecute (and not others). Doing so can help elucidate the relationship between decision-making within the OTP and the effects the Court ultimately has on peace, justice and conflict processes. More research, especially research done through embedded participant observation, is needed to fully understand the practices within the Court and how the OTP's decision-making, in particular, shapes the effects the Court has on the conflict situations it investigates. Prosecutorial decision-making is constrained and negotiated within the context of international politics. It seeks to reaffirm the Court as a legitimate and effective institution and to improve its chances of successfully investigating crimes and having arrest warrants enforced. How this plays out shapes how the Court affects the peace, conflict and justice processes of the states and situations in which it intervenes. Future research on the Court should focus not only on *what* effects the ICC has but *why* and *how* it has

these effects.

This rest of this section offers concluding reflections on the ICC's effects on each of the issues and dynamics that constituted the thesis' analytical framework. It identifies where further research is needed and, where appropriate, offers some practice-oriented suggestions for moving forward.

### *Conflict Narratives*

The preeminent effect of ICC interventions on ongoing and active conflicts is on conflict narratives – the dominant understanding of the causes and drivers of violence, who is responsible for the conflict and how the conflict should be resolved. State actors and international organizations are interested in *utilizing* the ICC to frame their conflicts. For the GoU, the ICC's involvement and its targeting of the LRA has legitimated it and boosted its reputation. In Libya, it legitimized the opposition and NATO's military intervention. In both cases, non-targeted parties (the GoU; Libya and NATO) were able to use the ICC to legitimate their military aims against their targeted enemies (the LRA; the Gaddafi regime). In other words, there is a correlation between targets of judicial intervention and targets of military operations. There is a risk that the ICC not only acts to attribute responsibility and achieve accountability but provides support for military targeting decisions.

That ICC interventions shape conflict narratives may be inevitable. However, the specific way in which it contributes to the framing of conflicts is not. As noted above, it depends, in particular, on who the Prosecutor decides to target for investigation and prosecution. The cases that this thesis has focused on – Libya and northern Uganda – are instances where only one side of a conflict is targeted by the ICC, creating a fundamentally asymmetrical understanding of violence and responsibility in each. In both cases, observers suggested that the targeted parties would fight to the bitter end, thus prolonging violence. However, in both Libya (the opposition) and northern Uganda (the GoU), the resolve of the *non-targeted* parties to seek a military solution to the war was bolstered by the ICC's intervention. This is an important finding insofar as it suggests that military solutions to conflicts may be less likely in situations where both sides are targeted by the Court.

It is important to note that the ICC did not create a 'good vs evil' narrative in either Libya or northern Uganda. Such a narrative preceded ICC intervention in both situations. This raises another pressing question: can the ICC intervene in a conflict where there is no dominant narrative elevating one side as 'good' and another as 'evil'? How the ICC impacts or entrenches dominant conflict narratives and how this, in turn, affects peace, justice and conflict processes requires further and continuous analysis. This is particularly the case if the ultimate aim of peace processes is conflict

transformation and thus to transform the relationships and *discourses* between warring parties (see Miall 2004, 4).

### *Attitudes and Incentives of Warring Parties*

Will parties to a conflict be able to challenge a narrative they view as unfair or biased? Will they be able to redefine their relationship? Can they transform their conflict into one which is expressed through peaceful dialogue and contestation rather than violence? The potential for warring parties to commit to a peace process (even if they do not do so fully or genuinely) is dependent on the nature of the conflict narrative and how warring parties relate and respond to it. This does not mean that a conflict narrative that is heavily biased against one party will necessarily result in their precluding a commitment to peace talks. In the case of northern Uganda, it was shown that the conflict narrative heavily favours and legitimates the GoU, ascribing responsibility for atrocities and the conflict itself to the 'evil' LRA. However, this did not preclude the LRA from entering negotiations. Rather, as outlined in Chapter 4, the LRA explored and at least nominally committed itself to the Juba peace process as a means to challenge the dominant discourse regarding responsibility for violence and atrocity during its war with the GoU. In contrast, the conflict narrative in Libya bolstered the ability of the Libyan opposition to reject any commitment to peace negotiations with the 'criminal' Gaddafi regime.

