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# **INDIANA INTERNATIONAL AND COMPARATIVE LAW REVIEW**

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Introduction to Panel Discussion:

“The Rome Statute: Opportunities and Challenges in Enforcement”

Frank Sullivan, Jr.\*

I was honored to have been asked by Paul T. Babcock, the Editor-in-Chief, and Laura Walker, Symposium Coordinator, to moderate the panel on “The Rome Statute: Opportunities and Challenges in Enforcement” during the 2015 Annual Live Symposium of the *Indiana International & Comparative Law Review*.

The panelists were Professor Yvonne M. Dutton, Professor Stuart Ford, and Avril Rua Pitt. The discussions of the panel and questions from those attending were wide-ranging and provocative. The purpose of this brief introduction is not to recount the details of our deliberations but to identify the questions we examined and debated as predicate for the scholarship to follow.

First, a brief introduction of the panelists is in order. My colleague Professor Dutton is an Associate Professor of Law at the Indiana University Robert H. McKinney School of Law where she is a popular teacher of international criminal law, evidence, and criminal law and procedure. She is the author of a book on the International Criminal Court (“ICC”)<sup>1</sup> and has served as a federal prosecutor in the Southern District of New York. Her law degree is from Columbia University and she holds a Ph.D. from the University of Colorado.

Professor Ford is an Assistant Professor at The John Marshall Law School in Chicago where he researches and writes about public international law and teaches courses in

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<sup>1</sup> RULES, POLITICS, AND THE INTERNATIONAL CRIMINAL COURT: COMMITTING TO THE COURT (Routledge, May 2013).

international criminal law and international organizations. He worked as a prosecutor, and had an international tribunal prosecuting senior leaders of the Khmer Rouge. His law degree is from the University of Texas and he holds an LL.M. from the University of Nottingham in the United Kingdom.

Ms. Pitt is currently on the staff of the Indiana University Center for Bioethics. She holds an LL.M. in Human Rights from the Indiana University Robert H. McKinney School of Law, where her research included studying the role of child soldiers and the intentional transmission of HIV. Her law degree is from Moi University in Kenya and she holds a Masters in Bioethics from Indiana University-Purdue University Indianapolis.

Our panel began by comparing and contrasting the principle of “universal jurisdiction” and the jurisdiction of the ICC. The Restatement (Third) of Foreign Relations defines “universal jurisdiction” as follows:

A state has jurisdiction to define and prescribe punishment for certain offenses recognized by the community of nations as of universal concern, such as piracy, slave trade, attacks on or hijacking of aircraft, genocide, war crimes, and perhaps certain acts of terrorism. . . .<sup>2</sup>

A comment to this section discusses “universal jurisdiction” in further detail as follows:

[I]nternational law permits any state to apply its laws to punish certain offenses although the state has no links of territory with the offense, or of nationality with the offender (or even the victim). Universal jurisdiction over the specified offenses is a result of universal condemnation of those activities and general interest in cooperating to suppress them, as reflected in widely-accepted international agreements and resolutions of international organizations. These offenses are subject to universal jurisdiction as a matter of customary law.<sup>3</sup>

The panel examined the practical difficulties in effectuating the exercise of universal jurisdiction

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<sup>2</sup> RESTATEMENT (THIRD) OF FOREIGN RELATIONS §404 (Am. Law Inst. 2002).

<sup>3</sup> *Id.*

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and the consequent establishment of, first, specific tribunals,<sup>4</sup> and, subsequently, the ICC.<sup>5</sup>

The panel next turned its attention to the uneasy tension between the role of the United Nations Security Council as an entity that both refers situations to the ICC and authorizes peacekeeping missions.

Under the Rome Statute, the United Nations Security Council can refer situations to the Prosecutor for investigation.<sup>6</sup> This is how the situation in Darfur, Sudan, was brought before the ICC.<sup>7</sup> The Security Council has authorized peacekeeping missions in Darfur,<sup>8</sup> in Sudan's Abyei region,<sup>9</sup> and in South Sudan.<sup>10</sup>

Using the charges against Omar Hassan Ahmad Al Bashir, the President of the Republic of Sudan,<sup>11</sup> as the most graphic example of this tension, the panel discussed whether the Security Council jeopardizes the neutrality and the safety of a peacekeeping mission in a region when making a referral to the ICC.

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<sup>4</sup> *E.g.*, the Nuremberg Tribunal established by the Agreement for the Prosecution and Punishment of the Major War Criminals of the European Axis, Aug. 8, 1945, 59 Stat. 1544, 82 U.N.T.S. 279; the International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law in the Territory of the Former Yugoslavia Since 1991, Security Council Resolution 827, U.N. S.C.O.R., 48th Sess., 3175th mtg., U.N. Doc. S/RES/827 (1993); and the International Tribunal for the Prosecution of Persons Responsible for Genocide and Other Such Violations of International Humanitarian Law Committed in the Territory of Rwanda and Rwanda Citizens Responsible for Genocide and Other Such Violations Committed in the Territory of Neighboring States, Between January 1, 1994 and December 31, 1994, Security Council Resolution 955 (1994), U.N. S.C.O.R., 50th Sess., U.N. Doc. S/RES/134 (1995).

<sup>5</sup> Rome Statute of the International Criminal Court, U.N. Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court, U.N. Doc. A/Conf/183/9 (1998) [hereinafter "Rome Statute"], art. 13(b).

<sup>6</sup> *Id.*

<sup>7</sup> Security Council Resolution 1593, U.N. S.C.O.R 5158<sup>th</sup> mtg., U.N. Doc. S/RES/1593 (2005).

<sup>8</sup> African Union-United Nations Hybrid Operation in Darfur, Security Council Resolution 1769, U.N. S.C.O.R., 5727<sup>th</sup> mtg., U.N. Doc. S/RES/1769 (2007).

<sup>9</sup> United Nations Interim Security Force for Abyei, Security Council Resolution 1990, U.N. S.C.O.R., 6567<sup>th</sup> mtg., U.N. Doc. S/RES/1990 (2011).

<sup>10</sup> United Nations Mission in the Republic of South Sudan, Security Council Resolution 1996, U.N. S.C.O.R., 6567<sup>th</sup> mtg., U.N. Doc. S/RES/1996

<sup>11</sup> See ICC Case Information Sheet, Situation in Darfur, Sudan, No. ICC-02/05-01/09 (26 March 2015), <http://www.icc-cpi.int/iccdocs/PIDS/publications/AlBashirEng.pdf> (last visited January 28, 2016). [<http://perma.cc/ZS8H-MEEL>].

Next, the panel examined the situation in Kenya. The discussion began with an explanation that under the Rome Statute, the Prosecutor can initiate investigations *proprio motu* (on his or her own motion) on the basis of information on crimes within the jurisdiction of the Court.<sup>12</sup> This is how the situation in Kenya was brought before the ICC.<sup>13</sup> Professor Dutton and Ms. Pitt, both experts on Kenya, discussed the Kenyan reaction to the charges, and more generally, the implications from the Kenyan situation for future compliance with investigations initiated *proprio motu*.

Frequent attention has been drawn to the fact that only situations in Africa have been brought before the ICC to date.<sup>14</sup> However, investigations are underway of situations in Afghanistan, Colombia, Georgia, Guinea, Iraq, Nigeria, Palestine, and Ukraine.<sup>15</sup> The panelists reviewed the challenges and opportunities that the ICC would be presented with if these situations are brought before the court. This discussion led to an intense debate over the recent action of the Palestinian Authority to join the ICC and the potential of Palestinian claims being brought against Israel and counterclaims against Palestinian officials.<sup>16</sup> The panel noted that some observers see the ICC taking such cases as a way of blunting criticism of pursuing only African targets.<sup>17</sup>

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<sup>12</sup> Rome Statute, *supra* note 5, art. 15(1).

<sup>13</sup> See ICC Case Information Sheet, Situation in the Republic of Kenya, No. ICC-01/09-02/11 (13 March 2015), <http://www.icc-cpi.int/iccdocs/PIDS/publications/KenyattaEng.pdf> (last visited January 28, 2016). [<http://perma.cc/XR2A-2ETL>].

