States adopt policies and strategies designed to serve primarily their own national interests. The International Criminal Court’s recent indictments of Omar al-Bashir and Moammar el-Qaddafi highlight growing concerns with some states’ strategies. My aim is to address these concerns as well as the changing, positive dynamics of imposing international justice. I argue that imposing international justice is a necessary corrective to the problems posed by state politics.

In the roughly eight years since it became fully operational, the International Criminal Court (ICC) has encountered many difficulties and political challenges. The United States, for instance, actively opposes the ICC’s jurisdictional authority, launching what many have considered a “virtual war” on the court. More recently, states such as Sudan and Kenya have been reluctant to cooperate with the Court. The ICC indictment of Omar Hassan al-Bashir, the current Sudanese head of state, raised considerable concern among diplomats who argued that its timing was flawed and would encourage al-Bashir to exit the peace agreement between the Sudanese state and southern rebels, leading to more political violence. Similarly, in Kenya, ethnic tensions between Kenyan political parties have discouraged political leaders from cooperating with ICC authorities. These examples raise the issue of whether the short-term security and peace concerns of territorial states restrict the ICC’s duty of imposing justice on the “disingenuous politics” of states. The term “disingenuous politics” refers to states’ policies and strategies that serve their national interests while concealing their unwillingness to fully cooperate with ICC authorities, creating limitations in applying international law. Such politics raises two important questions: how have ICC accommodation and negotiation exposed the stakes of imposing international justice on states? And how has imposing justice—whether or not the ICC decides to enforce its judgments in situations where national authorities
have not cooperated in a genuine manner—heightened tensions between ICC authorities and states engaged in disingenuous politics? I argue that imposing international justice is a necessary and desirable corrective to this limitation of international law. My aim is to examine the changing historical and social conditions of imposing international justice on state parties and non-state parties. As we shall see, upholding the impartiality and/or integrity of the Rome Statute—going after those who have perpetrated the gravest crimes, regardless of nationality and status—means striking the proper balance between imposing international standards of justice and domestic politics.

International Justice and Nuremberg

The Nuremberg trials (1945–46) represent the first official twentieth-century model of imposing international injustice. There was considerable debate among the leaders of the Allied Powers as to whether the trials should be held. Winston Churchill insisted on summary execution of the Nazi perpetrators, while Josef Stalin called for show trials followed by automatic sentences of execution, a common practice in Stalin’s regime. The United States, however, insisted on a legalized solution, arguing that holding trials in accordance with international criminal law would offer an important precedent for upholding the rule of law at the international level. But the Allied Powers agreed that, because of the extreme gravity of Nazi crimes, only Nazi perpetrators could be tried for the crime of aggression (“the supreme crime”), crimes against humanity, crimes against the peace, and war crimes.

At the first trial—there were thirteen in all—twelve people were found guilty and sentenced to death by hanging, seven received either life or reduced sentences, and three were acquitted. Nine of the most serious perpetrators received sentences or acquittals. The Nuremberg prosecutors scrutinized the evidence which provided an unprecedented amount of criminal documentation, establishing a major part of the historical record of Nazi crimes. Despite many objections to the legal process, including that defendants were not allowed to appeal and that the crimes were adopted ex post facto, it was hard to lose sight of the prosecutors’ powerful (albeit not evenly shared) interest in international justice. As Gary Bass puts it: “once the Nuremberg tribunal was up and running, victors could shake their heads at the show of victors’ justice, but at least the victors took an interest in justice.”

Bass also notes how the US administration remained slow or unwilling to codify crimes against humanity until evidence revealed in 1945 exposed the gravity of the Holocaust. For the most part, the Allied Powers focused on the crime of aggression, believing it would teach the Nazis an important political lesson for having launched the war. Whether or not this was true, the Allied powers showed no willingness to investigate and prosecute any of their own military personnel. The Nuremberg Trials thus offer a somewhat controversial precedent for international justice. On the one hand, the trials constituted a previously unseen level of commitment to international justice; on the other hand, Nuremberg demonstrated that legal and moral accountability was finite. The question of whether international authorities could administer or impose criminal justice impartially would remain open.
Beyond Victors’ Justice?

Many contemporary scholars argue that the Nuremberg Trials were the first of several models exhibiting limited accountability.\(^3\) UN-established international criminal tribunals and even traditional justice programs or truth commissions continue to practice victors’ justice, engaging in political tactics calculated to limit state—or state leaders’—accountability. As Victor Peskin points out, “tactics by states targeted by a tribunal can significantly limit a tribunal’s ability to realize justice in a fair and evenhanded manner.”\(^4\)

State leaders use such tactics when they intentionally delay investigations into crimes that they are accused of committing during war. Franjo Tudjman, the former President of Croatia, managed to escape prosecution for atrocities committed during the Homeland War largely by electing not to cooperate with the International Criminal Tribunal for the Former Yugoslavia (ICTY). As a result, the ICTY did not make any real effort to investigate his crimes until after his death.