Scholars and analysts should not assume that the attitudes and incentives of warring parties are the same across cases. It is insufficient to suggest that targeted parties will “fight to their death” irrespective of whether they are non-state actors or state actors and whether they are senior actors or mid-level officials. We may not know what incentivises specific leaders of rebel groups or governments, but the assumption that they follow the same logics needs to be scrutinized. Joseph Kony is not Muammar Gaddafi and it should not be assumed that, just because of the ICC issues arrest warrants against them, their attitudes and incentives towards negotiating peace will be the same.

It is also clear from this thesis' analysis of the ICC's effects that the role of contextual factors, especially the interests and involvement of third parties, are too often neglected. It should be expected that the ICC not only affects the active participants in a conflict but also third parties with vested interests in the conflict – including sponsors (such as South Sudan and Sudan in northern Uganda) and intervening actors (such as NATO in Libya). More research is needed to understand how interventions by the ICC affect these actors, justify their positions vis-à-vis the conflict in question, influence their decision-making, and shape the potential for peace processes to progress.

### *Timing of Negotiations*

With regards to Mutually Hurting Stalemates, the question that arises is whether ICC interventions induce or undermine such stalemates from emerging. The ICC's effects on timing are heightened by the fact that the Court has, as demonstrated in Chapter 8, generally only targeted one side of a conflict. This proclivity need not necessarily undermine the Court's contribution to the emergence of a Mutually Hurting Stalemate. However, evidence from the cases of Libya and Uganda suggests that the Court tends to intervene in a way that supports and legitimates the stronger (or strengthening) belligerent over the weaker (or weakening) side. In Libya, the opposition, which was backed by a NATO-led mission, benefitted from the ICC targeting the Gaddafi regime. In northern Uganda, the ICC targeted the LRA which is, militarily, no match for the GoU and UPDF. How the ICC relates to the power dynamics between belligerents is an issue that this thesis has, for reasons of time and space, not covered explicitly. But it is crucial to determining whether and how the ICC can ever induce the creation of ripe moments where parties *mutually* recognize and are attracted to the potential of a negotiated peace.

### *Location of Negotiations*

The decision of where to hold peace negotiations is undoubtedly important to their outcome. Not every location is best suited for peace talks. In situations where the ICC intervenes, the importance of deciding where to hold talks is amplified. Targeted parties will find it difficult to negotiate on the territory of an ICC member-state, particularly if the targeted party is a non-state actor.

If a goal of international conflict resolution is that key parties to a conflict participate in negotiations, then finding the right spaces to do so is crucial. Ironically, these spaces may need to be protected from ICC jurisdiction or interference by the very international community that supposedly supports the Court. To a certain extent, this has already occurred. Doha, Qatar has played host to peace negotiations regarding the war in Darfur as well as negotiations between the US and the Taliban (Sudan Tribune 2013; Graham-Harrison 2013). In a world where proscription (in the case of the Taliban) and potential prosecution (in the case of the Khartoum leadership) are increasingly common-place, mediators may seek to shift their focus away from Western sites of negotiations like Geneva towards other locales where the ICC is less likely to have an influence. As a non-member of the ICC, states like Qatar may be able to offer indicted parties security in the knowledge that the country has no legal obligations to surrender suspects to The Hague. However, more research is needed on whether Qatar (or other states like it) can actually provide adequate and impartial spaces for negotiation and whether there are any contexts in which indictees should be directly negotiated with – irrespective of where

negotiations are held.

### *Mediation Strategies to get Parties to the Negotiation Table*

More clarity is needed on what mediation strategies are conducive to getting warring parties to the negotiation table in cases where the ICC has intervened. As a first step, a more consistent and comprehensive dialogue between mediators and practitioners of international criminal justice needs to take place. International criminal justice has often been presented as a *fait accompli* to negotiators. In a 2009 interview, for example, former Chief Prosecutor Moreno-Ocampo spoke of how Sudanese President Omar al-Bashir could not be negotiated with and that mediators have to 'deal with it': "Mr. Bashir could not be an option for [negotiations on] Darfur. I believe negotiators have to learn how to adjust to the reality. The court is a reality." (See Allen 2009). This establishes neither respect nor respectful dialogue between those engaged in the project of international conflict resolution and those committed to the project of international criminal justice.