<sup>14</sup> E.g., Adam Taylor, *Why so many African leaders hate the International Criminal Court*, Wash. Post (June 15, 2015); *African Leaders to Court: Drop Cases Against Top Africans*, Associated Press (Feb. 1, 2015), [http://news.yahoo.com/african-leaders-court-drop-case-against-sudans-leader-071440718.html;\\_ylt=A0LEVj3LnapWLYAAiSQnnIIQ;\\_ylu=X3oDMTE0MGhyOWFIBGNvbG8DYmYxBHBvcwMxBHZ0aWQDUFJEQkNLMV8xBHNiYwNzcg--](http://news.yahoo.com/african-leaders-court-drop-case-against-sudans-leader-071440718.html;_ylt=A0LEVj3LnapWLYAAiSQnnIIQ;_ylu=X3oDMTE0MGhyOWFIBGNvbG8DYmYxBHBvcwMxBHZ0aWQDUFJEQkNLMV8xBHNiYwNzcg--) (last visited January 28, 2016) [<http://perma.cc/7JK7-7H5L>]; Kenneth Roth, *Africa Attacks the International Criminal Court*, N.Y. Rev. of Books (Feb. 6, 2014).

<sup>15</sup> See ICC, Situations and cases, [http://www.icc-cpi.int/en\\_menus/icc/situations%20and%20cases/Pages/situations%20and%20cases.aspx](http://www.icc-cpi.int/en_menus/icc/situations%20and%20cases/Pages/situations%20and%20cases.aspx) (last visited January 28, 2016). [<http://perma.cc/UR7T-UG36>].

<sup>16</sup> Jodi Rudoren, *Court membership Wouldn't Guarantee Palestinians a War Crimes Case*, N.Y. Times (Jan. 2, 2015).

<sup>17</sup> *Id.*

## 2016] INTRODUCTION TO PANEL DISCUSSION

In response to an observation that metrics are regularly applied to many court systems in order to assess their productivity and efficiency, Professor Ford explained the results of his research on the productivity and efficiency of the ICC.

Lastly, the panel and the audience considered the hypothetical of a state granting an individual a complete pardon and immunity for any and all crimes as part of a legitimate, transparent domestic truth and reconciliation process. This hypothetical amnesty pardons and immunizes the individual of crimes within the jurisdiction of the ICC. Does the Rome Statute nevertheless permit such an individual to be prosecuted? If so, should it?

The attendant conversation delved into the principle of “complementarity,” which as a general matter refers to the granting of jurisdiction to a subsidiary body when the main body fails to exercise its primary jurisdiction.<sup>18</sup> In the context of the panel’s discussion, it refers to international criminal justice systems intervening when national systems fail to curb crimes of international law.<sup>19</sup> The panel and the audience debated whether the ICC was consistent with the principle of complementarity. Some argued that it was, operating as sort of a “safety net” to prevent impunity for the most serious of crimes against humanity. Others took the view that the ICC has expanded jurisdiction at the expense of individual states, radically altering the balance between international and national criminal justice systems, and thereby changing the concept of complementarity.

As noted at the outset, it was a great honor to moderate a panel of such experts on such an interesting constellation of issues before such an engaged and knowledgeable audience. And it

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<sup>18</sup> See Xavier Philippe, *The Principles of Universal Jurisdiction and Complementarity: How Do the Two Principles Intermesh?*, 88 Int’l Rev. of the Red Cross 375 (June 2006), citing Bartram S. Brown, *Primacy Or Complementarity: Reconciling The Jurisdiction Of National Courts And International Criminal Tribunals*, 23 Yale J. Int’l L. 386 (1998).

<sup>19</sup> Philippe, *supra* note 18, at 380.

demonstrated again the singular contribution that the Indiana International & Comparative Law Review makes to scholarship and discourse on major topics of international and comparative law.

## ENFORCING THE ROME STATUTE: EVIDENCE OF (NON) COMPLIANCE FROM KENYA

Yvonne M. Dutton\*

### I. INTRODUCTION

In July 1998, with the adoption of the Rome Statute, states created the world's first permanent international criminal court, the International Criminal Court (ICC).<sup>1</sup> The ICC began its work in The Hague in 2002. The court's stated ambition, according to the preamble of the Rome Statute, is to end impunity for perpetrators of genocide, crimes against humanity, war crimes, and aggression.<sup>2</sup> States did not take the court's ambition lightly: they endowed the institution with strong powers. According to treaty terms, the more than 120 states that have already committed to the court agree that an independent prosecutor may try a state's own nationals for mass atrocities, should the ICC determine that the state is unwilling or unable to do so domestically.<sup>3</sup> The prosecutor and court operate without direct United Nations Security Council oversight.<sup>4</sup> Moreover, the treaty does not recognize any immunity for heads of state.<sup>5</sup> Of course, the ICC is not all-powerful: for example, it has no police force and must rely on states to execute on its arrest warrants. But on the whole, the ICC has been designed so that the looming and real threat of prosecution should induce compliance with treaty terms.

But is the ICC actually effective in enforcing compliance and positively influencing behavior? To date, the evidence on the effectiveness of international human rights treaties in

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<sup>1</sup> U.N. Rome Statute of the International Criminal Court, July 17, 1998, U.N. Doc. A/CONF. 183/9 (1998).

<sup>2</sup> *Id.* at preamble, article 5.

<sup>3</sup> *Id.* at Arts. 5-8, 11, 12(2), 13.

<sup>4</sup> Lionel Yee, *The International Criminal Court and The Security Council: Articles 13(b) and 16*, in ROY S. LEE, *THE INTERNATIONAL CRIMINAL COURT: THE MAKING OF THE ROME STATUTE* 143-52 (1999).

<sup>5</sup> U.N. Doc. A/CONF. 183/9, *supra* note 1 at Art. 27.



improving behavior is mixed at best.<sup>6</sup> Some studies, in fact, conclude that that treaty commitment does not contribute to better state practices.<sup>7</sup> The treaties that are the subject of those studies, however, have weak enforcement mechanisms: they only require states to self-report the compliance and measures they have undertaken to implement treaty terms and improve their domestic protections against human rights abuses.<sup>8</sup> As commentators have noted, this lack of any real enforcement mechanism means that some states can choose to commit without facing any specific negative consequences should they fail to comply.<sup>9</sup> The ICC, by contrast, can try the citizens of member states (and even the citizens of non-member states under some circumstances) if they commit mass atrocities.

If the ICC's powers are as strong in practice as they are on paper, should we not expect more promising findings? This Article examines Kenya's relationship with the ICC for evidence of whether the ICC is effective at holding states accountable to their commitment to the Rome Statute and the stated goal of ending impunity for mass atrocities. Kenya has a history of poor human rights practices and violent domestic conflict. Yet it joined the court in 2005 and became the subject of the ICC's prosecutor's first *proprio motu* prosecution. Examining the Kenya case

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<sup>6</sup> See, e.g., Linda Camp-Keith, *The United Nations International Covenant on Civil and Political Rights: Does It Make a Difference in Human Rights Behavior?*, 36 J. PEACE RES. 95 (1999) (finding no empirical evidence suggesting that commitment to the International Covenant on Civil and Political Rights improved states' human rights practices); Daniel W. Hill, Jr., *Estimating the Effects of Human Rights Treaties on State Behavior*, 72 J. POLITICS 1161, 1170-71 (2010) (finding that states improved their relevant behavior after commitment to some international human rights treaties, but not others); BETH A. SIMMONS, *MOBILIZING FOR HUMAN RIGHTS: INTERNATIONAL LAW IN DOMESTIC POLITICS* 68 (2009), (finding that governments that are not stable democracies or autocracies do improve their respect for human rights after treaty ratification).

<sup>7</sup> See, e.g., Oona Hathaway, *Do Human Rights Treaties Make a Difference*, 8 YALE L. J. 1935, 1940 (2002) (finding that "noncompliance with treaty obligations appears to be common" and that in some cases ratification was "not infrequently associated with worse human rights ratings than otherwise expected").

<sup>8</sup> See Yvonne M. Dutton, *Explaining State Commitment to the International Criminal Court: Strong Enforcement Mechanisms as a Credible Threat*, 10 WASH. U. GLOBAL STUDS. L. REV. 477, n.9 (2011) (citing to enforcement provisions of human rights treaties).

<sup>9</sup> See Emilie M. Hafner-Burton & Kiyoteru Tsutsui, *Human Rights in a Globalizing World: The Paradox of Empty Promises*, 110 AM. J. SOC. 1373, 1374 (2005) (noting that the average state has ratified a steadily increasing number of human rights treaties, but that the percentage of states reportedly repressing human rights has grown over time, suggesting that states may ratify only as window dressing).

should provide insights about the strength of the prosecutor's powers in practice and the prospects for future compliance with the ICC's *proprio motu* investigations—namely, those investigations that the prosecutor is empowered to commence without waiting for a state or United Nations Security Council referral. To the extent that the evidence shows an ICC without strong enforcement powers in practice, this timely study should aid policy makers and states in finding ways to ensure that this new institution can make the positive contribution to international justice its creators intended it to make.