Similarly, the Rwandan government continues to limit the accountability of the state for atrocities committed under the government-sponsored local justice project named gacaca. Over the past several years, the government has prevented investigations of Rwandan Patriotic Front (RPF) soldiers, even though these soldiers killed thousands of people and massacred many Hutus as they advanced across the country in pursuit of Hutu extremists. To the Hutus, as Timothy Longman points out, “gacaca appears to be a form of victors’ justice, serving more to exercise power of the state than to promote accountability and the rule of law.”\(^5\) At the same time, by designing the country’s truth and reconciliation commission, the Rwandan government also retains de facto ability to control and manipulate parts of the legal process. Not surprisingly, this has raised concerns about inequity that continues to deepen grievances amongst warring parties.

Despite these issues at the state level, many believe that the ICC’s impartiality and/or independence from the UN Security Council will move us beyond the problems of victors’ justice. But such optimism disguises the complexity of the ICC’s task in imposing justice: ICC presence still produces the same political accusations of bias that states themselves are accused of, especially if an ICC investigation is imposed on unwilling non-state parties and in a region of the world that seems to be “targeted” by the ICC. The ICC’s investigations tend to take place in war-torn countries, amidst ongoing civil wars or fragile peace agreements. In this respect, referrals by states, which bring a situation involving grave human rights abuses to the attention of the Office of the Prosecutor, invariably link the ICC to the national government’s efforts to end the civil war and hold rebel perpetrators accountable, thus eschewing state responsibility.

This certainly applies to the situation in Northern Uganda. The ICC has issued an indictment against rebel leader Joseph Kony of the Lord’s Resistance Army (LRA), and continues to negotiate with state officials. But the fact that the ICC is negotiating with
one side does not necessarily mean that it will restrict its investigations to this side, or impose international justice in a way that strictly serves the interests of the state. It can still investigate sitting state officials believed to have committed grave atrocities. As a result, state leaders remain wary of inviting ICC investigations, believing that they need to adopt strategies to deflect attention away from their own involvement/complicity with the atrocities committed.

**Imposition and Accommodation**

Thus far, state leaders have formulated two discernable strategies for addressing this outside threat: (1) to initiate their own justice programs; (2) and to use the ICC to legitimize their regimes while simultaneously eliminating their political competition.

**Initiating Justice Programs**

In Uganda, the state has begun to support a local justice system called *Mato Oput*, a traditional form of local justice practiced in the Acholi region of Northern Uganda. Under *Mato Oput* (meaning “bitter root”), there are no trials or punitive sentences for individuals. Rather, the system is based on the principles of forgiveness, truth-telling, and reconciliation, and is mediated by a well-respected Council of Elders. Perpetrators and victims ‘cleanse their souls’ of resentment and vengeance through rituals and ceremonies, such as the sacrifice of animals or goats. In sponsoring this local justice program, the Ugandan state offers an important and potentially beneficial alternative to the ICC. More importantly, it assumes some control over a legal process that the majority of the local population recognizes as legitimate and preferable to the ICC or other punitive options. State leaders may be calculating that the ICC will become less willing to investigate and prosecute them because of their role in implementing the popular and trusted *Mato Oput*. Yet, whether or not this is the case, the ICC has repeatedly stated its willingness to accommodate local, alternative forms of justice under its complementarity principle, which requires the ICC to defer *prima facie* to states unless states prove unable and unwilling to investigate and prosecute the crimes themselves. Nevertheless, the most serious crimes committed by the LRA may well lie beyond either the state’s ability to effectively prosecute the LRA perpetrators, or communities’ willingness to forgive the rebel leaders. In this respect, the ICC could establish an important and desirable threshold for imposing formal punitive measures on those who simply cannot be forgiven. It has already done so to a certain extent with its indictments of LRA leaders. Developing *Mato Oput* into a systemic mechanism of justice would reinforce the image and role of the state in promoting reconciliation. In addition, it would further justify the imposition of international justice and the ICC’s objective of restoring victims’ rights by administering a widely accepted, legitimate form of ceremonial justice for many of the perpetrators.

**Using the ICC to Legitimize Regimes**

At the same time, state leaders may see compliance with the ICC as a strategic means to eliminate their political rivals. Some have argued that Joseph Kabila’s decision to
refer the situation of the Democratic Republic of Congo (DRC) was motivated by his knowledge of atrocities committed by his political rivals after the ICC had become fully operational in 2002. The ICC’s rationae temporis principle states that the ICC can only exercise jurisdiction over the serious crimes encoded in the Rome Statute after July 2002, the date it entered into force. As such, Kabila seemed to calculate that the ICC would focus on his political rivals’ crimes. To some extent he has been proven correct—the ICC is currently trying one of these former rivals, Jean-Pierre Bemba. It should also be noted that Kabila has initiated a movement for enhancing the rule of law in the DRC and its national judiciary system; notwithstanding its progressive platform, this movement appears to reflect Kabila’s interest in increasing his ability to eliminate his political rivals at the national level, and to assuage political concerns of rampant corruption.