Compounding matters, international mediators and negotiators do not have adequate rules to guide their engagement with ICC indictees (see Kersten 2013b; Lynch 2013). The UN Guidelines briefly discussed in Chapter 3 remain insufficient and convoluted. Without greater clarity (as a product of an honest and fair debate between mediators and jurists), engaging in negotiations with individuals who may be indicted by the ICC or other tribunals will continue to be haphazard and piecemeal – satisfying no one. Again, in order to achieve clarity on guidelines for negotiating with alleged perpetrators, there is a need to get those with experience – in international criminal justice *and* conflict resolution – into the same room. Additionally, scholars of conflict and peace studies need to better integrate questions of justice and accountability into their research agendas. As shown in Chapter 3, while this process has begun, more can – and needs – to be done. Lastly, it would be a welcome development if the ICC increased its capacity to analyze the conflicts in which it previously intervened. To date, it has not conducted stock-taking on the impact of interventions on ongoing and active conflicts. As a result, the Court's ability to learn from previous experiences is limited.

### *Delegation Composition*

The process of inclusion and exclusion is an important element in peace negotiations. In conflicts where the ICC has intervened, deciding who gets a seat at the negotiating table is an issue whose importance is heightened. Should indicted actors take an active role in negotiations? If not, who should take their place and is it possible to ensure that they truly represent their leaders?

As discussed in Chapter 2, proponents of international criminal justice maintain not only that wanted criminals should not participate in peace talks, but that international criminal law helps to ensure that they do not. However, in some cases, it may simply be unfeasible to proceed with negotiations if indicted individuals are unable to participate. The ICC issues arrest warrants only for those “most responsible” for international crimes. As a result, it is bound to target senior state and non-state actors, precisely the types of individuals who need to endorse and, at least at some point, participate in the process. If it is simply unacceptable that such actors participate in negotiations, then mediators need to develop novel strategies to deal with this. One such strategy may be to build trust and provide training for mid-level combatants prior to peace negotiations so that they can emerge as feasible and capable representatives. Where responsibility over peace talks is delegated to representatives of ICC indictees, as it was in the LRA delegation during the Juba peace negotiations, it is crucial that third parties monitor the delegation's behaviour and capacity to genuinely represent the positions and interests of their leadership. The discipline of delegations is critical to ensuring that the process retains the trust of the most senior actors. Its erosion is a significant danger to peace talks.

### *The Agenda of Peace Talks*

It is unclear in which cases justice might be placed on the agenda of peace negotiations, why it might be done, and whether the ICC will have a direct impact on its inclusion. In some cases, like the Juba peace talks, it is clear that the parties – especially the targeted parties – will want to deal with justice. However, including justice and accountability on the agenda of negotiations does not tell us whether the intention is to negotiate ICC arrest warrants 'away', whether its presence is a result of external pressure (by mediators or other third parties), or whether there is a genuine interest in achieving post-conflict accountability. More research needs to be done on what determines the presence of justice as an agenda item in peace talks.

It also remains unclear *when* matters of justice and accountability should be addressed. Should they be dealt with *during* talks or should they be dealt with afterwards? Should they be addressed first or should other issues which could potentially build trust between the parties and confidence in the process be agreed to first? Here it is important to remember that, unless their target dies or they are tried and acquitted, arrest warrants are permanent and cannot be revoked once they are issued. This creates a certain structural inflexibility if parties seek to deal with warrants during negotiations. In northern Uganda, for example, despite assurances from the GoU that the warrants for senior members of the LRA could be withdrawn, they were not. Other belligerents in similar situations may 'learn' from

this experience and be more skeptical of attempting to enter negotiations in order to have warrants dropped or prosecutions deferred.