This Article describes Kenya's commitment to the ICC and the subsequent ICC investigation into the Kenyan situation. The next section outlines the literature addressing the design of international human rights law treaties and their effectiveness in inducing compliance and positively influencing behavior. The Article then turns to describing methodology and examining the evidence of compliance (or lack thereof) with treaty terms and demands in the context of the ICC's case against Kenya. The Article concludes with some observations about the evidence and its implications regarding the ICC's enforcement powers.

## II. BACKGROUND: KENYA AND THE ICC

Kenya signed the ICC treaty on August 11, 1999, under the leadership of long-time authoritarian President Daniel arap Moi.<sup>10</sup> It ratified the treaty in 2005, only three years after the election of President Mwai Kibaki—a politician who ran on a platform promising democratic reforms.<sup>11</sup> When Kenya joined the court, it was still a country plagued by poor human rights practices and weak domestic law enforcement institutions. It also joined knowing that it had a

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<sup>10</sup> *Ballots to Bullets: Organized Political Violence and Kenya's Crisis of Governance*, HUMAN RIGHTS WATCH (17 Mar, 2008), Volume 20, No. 1 (A), available at <http://www.refworld.org/docid/47de7bd22.html>, at 16 (referencing Moi's term as president until 2002).

<sup>11</sup> See Andrew England, *New President of Kenya Vows to End 'malaise:' Kibaki Sworn in, Pledges to Undo Years of Corruption*, THE CHICAGO TRIBUNE, Dec. 31, 2002.

history of significant ethnic violence leading up to or following elections.<sup>12</sup> Nevertheless, Kenya ratified the Rome Statute at a time when President Kibaki was under significant pressure from both the international community and its own civil society to demonstrate his commitment to the democratic and judicial reforms he had promised during his campaign. Indeed, in 2005, the NGO Coalition for the International Criminal Court (CICC) chose Kenya as its target country on which to focus its ICC ratification efforts.<sup>13</sup>

Only a couple of short years after ratification, however, Kenya erupted into ethnically-charged violence in the aftermath of its presidential elections. More than 1,000 people died – and some 300,000 were displaced – during the violence that occurred after Kibaki allegedly rigged election results which voting tallies had suggested were favoring his opponent, Raila Odinga.<sup>14</sup> Only one hour after the Chair of the Electoral Commission of Kenya declared Kibaki the winner of the presidential elections, Kibaki quickly had himself sworn into office.<sup>15</sup> Violence erupted shortly thereafter. Although reports suggest that some violence was spontaneous and some was orchestrated by Odinga supporters against the ethnic groups that supported Kibaki, the facts also show that Kibaki's own police forces actually contributed to the violence that left more than one thousand people dead and hundreds of thousands displaced.<sup>16</sup>

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<sup>12</sup> *Ballots to Bullets*, *supra* note 10.

<sup>13</sup> COALITION FOR THE INTERNATIONAL CRIMINAL COURT, GLOBAL COALITION CALLS ON KENYA TO RATIFY INTERNATIONAL CRIMINAL COURT TREATY: AS CONFLICTS RAGE IN NEIGHBORING COUNTRIES, KENYA'S RATIFICATION CAN OFFER BEACON OF HOPE, (Jan. 11, 2005), *available at* [http://www.coalitionfortheicc.org/documents/KenyaRat\\_11Jan05.pdf](http://www.coalitionfortheicc.org/documents/KenyaRat_11Jan05.pdf) (after Kenya ratified the ICC treaty, it was by its own civil society for sending a strong message that it intends to break from its past cycle of impunity. Kenya National Commission on Human Rights, Ratification of International Criminal Court is an Essential Pillar for Securing the Rights of Kenya).

<sup>14</sup> HUMAN RIGHTS WATCH, ORGANIZED POLITICAL VIOLENCE AND KENYA'S CRISIS OF GOVERNANCE, *supra* note 12, at 21-23.

<sup>15</sup> *Id.* at 22.

<sup>16</sup> U.N. High Comm. for Human Rights Rep. from OHCHR Fact-finding Mission to Kenya, Feb. 6, 2008–Feb. 28, 2008, (2008), at 8-12.

To address the violence, the international community helped to establish a mediation process led by former Secretary-General of the United Nations, Kofi Annan. The main outcome of that process was the formation of a grand coalition Government, with Kibaki as President and Odinga as Prime Minister.<sup>17</sup> In addition, a Commission of Inquiry, chaired by Justice Philip Waki of the Kenyan Court of Appeal, was charged with investigating the post-election violence and making recommendations. The Commission's report (the "Waki Report") issued on October 15, 2008, concluded that there were systematic and violent attacks to kill and maim citizens based on their ethnicity and political affiliations.<sup>18</sup> To break the country's cycle of impunity surrounding post-election violence, the report recommended establishing a Special Tribunal in Kenya to investigate, prosecute, and adjudicate the identified alleged crimes.<sup>19</sup> The Commission gave Kofi Annan a list of names to forward to the ICC in the event the Special Tribunal processes did not proceed.<sup>20</sup>

The Special Tribunal was never created. Hours before the initial deadline to send the list of names to the ICC, the government signed a bill to start the legislative process necessary to create the tribunal.<sup>21</sup> However, the bill was later rejected by parliament.<sup>22</sup> The deadline to turn over the

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<sup>17</sup> See Kenyan National Dialogue and Reconciliation, *The National Accord and Reconciliation Act (2008)*, available at [http://www.dialoguekenya.org/docs/Signed\\_National\\_Accord\\_Act\\_Feb28.pdf](http://www.dialoguekenya.org/docs/Signed_National_Accord_Act_Feb28.pdf). [<http://perma.cc/7KKG-7KAK>].

<sup>18</sup> See COMMISSION OF INQUIRY INTO POST ELECTION VIOLENCE, COMMISSION OF INQUIRY INTO THE POST ELECTION VIOLENCE (CIPEV) REPORT 347 (2008), [http://www.kenyalaw.org/Downloads/Reports/Commission\\_of\\_Inquiry\\_into\\_Post\\_Election\\_Violence.pdf](http://www.kenyalaw.org/Downloads/Reports/Commission_of_Inquiry_into_Post_Election_Violence.pdf) [hereinafter Waki Commission Report].

<sup>19</sup> L. Muthoni Wanyeki, *The International Criminal Court's Cases in Kenya: Origin and Impact*, INST. SEC. STUDIES, No. 237 (August 2012), at 7.

<sup>20</sup> Antonia Okuta, *National Legislation For Prosecution Of International Crimes in Kenya*, 7 J. INT'L CRIM. JUSTICE 1063, 1065 (2009).

<sup>21</sup> David Mugonyi, *Secret List: Now Kibaki and Raila Sign Pact*, DAILY NATION (Dec. 17, 2008), <http://www.nation.co.ke/News/-/1056/503642/-/view/printVersion/-/14c3qeg/-/index.html>.

<sup>22</sup> Okuta, *supra* note 20, at 1069. (In fact, Kenya's parliament rejected a bill to establish a special tribunal on several occasions: on February 12, 2009, July 14, 2009, and July 30, 2009. On November 2009, parliament did not have a quorum to debate the special tribunal bill.) See Thomas Obel Hansen, *Transitional Justice in Kenya? An Assessment of the Accountability Process in Light of Domestic Politics and Security Concerns*, 42 CAL. W. INT'L L.J. 1, 8 (2011).

names was extended more than once at Kenya's request. Yet parliament still voted down the bill to establish the Special Tribunal.<sup>23</sup> As a result, the list of names was forwarded to the ICC prosecutor.