In short, the ICC has a duty to assist cooperative states. Yet, the problem with relying on that cooperation is that states may have ulterior political motives for working with the ICC. In Uganda and the DRC, as we have seen, the ICC’s presence seems to have motivated state leaders to take a more proactive role in bolstering their own judicial mechanisms. Moreover, the ICC retains its right of initiating investigations (proprio motu) in states unwilling to investigate in a genuine manner. In the DRC, the ICC Prosecutor’s threat of invoking this power on state officials may have motivated the government to refer the situation to the Prosecutor and to begin developing higher national standards of criminal accountability. In effect, state leaders have learned to respect, and therefore respond to, the ICC’s threat of imposing international justice.

Indicting Heads of State

The same cannot be said of the ICC indictments against heads of state, such as Moammar Qaddafi (and his sons) and Omar al-Bashir. These high-profile examples expose the rising political stakes of imposing international justice on uncooperative, non-state parties and reflect an increasing concern with the politics of ICC intervention. Last year, the African Union passed a motion requesting all member states not to recognize the recent arrest warrant against Colonel Moammar al-Qaddafi, claiming that the ICC was “discriminatory” against African nations and had failed to investigate crimes committed in Iraq and Afghanistan. Such a charge goes directly against the ICC’s mission of employing its impartial standards to hold accountable the worst perpetrators. More importantly, it suggests that the hegemonic power of Western countries continues to exercise considerable influence on the selection of ICC cases. If this is true, then the ICC represents a residual variant of victors’ justice. At the very least, it shows the deeply contested nature of indictments of state leaders such as al-Bashir and Qaddafi.

Indeed, in the case of the al-Bashir indictment, the specter of victor’s justice has led to a very contentious debate involving the imposition of justice at the regional and international level. Critics of the indictment, which included international policymakers and diplomats engaged in the peace negotiations between Sudanese state officials and rebel groups, claimed that it produced the very political pressures that diplomats
had worked so vigorously to mitigate. Even UN Secretary-General Ban Ki-Moon expressed reservations about the indictment, calling it “a possible rush to judgment.” Thus, rather than stopping the genocide, the indictment was perceived as worsening regional instability by impeding diplomacy and negotiations with key state leaders.

Nevertheless, supporters of the decision to indict al-Bashir, which included human rights groups, scholars, and reporters, claim that such imposition was needed to serve the interests of international justice and the mission of the Court. Appearing on National Public Radio, Moreno Ocampo, the ICC Chief Prosecutor, emphatically insisted that, “there is no conflict between peace and justice.”

Given the overwhelming evidence gathered against al-Bashir, it is certainly difficult to disagree with this assessment of his role in sponsoring the violence that has led to the political instability in Sudan. Ocampo’s remark also raises the question of how the Court could have ignored a situation that, more than any other, tested its own mission of holding accountable the very worst perpetrators. In this regard, the ICC’s stark imposition of international justice may produce short-term consequences of uncertainty and instability. In the long term, however, it will not only have served its mission in a determined manner, but will have also played a key role in the diplomatic isolation of war criminals.

**Conclusion**

Victors’ justice continues to play a problematic role in imposing justice at the state and local level. Rwandan state leaders, for instance, have continually ruled out any need for moral accountability for RPF soldiers. And the ICC faces accusations of partiality and discriminatory actions in Sudan and Libya vis-à-vis its unwillingness to launch investigations in Afghanistan and Iraq. What is more, many continue to argue that the ICC should play a less active role in politically charged situations so that it does not disrupt negotiation efforts between warring sides. But restricting or predetermining how the ICC should impose justice ignores the complexity of these challenges.

The ICC’s imposition of justice, as we saw, is not strictly limited to these so-called hard cases. It actually operates along two tracks: one through accommodation of self-referral states in which the goal, as I have argued, is to expose and to work beyond the limits posed by disingenuous state strategies; the other, through demands on states in situations where cooperation remains overtly lacking. The former implies both limits and prospects in reshaping non-genuine state cooperation and justifying the ICC’s special role in punishing the worst perpetrators. It is possible that as the ICC develops further, the difference between the two will become less pronounced and that time will tend to favor a proper balance between accommodation and imposition. Indeed, while it may take years before we finally know whether the ICC has overcome this challenge, it will be important to continue looking for ways to expand and enhance the commitment to, and interest in, imposing international justice fairly and impartially.

– Audrey Latura served as Lead Editor for this article
NOTES

7. See Alexander Greenawalt, “Complementarity in Crisis,” *Virginia Journal of International Law*, 50(1)(2009): 131-134. In the 2009 Office of the Prosecutor (OTP) report, for example, Moreno Ocampo stated that the ICC’s complementarity principle “does not exclude alternative forms of justice.” The idea here is that both sides need to enter into concerted dialogue regarding the administration of justice.
10. “African Union opposes Warrant for Qaddafi,” *New York Times*, July 3, 2011, p. 10. Note that the recent killing of Qaddafi and his two sons, leaves Saif-al Islam as the only likely state official that will be surrendered to the ICC.