### *Were Peace Talks about Peace?*

As noted in Chapter 3, violent political conflicts increasingly lead to negotiations rather than conclude in a one-sided military victory. It should thus be expected that negotiations affect the rationale and strategic positions of warring parties. It may be that, in many cases, entering peace negotiations represents a strategic decision to continue conflict rather than a concerted commitment to end or transform the war in question. This certainly appears to have been the case for the LRA and the GoU where, as argued in Chapter 5, neither party appeared fully and genuinely committed to a comprehensive peace agreement.

Asking whether peace talks were actually about peace is crucial – and not just for those seeking to absolve the ICC of responsibility for the failure of peace negotiations. Querying the intentions and behaviours of warring parties forces researchers to consider the array of factors which may affect the potential of negotiations to succeed or fail – irrespective of ICC interventions. As suggested at the outset of this section, there is an ever-present danger in 'not seeing the forest for the trees' and overstating the role, importance and impact of the ICC. It would be useful for future research to examine non-cases of ICC interventions – situations which clearly warrant an ICC intervention but where the Court cannot intervene, such as Syria. These cases should be critically analyzed to assess what effects the ICC might have and whether many of the predicted outcomes of ICC interventions, as represented by the tropes of the peace-justice debate (deterrence, failed negotiations, prolonged violence, etc.), persist *without* ICC intervention.

### *Implementation of Post-Conflict Accountability Mechanisms*

Both the Libyan and northern Ugandan cases confirm that *how* a conflict concludes will have a significant impact on the accountability mechanisms and approaches to justice that are subsequently implemented and pursued. But in neither case was the dominant conflict narrative, which the ICC's interventions helped to propagate, redrawn. Instead, post-conflict mechanisms and approaches to justice tended to affirm the dominant narratives of responsibility for violence. In the case of Libya, where the opposition and rebel forces achieved an outright military victory, this is unsurprising. The decision to amnesty militias, pass the PIL and the inability or unwillingness to prosecute opposition crimes, has entrenched the dichotomous narrative which justifies the prosecution and political

elimination of figures associated with the Gaddafi regime. In northern Uganda, the creation of the ICD was negotiated by the LRA and GoU delegations at Juba. But as it was set up, the Division will *only* prosecute LRA commanders (i.e. Kwoyelo) – and only those who are of no political use to the GoU (i.e. not Achellam). As such, it has acted to further entrench rather than transcend the dominant narrative of the war in northern Uganda which sees the LRA as the root of all violence and as ultimately responsible for the war and its excesses. Any accountability for Government or military perpetrators will be achieved through other means – if at all.

In Chapter 3, it was suggested that one possibility for states emerging from war was to ignore the question of the ICC altogether. This was certainly not the case in either Libya or northern Uganda. Both post-conflict Libya and Uganda have engaged directly with the Court. In northern Uganda, the ICC's intervention galvanized a number of justice-related processes (Nouwen 2013, 234). This was most evident in the creation of an ICD, established to prosecute international crimes domestically in Uganda rather than in The Hague. In Libya, legal representatives of the state have now worked for over three years on admissibility challenges at the ICC. This is strong evidence that post-conflict states in which the ICC has intervened will engage with the Court and that they feel some degree of pressure to achieve justice domestically – and to have their efforts endorsed by the ICC itself. There are, of course, limits to how positive a development this is. Again, in northern Uganda, the ICD has only affirmed the asymmetrical narrative of the war while a fair trial for either Saif or Senussi in Libya appears to be a distant prospect.

One over-arching question should be asked of post-conflict justice mechanisms: do they act to further the dominant conflict narrative or are they contributions to the transformation of relationships between former belligerents? There is an ongoing danger, as both the Libya and northern Uganda cases demonstrate, that approaches to post-conflict accountability entrench rather than alleviate asymmetrical conflict narratives therefore feeding rather than dispelling the seeds of conflict.