In November 2009, after the Kenyan government refused to self-refer its case to the ICC, the ICC prosecutor used his *proprio motu* powers for the first time to open a preliminary investigation into the post-election violence.<sup>24</sup> In March 2010, an ICC Pre-Trial Chamber authorized the prosecutor to commence a formal investigation into the Kenya situation. In March 2011, the ICC issued summonses for six prominent Kenyans from Kibaki's and Odinga's political parties.<sup>25</sup> Several weeks later, Kenya filed an application challenging the admissibility of the case, arguing that the country was in the process of a comprehensive judicial reform and intended to investigate and prosecute the case domestically. That challenge was rejected; the court concluded that Kenya had provided no credible information suggesting that it was in fact investigating the suspects.<sup>26</sup> On January 23, 2012, the ICC confirmed charges against four of the six suspects, among them now-President Kenyatta and now-Deputy President Ruto (who assumed their posts in March 2013).<sup>27</sup>

As of January 2015, however, the ICC was proceeding against only two of the suspects. The ICC dropped its case against suspect Francis Muthaura (Head of Public Service and Secretary

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<sup>23</sup> Maria Wambua, *How Kenya Handled Local Tribunal Process*, DAILY NATION (Sept. 17, 2013), <http://www.nation.co.ke/news/politics/How+Kenya+handled+local+tribunal+process+/-/1064/1997172/-/iko52x/-/index.html>.

<sup>24</sup> *Id.* For a description of the ICC Prosecutor's *proprio motu* powers, see The Rome Statute, at Art. 15.

<sup>25</sup> Charles C. Jalloh, Commentary, *Kenya vs. The ICC Prosecutor*, 53 HARV. INT'L L.J. ONLINE, 269, 270-71 (2012).

<sup>26</sup> See Prosecutor v. William Samoei Ruto, Henry Kiprono Kosgey and Joshua Arap Sang, Case No. ICC-01/09-01-11, Decision on the Application by the Government of Kenya Challenging the Admissibility of the Case Pursuant to Article 19(2)(b) of the Statute (May 30, 2011); Prosecutor v. Francis Kirimi Muthaura, Uhuru Muigai Kenyatta and Mohammed Hussein Ali, Case No. ICC-01/09—2/11, Decision on the Application by the Government of Kenya Challenging the Admissibility of the Case Pursuant to Article 19(2)(b) of the Statute (May 30, 2011).

<sup>27</sup> Wanyeki, *supra* note 19, at 15.

to the Cabinet at the time of the post-election violence).<sup>28</sup> In doing so, the prosecutor cited evidentiary difficulties, including problems related to the absence of witnesses because of deaths or refusals to testify because of fear.<sup>29</sup> The case against Kenyatta met a similar fate in December 2014.<sup>30</sup> The prosecutor said that dropping the charges constituted a “dark day” for international criminal justice, but stated that the case could not continue because Kenya had obstructed the court’s investigation of Kenyatta, leading to a lack of sufficient evidence to prove guilt beyond a reasonable doubt.<sup>31</sup> Trials against the two remaining defendants, Ruto and Joshua Arap Sang (Head of Operations at radio station, Kass FM) commenced in September 2013. The trial was ongoing as of early 2015, and had apparent evidentiary difficulties. As to the case against Ruto in particular, the prosecutor has stated, “[w]e are having tremendous difficulties, as usual, with our witnesses not wanting to come forward or changing their minds at the last minute.”<sup>32</sup>

### III. THE POTENTIAL EFFECTIVENESS OF THE ICC IN ENFORCING COMPLIANCE WITH TREATY TERMS

Before analyzing the evidence of whether Kenya has “benefited” from its ICC commitment, this section briefly surveys the literature on the effectiveness of international human

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<sup>28</sup> See International Criminal Court, STATEMENT BY ICC PROSECUTOR ON THE NOTICE TO WITHDRAW CHARGES AGAINST MR MUTHAURA (2013), [http://www.icc-cpi.int/en\\_menus/icc/press%20and%20media/press%20releases/Pages/OTP-statement-11-03-2013.aspx](http://www.icc-cpi.int/en_menus/icc/press%20and%20media/press%20releases/Pages/OTP-statement-11-03-2013.aspx).

<sup>29</sup> Michael Pearson & Zain Vergee, *ICC Drops Charges Against Former Kenya Official*, CNN (March 11, 2013), <http://www.cnn.com/2013/03/11/world/africa/kenya-icc-charges/index.html>. [<http://perma.cc/R77H-AGCJ>].

<sup>30</sup> Marlise Simons & Jeffrey Gettleman, *International Court Ends Case Against Kenyan President in Election Unrest*, N.Y. TIMES (Dec. 5, 2014), [http://www.nytimes.com/2014/12/06/world/africa/uhuru-kenyatta-kenya-international-criminal-court-withdraws-charges-of-crimes-against-humanity.html?\\_r=0](http://www.nytimes.com/2014/12/06/world/africa/uhuru-kenyatta-kenya-international-criminal-court-withdraws-charges-of-crimes-against-humanity.html?_r=0). [<https://perma.cc/W7B8-UBCM>].

<sup>31</sup> Carol J. Williams, “Dark Day”: *Hague prosecutors drop charges against Kenyan leader*, L.A. TIMES (Dec. 5, 2014), <http://www.latimes.com/world/africa/la-fg-icc-kenya-kenyatta-charges-dropped-20141205-story.html>. [<http://perma.cc/Q7SQ-ZGR6>].

<sup>32</sup> Kevin J. Kelley, *Bensouda Cites Difficulties With Ruto Witnesses*, DAILY NATION (May 14, 2014), <http://www.nation.co.ke/news/Bensouda-cites-tremendous-difficulties-with-Ruto-witnesses/-/1056/2314088/-/j7kcx/-/index.html>. [<http://perma.cc/76YE-LLAM>].

rights treaties in inducing compliance and promoting better practices. Thus far, that literature has reached no absolute conclusions. Rather, scholars continue to debate whether and to what extent international human rights treaties can actually constrain state practices and improve domestic protections against human rights abuses.

For instance, scholars adhering to a realist tradition argue that international law has little effect on a state's human rights practices.<sup>33</sup> Instead, states act rationally and are guided by self-interest. They may improve their human rights practices, but not because a treaty requires them to do so. As Jana von Stein argued, treaties may screen out potentially bad and noncompliant members, rather than induce them to join and thereafter alter their behavior to conform to treaty terms.<sup>34</sup>

Other literature is more optimistic about the effects of treaty commitment. Scholars doing normative research emphasize states' innate "propensity to comply" with the agreements they sign. According to this theory, states genuinely wish to embrace change, and formal treaties provide them with the channels through which they may exercise this propensity. Thus, the institution acts to constrain state behavior because the states themselves are seeking a mechanism by which to commit to change.<sup>35</sup>

Scholars in the institutionalist tradition also argue that international institutions can, and do, favorably constrain and alter sovereign behavior. However, they emphasize how the state's particular domestic political situation may exert some pressure on the government to embrace the hand-tying effects of committing to an international institution. Indeed, Beth Simmons suggested

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<sup>33</sup> JACK L. GOLDSMITH & ERIC A. POSNER, *THE LIMITS OF INTERNATIONAL LAW* 121-24 (2005).

<sup>34</sup> Jana von Stein, *Do Treaties Constrain or Screen? Selection Bias and Treaty Compliance*, 99 *AM. POL. SCI. REV.* 611 (2005).

<sup>35</sup> See generally A. Chayes & A.H. Chayes, *On Compliance*, 47 *INT'L ORG.* 175 (1993).

that by committing to an international legal institution, governments might send a credible signal to their domestic or international audiences about their intention to behave differently in the future under conditions of incomplete information and uncertainty.<sup>36</sup> For example, states in democratic transition may have poor human rights practices, but may nevertheless wish to tie their hands through a human rights institution to help facilitate future improvement.<sup>37</sup>

A separate question is whether there is evidence to support these theories about the ability of international human rights institutions to constrain and improve state behavior. The evidence is equivocal. Several early empirical studies failed to find evidence demonstrating that treaty ratification caused an improvement in states' human rights practices.<sup>38</sup> A 2005 study by Emilie Hafner-Burton and Kiyoteru Tsutsui found that for states with the worst human rights practices, membership in the Convention against Torture (CAT) and the International Convention for the Protection of Civil and Political Rights (ICCPR) was no more likely to produce better behavior than had the states that remained outside the treaty.<sup>39</sup> Daniel Hill's 2010 study found that states that committed to the Convention for the Elimination of Discrimination against Women improved their protection of women's political rights after commitment. With regard to the ICCPR and CAT, however, he found that commitment was associated instead with *worse* human rights practices. Hill hypothesized that states committing to the CAT and the ICCPR may commit "as a subterfuge to hide worsening practices."<sup>40</sup>

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<sup>36</sup> Beth A. Simmons, *International Law and State Behavior: Commitment and Compliance in International Monetary Affairs*, 94 AM. POL. SCI. REV. 819 (2000).

<sup>37</sup> See, e.g., Beth A. Simmons & Alison Danner, *Credible Commitments and the International Criminal Court*, 64 INT'L ORG. 225 (2010); Andrew Moravcsik, *The Origins of Human Rights Regimes: Democratic Delegation in Postwar Europe*, 54 INT'L ORG. 225 (2000).

<sup>38</sup> See, e.g., Camp-Keith, *supra* note 6; Hathaway, *supra* note 7.

<sup>39</sup> Hafner-Burton & Tsutsui, *supra* note 9.

<sup>40</sup> Hill, *supra* note 6, at 1170-72.



By contrast, some scholars have found that membership in international human rights treaties can positively influence the behavior of some category of states: they have found that the positive effect is conditional on the presence of some other important factor. In their separate studies, both Beth Simmons and Eric Neumeyer concluded that the presence of an active civil society was a factor influencing whether or not treaty membership could successfully constrain states and lead to greater domestic protection of human rights.<sup>41</sup>

To date, there is scant literature testing the impact of the ICC and whether it is influencing behavior in a positive way as contemplated by the Rome Statute. On the other hand, that limited literature has produced some preliminary evidence suggesting that the ICC may have the positive influence and deterrent effect that scholars have frequently found lacking in their studies of other international human rights treaties. Specifically, using case studies of indictments for leaders in Côte d'Ivoire, Uganda, and Sudan; Payam Akhavan concluded that the ICC deters violence by raising the potential cost of it, rather than creating perverse incentives for leaders who have been indicted to continue committing human rights abuses to avoid arrest.<sup>42</sup> Mitchell and Powell invoked an argument about domestic legal structures, finding that an ICC signature is mostly irrelevant, but that ratification reduces many forms of human rights abuses.<sup>43</sup>

#### **IV. TESTING THE ICC'S EFFECTS ON COMPLIANCE IN THE CONTEXT OF THE KENYA CASE**

Using Kenya as a case study, this section explores the outlined theories about the ability of

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<sup>41</sup> Simmons' results showed that governments that were not stable democracies or autocracies improved their respect for human rights after ratification, a finding she attributed to the presence of an active civil society with an incentive to mobilize and demand improvements in state practices. See Simmons, *supra* note 36. Neumeyer, on the other hand, found that the more democratic a country was and the more active its civil society, the more likely it was to improve its practices after joining the CAT. Eric Neumeyer, *Do International Human Rights Treaties Improve Respect for Human Rights?*, 49 J. CONFLICT RES. 925, 941 (2005).

<sup>42</sup> Payam Akhavan, *Are International Criminal Tribunals a Disincentive to Peace?: Reconciling Judicial Romanticism with Political Realism*, 31 HUM. RIGHTS Q. 624 (2009).

<sup>43</sup> SARA McLAUGHLIN MITCHELL & EMILIA JUSTYNA POWELL, *DOMESTIC LAW GOES GLOBAL: LEGAL TRADITIONS AND INTERNATIONAL COURTS* 196-205 (Cambridge University Press, 2011).

an international institution like the ICC to influence behavior and compliance positively. Kenya is a good case to seek evidence of compliance for several reasons. First, Kenya joined the court in 2005 despite the fact that it had relatively poor human rights practices, a history of civil conflict, and slow and corrupt judicial institutions.<sup>44</sup> This means that Kenya is a state with room to improve and where evidence of compliance or noncompliance, in terms of bettering human rights practices or protecting against impunity, may be more readily observable. Thus, although some literature expects a screening effect where “bad” states do not participate, this is a case where we can look for behavioral change related to treaty terms and goals.

Second, Kenya provides a good test of normative theories about effectiveness and compliance precisely because the ICC case was commenced by the prosecutor *proprio motu*. Kenya refused to self-refer its case to the ICC, meaning that it did not *expressly* consent to the ICC’s investigation. Under such circumstances, one might expect that the ICC could have some difficulties obtaining Kenya’s cooperation with future orders. Therefore, to the extent there is evidence of positive change, it may not have been wholly self-driven, but instead, may have been influenced by the ICC and its enforcement powers.

Finally, the Kenya case also provides a good test of the institutionalist hand-tying theory. Kenya was in a democratic transition at the time it joined the court, and examining the post-commitment evidence can help show whether its actions are consistent with some other domestically-driven movement for positive change relating to protections against human rights abuses. In particular, we can assess not only whether the ICC influenced any positive changes in behavior, but also whether any such changes were influenced by the type of strong civil society

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<sup>44</sup> See UN Human Rights Council, *Report of the Special Rapporteur on Extrajudicial, Summary or Arbitrary Executions, Addendum: Mission to Kenya*, Philip Alston (May 26, 2009), at para. 23, 16-17 (calling the Kenyan criminal justice system “terrible” and indicating that judicial processes are slow and corrupt).

that Simmons and Neumeyer found aided institutional effectiveness and member compliance.

## V. METHODOLOGY: DEFINING COMPLIANCE

This case study examines Kenya's actions and facts surrounding its interaction with the ICC in an effort to find evidence of whether the ICC's ostensibly strong enforcement powers are as strong in practice as they seem to be on paper. In doing so, it considers several aspects of positive influence and compliance that directly relate to the ICC's overarching goal of ending impunity for mass atrocities, as well as its processes for achieving that goal.

- (a) **Kenya's human rights record before and after ICC ratification.** First, this study will seek evidence about whether Kenya's human rights practices have changed in any notable way since Kenya ratified the Rome Statute in 2005. Such evidence is relevant because one goal of the threat of prosecution is to deter international criminal behavior.<sup>45</sup> In the case of the ICC, one primary way that states can avoid an ICC prosecution of their citizens is if the state's citizens do not commit serious human rights violations.
- (b) **Kenya's tolerance level for impunity.** Second, this study will look for evidence of any notable change as it relates to Kenya's tolerance for impunity for serious human rights abuses. It seeks evidence of domestic prosecutions or other efforts to improve the domestic protections against human rights abuses—for example, through laws or other changes to law enforcement institutions like courts and the police. Such evidence is relevant given that the ICC's stated goal is to end impunity for serious international

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<sup>45</sup> Deterrence is a principle justification for international criminal law, as well as for domestic criminal justice systems. MARK A. DRUMBL, ATROCITY, PUNISHMENT, AND INTERNATIONAL LAW 169 (2007) (discussing international criminal law); Paul Robinson & John Darley, *The Role of Deterrence in the Formulation of Criminal Law Rules: At Its Worst When Doing Its Best*, 91 GEO. LAW J. 949, 950-51 (2002) (discussing the primary justification for domestic criminal justice systems).

crimes. Further, the ICC's complementarity provision seeks to encourage domestic prosecutions so that the court is only a last resort. States can better comply with the ICC treaty if they take measures to discourage human rights abuses through their own domestic prosecutions. Such domestic processes also signify a way in which states can comply with the treaty mandate of ending impunity for serious international crimes.

(c) **Kenya's ICC compliance.** Last, because Kenya is the subject of an ICC case, this study offers the possibility of seeking evidence of Kenya's compliance with specific court processes and orders relating to the case. If the ICC's enforcement powers are strong in practice, then we should see that the ICC can compel Kenya to cooperate in its investigation even though Kenya did not self-refer the case. By ratifying the Rome Statute, Kenya supposedly signaled its commitment to the court and its agreement that the court could prosecute its own citizens if Kenya failed to prosecute them on its own.

## **VI. KENYA: THE EVIDENCE OF (NON) COMPLIANCE**

### **A. HAVE HUMAN RIGHTS PRACTICES CHANGED SINCE KENYA RATIFIED THE ROME STATUTE IN 2005?**

Shortly after ratification, during the 2008 presidential elections, Kenya was again engaged in mass violence that left many dead or displaced. This evidence suggests that at least in the early days, Kenya's commitment did not also lead to compliance inasmuch as its own government was alleged to have either participated in or silently sanctioned human rights abuses against citizens.