#### IV. Conclusion: The ICC, Peace, Conflict and Justice

There is unlikely to ever be a consensus regarding the effects of the ICC on peace, justice and conflict processes. The “peace versus justice” debate is a – if not *the* – dominant framework within which the appropriateness of ICC interventions is contested. While there is a desire amongst many to move beyond the “peace versus justice” debate, doing so may be impossible. As debates over a possible ICC investigation in Syria (see, e.g., Cronin-Furman 2014; Vinjamuri 2014) suggest, potential interventions by the ICC into an ongoing and active conflict will be debated using the language of the “peace versus justice” debate. But while debating whether ICC interventions are 'good' or 'bad' for peace is a permanent feature of international relations, the arguments within the peace-justice debate need not remain stagnant. Fortunately, as the field of international criminal justice matures, the arguments within the peace-justice debate have become increasingly refined and nuanced. Still, more nuance and in-depth knowledge of the ICC's effects is needed, particularly in regards to case studies of specific ICC interventions which could feed empirical findings back to analytical models.

This thesis has sought to achieve three things: create an analytical framework based on insights from conflict resolution and negotiation theory which could be used as a novel tool to study and assess the effects of the ICC on peace, justice and conflict processes; provide new insights and an original account of the empirical effects of the Court's interventions in northern Uganda and Libya; and analyze why the ICC has the effects it does on peace processes by examining the Court's decision-making and selectivity. The ultimate success of this thesis will be if the analytical framework that was presented as the basis of how to study the ICC is developed, adapted and refined in response to new developments in Libya and northern Uganda as well as other relevant contexts. How does the framework apply to the ICC intervention in Kenya, where the OTP opened an investigation using *proprio motu* powers and targeted both sides responsible for the 2007/08 post-election violence? How does it apply to the non-case of Syria where there is no consensus conflict narrative regarding responsibility for the conflict and atrocities and therefore no 'good' side to legitimate or 'evil' side to castigate?

The ICC is now a permanent actor in the realm conflict resolution. The ICC will continue to intervene in, and have effects on, ongoing conflicts. But greater clarity is needed on what those effects are and whether they are helpful to peace or not. This thesis has demonstrated that interventions by the Court have a diversity of effects which may be both a help and hindrance to peace processes. This makes continued and in-depth empirical research into specific cases all the more important. Using this thesis' analytical framework as a 'roadmap' to conduct empirical research into these cases – as well as cases which may be more similar to Libya and northern Uganda (such as Darfur and the DRC) – has

the potential to enrich our understanding of the ICC's interventions and non-interventions and, perhaps, move beyond the dichotomous framing of ICC interventions where the Court must either be a help or hindrance to peace.

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- Aludi, Komakech John Bosco – Staff member, CARITAS (13 July 2011)
- Anywar, Jane – Legal advisor at Juba, delegate, (16 August 2011)
- Atingo, Jacqueline – Staff member, ACORD (16 October 2011)
- Bigombe, Betty – Member of Parliament; chief GoU representative of 1994 and 2004 peace negotiations (28 July 2011)
- Cosmas, Lam – Founder Member Acholi Religious Leaders Peace Initiative (28 July 2011)
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- Jacinta, Akwero – Staff member, ACORD (16 October 2011)
- Kagoda, Steven – Member of Parliament; GoU delegation member at Juba (29 July 2011)
- Kamadi, Byonabye – Uganda Human Rights Commission (15 July 2011)
- Khalil, Sheikh al Jaji Musa – Senior member of Acholi Religious Leaders Peace Initiative; observer at Juba (29 July 2011)
- Kitara, McMot – Former District Chairman of LC.5; observer at Juba (28 June 2011)
- Komakech, Lyandro– Staff member, Refugee Law Project (18 August 2011)
- Kulayigye, Felix – UPDF Spokesperson, GoU delegation member at Juba (28 July 2011)
- Lacambel, John – Host on Mega FM, Gulu (8 August 2011)
- Makumbi, Med – Staff member, USAID (18 June 2011)
- Mapenduzi, Martin – District Chairman of LC.5; local politician in Gulu (11 July 2011)
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- El-Gamaty, Guma – UK Coordinator for NTC (5 March 2014)
- Gebreel, Ahmed – Former member of NTC Executive Committee (6 September 2013)
- Gheblawi, Ghazi – Press Officer, Libyan Embassy in London (11 August 2013)
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