On the other hand, some evidence indicates that the ICC's involvement with Kenya has helped make Kenya a more peaceful and stable country as related to its 2013 elections. Indeed, after the ICC prosecutor named its initial six suspects, Kenyatta and Ruto formed a political alliance within their party to run for the presidency together to defeat then-Prime Minister, Raila

Odinga, who vocally supported the ICC processes that had commenced against his rivals.<sup>46</sup> This alliance was unusual in that Ruto and Kenyatta allegedly incited violent attacks against the other's supporters during the 2008 elections.<sup>47</sup> Commentators, however, suggest the partnership was a logical outcome of the ICC processes: a way for Kenyatta and Ruto to defeat both Odinga and the ICC prosecutor.<sup>48</sup> First, the two successfully defeated a case commenced by some local non-profits in Kenya, which argued that the men should not be able to run for office because the ICC indictments showed that they did not meet new Constitutional requirements which called for public officials to have integrity.<sup>49</sup> Kenyatta and Ruto were also successful in their presidential bid, using rhetoric about the supposed politically-motivated nature of the ICC proceedings to rally the support of their respective communities' support (Kenyatta is Kikuyu and Ruto is Kalenjin).<sup>50</sup> In short, the ICC indictments drove two staunch rivals to work together and to get their followers to do the same.

Not only did the ICC apparently contribute to the alliance, but it also seems to have played a large role in the peacefulness of the 2013 elections. The court went on record and warned the ICC suspects that it was prepared to issue new arrest warrants if the suspects were found making dangerous speeches that preached hatred and violence within Kenya. During a 2011 court appearance, an ICC presiding judge said that she had read "newspaper reports to the effect that

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<sup>46</sup> See Hansen, *supra* note 22, at 18-20. See also Joan Pereruan, *Hague cases set to change the 2012 election game plan*, DAILY NATION (Sept. 4, 2011), <http://www.nation.co.ke/News/politics/A+race+against+time+/-/1064/1141852/-/2ifwihz/-/index.html> [<http://perma.cc/LY8Q-MM75>].

<sup>47</sup> See Prosecutor's Application Pursuant to Article 58 as to William Samoei Ruto, Henry Kiprono Kosgey, and Joshua Arap Sang, Public Redacted Version of Document ICC\_01/09-30-Conf-Exp, Dec. 15, 2010.

<sup>48</sup> KNDR National Dialogue and Reconciliation Monitoring Project, Draft Review Report 47 (Apr. 2011), <http://www.dialoguekenya.org/docs/April2011KNDRReport.pdf> [<http://perma.cc/Z7CM-T323>].

<sup>49</sup> Jeffrey Gettleman, *Kenyan Court Rejects Suit Against Presidential Candidate*, N.Y. TIMES (Feb. 15, 2013), <http://www.nytimes.com/2013/02/16/world/africa/kenyan-court-rejects-suit-against-kenyattas-candidacy.html>. [<https://perma.cc/ZQZ9-P8D8>].

<sup>50</sup> International Crisis Group, *Kenya's 2013 Elections* (Jan. 17, 2013), at 11, 13, [hereinafter *Kenya's 2013 Elections*], [http://www.crisisgroup.org/~media/Files/africa/horn-of-africa/kenya/197-kenyas-2013-elections.pdf](http://www.crisisgroup.org/~/media/Files/africa/horn-of-africa/kenya/197-kenyas-2013-elections.pdf) [<http://perma.cc/X47X-A9GQ>].

some of the suspects are engaging in hate speech which could occasion fresh chaos” and that such speeches “could be interpreted as inducement to violate the conditions set by the court and which include that the suspects should not commit fresh crimes within the jurisdiction of the court.”<sup>51</sup> At least one commentator has argued that these warnings seem to have made a positive impact, with Kenyatta and Ruto only soon thereafter preaching peace and reconciliation before the upcoming election to a domestic audience.<sup>52</sup> Reports in a Kenyan paper state that the leaders’ message was a strong break from the combative statements the two had been issuing before their initial appearance in The Hague the week before.<sup>53</sup> Apparently, Kenyatta and Ruto continued to preach peace: news reports show that only one week before the 2013 elections, they and Odinga appeared at a prayer rally, all promising to promote non-violent elections.<sup>54</sup>

That the ICC played a significant role in contributing to Kenya’s peaceful elections seems clearer when one considers other alternative explanations for the outcome. First, the evidence does not suggest that Kenyatta and Ruto were pandering to the West and preaching peace so as to obtain aid or trade or other relations. News reports indicated that the west was hoping Odinga would win the elections, and Britain stated that if Kenyatta won, it would be limiting relations with him because of his ICC indictment.<sup>55</sup> Western states did warn Kenya that elections should be peaceful, but Kenyatta derisively dismissed those warnings. He retorted that Kenya is not keen on Western

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<sup>51</sup> Nzau Musau, *ICC Warns Ocampo Six Over Hate Speech*, THE STAR (Apr. 8, 2011), <http://www.the-star.co.ke/news/article-67140/icc-warns-ocampo-6-over-hate-speech>.

<sup>52</sup> Hansen, *supra* note 22, at 26.

<sup>53</sup> William Oeri, *Uhuru and Ruto vow to preach peace*, DAILY NATION (Apr. 11, 2011), <http://www.nation.co.ke/news/politics/Uhuru-and-Ruto-vow-to-preach-peace-/-/1064/1142960/-/7hklm3/-/index.html> [<http://perma.cc/B5KT-35C4>].

<sup>54</sup> Simon Ndonga, *presidential candidates promise peaceful election*, AFRICA–NEWS AND ANALYSIS (Feb. 25, 2013), <http://africajournalismtheworld.com/tag/kenyatta-promises-peaceful-election/> [<http://perma.cc/8GNU-VQB4>].

<sup>55</sup> Alex Perry, *What Uhuru Kenyatta’s Victory Means for Kenya*, WORLD TIME (March 9, 2013), <http://world.time.com/2013/03/09/kenyas-election-what-uhuru-kenyattas-victory-means-for-africa/> [<http://perma.cc/5EWC-H6ME>].

interference and that others, like China, are interested in business relations with Kenya.<sup>56</sup>

One cannot contribute the peace to domestic institutional changes alone. Kenya did adopt a new constitution in 2010.<sup>57</sup> Some reports suggested that this new constitution contributed to more peaceful elections because it provided for an independent judiciary to preside over election results. As such, members of the public could feel more assured than in the past that election results would not be fraudulently manipulated by a powerful few.<sup>58</sup> Nevertheless, there are reasons to believe that the ICC helped make that new constitution a reality. Although Kibaki's presidential promises included delivering a new constitution, the initial constitution he proposed only months after committing to the ICC in 2005 was overwhelmingly rejected because it continued to vest all powers in the executive.<sup>59</sup> The new constitution providing for a more decentralized political system minimizing presidential power and increasing judicial independence was only delivered in 2010.<sup>60</sup>

In sum, there is reason to conclude that the ICC and its enforcement powers positively impacted Kenya's human rights practices by aiding in deterring an election accompanied by widespread violence. This is especially so as Kenyatta and Ruto were both associated with the authoritarian Moi regime and were viewed in the past as fueling divisive tribal politics—as opposed to unity politics.<sup>61</sup>

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<sup>56</sup> *If Raila Odinga Wins Kenya's elections, Britain's Interests Are Secure, But If Uhuru Kenyatta Wins . . .*, THE KENYAN DAILY EXPRESS (Feb. 27, 2013), <http://kenyanexpress.blogspot.com/2013/02/if-raila-odinga-wins-kenyas-elections.html>. [<http://perma.cc/K9CP-D5CC>].

<sup>57</sup> A copy of Kenya's 2010 constitution can be found at <http://www.nation.co.ke/blob/view/-/913208/data/157983/-/18do0kz/-/published+draft.pdf>.

<sup>58</sup> Herzon Ochiel and Drazen Jorgic, *Peace holds in heartlands of Kenya's election losers*, REUTERS, March 10, 2013, <http://www.reuters.com/article/2013/03/10/us-kenya-elections-idUSBRE92907Z20130310> [<http://perma.cc/GZM2-XUWC>].

<sup>59</sup> See MICHELA WRONG, *IT'S OUR TURN TO EAT: THE STORY OF A KENYAN WHISTLEBLOWER* (Fourth Estate: London, 2009), 241-45.

<sup>60</sup> Michael Onyiego, *New Constitution in Kenya Could Bring Long-Awaited Reform*, VOA NEWS.COM (Apr. 7, 2010), <http://www.voanews.com/content/new-constitution-in-kenya-could-bring-long-awaited-reform-90255757/159838.html> [<http://perma.cc/9GZ7-HJW5>].

<sup>61</sup> Hansen, *supra* note 22, at 30.

## B. HOW TOLERANT IS KENYA OF IMPUNITY?

This section considers whether and to what extent the ICC has impacted Kenya's commitment to ending impunity for serious international crimes. Evidence on the whole suggests that Kenya has not meaningfully altered its previous culture of impunity. As the above description of Kenya's initial behavior in response to the 2008 post-election violence shows, Kenya did not seem keen on investigating and prosecuting perpetrators. The ICC investigation commenced because Kenya many times failed to establish a domestic tribunal. In its admissibility challenge to the ICC, Kenya did claim that it was investigating the post-election violence. The Pre-Trial Chamber, however, found that Kenya had not commenced any domestic proceedings against persons bearing the greatest responsibility for the violence, but instead had commenced only a limited number of cases for minor crimes, such as for theft or housebreaking.<sup>62</sup> The Appeals Chamber later upheld the Pre-Trial Chamber's decision.<sup>63</sup>

Recent reports indicate that Kenya's government has still made no real efforts to establish domestic mechanisms to deliver justice to victims of the post-election violence by holding perpetrators accountable.<sup>64</sup> As of 2014, only twenty-four suspects had been convicted out of more than 6,000 cases that had been pending for potential domestic prosecution.<sup>65</sup> Moreover, in February 2014, the Office of the Director of Public Prosecutions declared that 4,000 cases were being dropped as they were impossible to prosecute.<sup>66</sup> In 2008, the government established a Truth

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<sup>62</sup> ICC Pre-Trial Chamber II, *Decision Pursuant to Article 15 of the Rome Statute on the Authorization of an Investigation into the Situation in the Republic of Kenya*, (March 31, 2010), ¶¶ 183-86, <http://www.icc-cpi.int/iccdocs/doc854287.pdf> [<https://perma.cc/HU5A-YFB4>].

<sup>63</sup> *Prosecutor v. Ruto, Kosgey & Sang*, Case No. ICC-01/09-01/11 A, Judgment on the Appeal of the Republic of Kenya Against the Decision of Pre-Trial Chamber II of 30 May 2011 Entitled "Decision on the Application by the Government of Kenya Challenging the Admissibility of the Case Pursuant to Article 19 (2)(b) of the Statute" (Aug. 30, 2011), ¶ 46, <http://www.icc-cpi.int/iccdocs/doc/doc1223134.pdf> [<http://perma.cc/7EWF-TH2B>].

<sup>64</sup> Kenyan Human Rights Commission, *Kenya: One Year in Office for Uhuru Kenyatta and William Ruto*, at 13.

<sup>65</sup> *Id.*

<sup>66</sup> *Id.* See also Luke Moffett, *After the collapse of the Kenyatta case, how is the ICC supposed to help victims?*, THE



Justice and Reconciliation Commission (TJRC) as part of the process immediately following the post-election violence. Then in May 2013, the TJRC delivered a final report to President Kenyatta. However, as of December 2014, the government has not implemented the TJRC's recommendations.<sup>67</sup>

Nor has Kenya embraced the ICC processes as a way to insure accountability and end impunity. Immediately after the six suspects were named, Kenya's parliament voted to have Kenya withdraw from the ICC.<sup>68</sup> Although Kenya did not withdraw at that time, it continued to try to stop the ICC from proceeding. After obtaining African Union support, Kenya lobbied the United Nations Security Council to defer the ICC cases.<sup>69</sup> After the Security Council refused the requested deferral, Kenya then filed its admissibility challenge, which the court rejected.<sup>70</sup>

As the cases neared trial, Kenya continued to fight the ICC processes. In May 2013, Kenya submitted a paper to the African Union urging it to help persuade the ICC to terminate the cases against Kenyatta and Ruto or refer the cases to Kenya for consideration, citing the country's new constitution and reformed judiciary.<sup>71</sup> Kenyatta himself spoke at the African Union Summit in

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CONVERSATION (Dec. 10, 2014), <http://theconversation.com/after-the-collapse-of-the-kenyatta-case-how-is-the-icc-supposed-to-help-victims-34991> [<http://perma.cc/2R5T-EF3Y>]; *Response to Ambassador Macharia Kamau's Statement* KENYANS FOR PEACE WITH TRUTH AND JUSTICE (Nov. 10, 2014), [http://www.iccnw.org/documents/KPTJ\\_Response\\_to\\_Kenya\\_UNGA\\_Statement\\_on\\_ICC.pdf](http://www.iccnw.org/documents/KPTJ_Response_to_Kenya_UNGA_Statement_on_ICC.pdf) [<http://perma.cc/J3XD-2MZT>].

<sup>67</sup> *Id.*

<sup>68</sup> Michael Onyiego, *Kenya's Politicians Look to Withdraw from ICC as Suspects Named*, VOA NEWS.COM (Dec. 16, 2010), <http://www.voanews.com/content/kenyas-politicians-look-to-withdraw-from-icc-as-suspects-named--111998579/157058.html> [<http://perma.cc/2YSZ-U7MT>].

<sup>69</sup> Emeka-Mayaka Gekara, *Kenyan security chiefs' bid to suspend Ocampo probe fails*, DAILY NATION (Feb. 2, 2011), <http://www.nation.co.ke/news/Kenyan-security-chiefs--bid-to--suspend-Ocampo-probe-fails--/1056/1100576/-/baxcam/-/index.html>.

<sup>70</sup> Michael Onyiego, *Kenya Seeks Another Way to Stall Hague Proceedings*, VOA NEWS.COM (March 21, 2011), <http://www.voanews.com/content/kenyaseeksanotherwaytostallhagueproceedings118352894/136823.html> [<http://perma.cc/FX4B-5C7S>].

<sup>71</sup> *ICC: Kenya seeks Africa's support*, NEW ZIMBABWE (May 23, 2013), <http://www.newzimbabwe.com/news-11190ICC+Kenya+seeks+Africa%E2% C3% AF% C2% BF% C2% BD% C3% AF% C2% BF% C2% BDs+support/news.aspx> [<http://perma.cc/Q6FS-T8P6>].

May 2013, accusing the ICC of bias and racism. The outcome of that Summit included an African Union call to halt the ICC case against Kenyatta and any sitting presidents going forward.<sup>72</sup> In September 2013, Kenya's parliament again voted to withdraw from the ICC.<sup>73</sup>

Though Kenya still has not withdrawn, it has also not stopped its efforts to halt the ICC processes. In November 2013, Kenya informed the United Nations that it would be seeking an amendment to the Rome Statute that would provide immunity from prosecution to sitting heads of state.<sup>74</sup> In only October 2014, Kenya's ambassador to the United Nations made a speech to the assembled parties arguing that the ICC is being manipulated by a pernicious group of countries of an imperialist nature who are targeting Africa. As to the Kenya cases, in particular, the ambassador claimed that the ICC cases were hindering domestic efforts at reconciliation.<sup>75</sup> As mentioned above, in December 2014, the ICC dropped its case against Kenyatta, with the prosecutor arguing that Kenya's lack of cooperation with the court and interference with witnesses had made it impossible for her to prove the charges beyond a reasonable doubt.<sup>76</sup>

Nevertheless, there have been some positive developments on the domestic front regarding institutional mechanisms to address criminal behavior, and hence, the fight against impunity. Since joining the ICC, Kenya has adopted a new constitution, implemented the 2009 International Crimes Act criminalizing domestically the crimes within the jurisdiction of the ICC, and improved

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<sup>72</sup>African Union Urges ICC to Deter Uhuru Kenyatta Case, BBC NEWS (Oct. 13, 2013), <http://www.bbc.com/news/world-africa-24506006> [<http://perma.cc/NXZ3-S4S5>].

<sup>73</sup> MG Zimeta, *What Kenya's withdrawal means for the international criminal court*, THE GUARDIAN (Sept. 6, 2013), <http://www.theguardian.com/commentisfree/2013/sep/06/kenya-withdrawal-icc-credibility>.

<sup>74</sup> Moses Michira, *We Have Already Sent Ammendment to UN, Says Amina*, STANDARD DIGITAL (NOV. 23, 2013), <http://www.standardmedia.co.ke/thecounties/article/2000098450/we-have-already-sent-ammdment-to-un-says-amina> [<https://perma.cc/6L77-D5RV?type=source>].

<sup>75</sup> Kevin J. Kelley, *Kenya's UN Envoy Launches Stinging Attack on ICC*, DAILY NATION (Nov. 1, 2014), <http://www.nation.co.ke/news/Kenya-UN-envoy-launches-stinging-attack-on-ICC/-/1056/2507206/-/ipvbfaz/-/index.html> [<http://perma.cc/6F85-YPVM>].

<sup>76</sup> Peter Cluskey, *Victims and International Criminal Court biggest losers as Kenyatta trial collapses*, IRISH TIMES (Dec. 16, 2014).

the functioning of its judiciary and police.<sup>77</sup> And there are reasons to believe the presence of the ICC is, at least in part, responsible for prompting these developments.<sup>78</sup> As noted above, although Kenya was on an apparent path towards democratizing with the election of Kibaki, the key constitutional component was only implemented well after the commencement of the ICC processes.<sup>79</sup> Similarly, although Kenya could have passed a domestic law criminalizing the ICC crimes before or at the time of its ratification, it only did so after the world community threatened to step in with an ICC case after the 2008 post-election violence.

These positive developments, however, do not change that in practice, as opposed to on paper, Kenya's culture of impunity—at least as to those in power—seems little changed. The weight of the evidence indicates that Kenya has done very little to hold perpetrators of the 2008 post-election violence accountable. Further, reports indicate that other accountability gaps remain. Allegations suggest that the security services are involved in disappearances and extrajudicial executions. There are also complaints regarding high-level corruption in the security services.<sup>80</sup>

### C. HAS KENYA COMPLIED WITH ICC PROCESSES AND ORDERS?

There is evidence that Kenya has been less than compliant with the ICC. Much evidence suggests that the ICC's enforcement powers have not been sufficient to compel Kenya to cooperate with the ICC's investigation or court processes.

The suspects in the Kenya case voluntarily answered the ICC summons against them and

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<sup>77</sup> Wanyeki, *supra* note 19, at 17-18.

<sup>78</sup> *Id.* at 17 (stating that the ICC has clearly helped produce constitutional, legal, and institutional reforms).

<sup>79</sup> The story is similar with respect to the 2009 International Crimes Act. Kenya joined the court in 2005, yet it only implemented the legislation to enable it to domestically prosecute the crimes within the court's jurisdiction after the threat of ICC intervention. That law, of course, only applies to crimes committed after its implementation, meaning that it cannot be used to prosecute the 2008 post-election violence cases domestically.

<sup>80</sup> Wanyeki, *supra* note 19, at 18.

appeared in The Hague.<sup>81</sup> This initially seemed like a good omen and one that might indicate a future of cooperation. In fact, President Kenyatta is the first sitting head of state to appear before the ICC.<sup>82</sup> Other suspects, like President Bashir, have evaded arrest for many years. On the other hand, as some commentators have noted, the decision to willingly appear before the court may constitute nothing more than a “veneer” of cooperation.<sup>83</sup> By publicly cooperating with the ICC, Kenyatta can purport to be on the right side of justice, rather than an alleged war criminal like President Bashir.<sup>84</sup> By publicly cooperating, Kenyatta could minimize the risk to trade and diplomatic relations.<sup>85</sup>

The evidence does show that Kenyatta has succeeded in being treated very differently from Bashir. For example, Britain, an ICC member state, initially threatened that because Kenyatta was an ICC indicted suspect, the country would limit itself to “essential contact” with him if he won the presidential election. Britain, however, soon reversed itself and invited Kenyatta to a conference in Somalia.<sup>86</sup> Kenyatta was also received at the White House while under indictment for committing crimes against humanity.<sup>87</sup> Further, there is no evidence that he or his country have

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<sup>81</sup> See Coalition for the International Criminal Court, *Cases & Situations: Kenya*, <http://www.iccnw.org/?mod=kenya&idudctp=20&show=all>.

<sup>82</sup> *Kenyatta appears at ICC in Hague for landmark hearing*, MALAWI 24 (Oct. 8, 2014), <http://malawi24.com/kenyatta-appears-at-icc-in-hague-for-landmark-hearing/> [https://perma.cc/QXN5-W9PR?type=source].

<sup>83</sup> See David Bosco, *How to Destroy the International Criminal Court From Within*, FOREIGN POLICY (Oct. 10, 2014), <http://foreignpolicy.com/2014/10/10/how-to-destroy-the-international-criminal-court-from-within/> [http://perma.cc/55HY-HLLA].

<sup>84</sup> Karen J. Alter, *The trials and tribulations of prosecuting heads of states: Kenyatta and the ICC*, Monkey Cage Blog, WASH. POST (Dec. 23, 2014), <http://www.washingtonpost.com/blogs/monkey-cage/wp/2014/12/19/the-trials-and-tribulations-of-prosecuting-heads-of-states-kenyatta-and-the-icc/> [http://perma.cc/S58M-XFTX].

<sup>85</sup> See *Kenya's 2013 Elections*, *supra* note 50, at 18.

<sup>86</sup> Geoffrey York, *How Kenya is defying the Hague*, THE GLOBAL MAIL (May 26, 2013), <http://www.theglobeandmail.com/news/world/how-kenya-is-defying-the-hague/article12161678/> [http://perma.cc/C5W2-4PW5].

<sup>87</sup> *Press Release, U.S. President Obama and First Lady Greet President Kenyatta*, (Aug. 5, 2014), EMBASSY OF THE UNITED STATES, <http://nairobi.usembassy.gov/pr-080514.html> [http://perma.cc/TWA9-FXMH].

been targeted with economic sanctions.<sup>88</sup>

What of the less public evidence? That evidence suggests that Kenya and Kenyatta have been covertly sabotaging the ICC's efforts to prosecute the Kenyan suspects.<sup>89</sup> Evidence even at the start of the ICC's investigation suggested that Kenya was not fully cooperating with efforts to gather evidence.<sup>90</sup> The evidence of a lack of cooperation has only mounted over time, such that ICC Prosecutor Bensouda has called it "unprecedented." She says that because Kenya has failed to turn over cell phone and financial information, it showed the link between the president and the gangs behind the post-election violence.<sup>91</sup> She charges that witnesses have "disappeared" or been bribed so as to withdraw.<sup>92</sup> Witnesses have also stated that they were concerned of their safety if they testified.<sup>93</sup> The ICC even issued an arrest warrant for Kenyan journalist, Walter Barasa, for allegedly participating in the bribery and intimidation.<sup>94</sup> The defense disavowed the accusations of witness tampering, claiming instead that witnesses were being coached.<sup>95</sup> In any event, the ICC dropped the case against Kenyatta. The prosecutor said the decision was not for the reasons stated

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<sup>88</sup> Apparently, the EU is a large donor and big importer of Kenyan produce, and the US gives Kenya about \$900 million per year in aid. David Smith, *Uhuru Kenyatta inauguration and the inconvenient ICC truth*, THE GUARDIAN (Apr. 9, 2013), <http://www.theguardian.com/world/2013/apr/09/uhuru-kenyatta-inauguration-icc> [<http://perma.cc/P5L4-HEF4>].

<sup>89</sup> Alter, *supra* note 84.

<sup>90</sup> Michael Onyiego, *Legal Challenges Threaten to Undermine ICC Investigation in Kenya*, VOA NEWS.COM (Oct. 4, 2010), <http://www.voanews.com/content/legal-challenges-threaten-to-undermine-icc-investigation-in-kenya-104287214/155957.html> [<http://perma.cc/2X3J-7ZUY>].

<sup>91</sup> Cluskey, *supra* note 76.

<sup>92</sup> See Natalie Ojweska, *Uhuru Kenyatta's trial, A case study in what's wrong with the ICC* (Feb. 6, 2014), <http://www.globalpost.com/dispatch/news/regions/africa/kenya/140206/uhuru-kenyattas-trial-case-study-whats-wrong-the-icc> (quoting the ICC Prosecutor talking about Kenya's witness tampering practices).

<sup>93</sup> Smith, *supra* note 88. See also Alter, *supra* note 84.

<sup>94</sup> Press Release, Arrest Warrant Unsealed in Kenya situation: Walter Barasa suspected of corruptly influencing witnesses (Feb. 10, 2013), [http://www.icc-cpi.int/en\\_menus/icc/press%20and%20media/press%20releases/Pages/pr948.aspx](http://www.icc-cpi.int/en_menus/icc/press%20and%20media/press%20releases/Pages/pr948.aspx) [<https://perma.cc/9ZXU-CEB7?type=source>].

<sup>95</sup> Adam Taylor, *Why Kenya's president came to the International Criminal Court—and why that's a problem for the ICC*, WASH. POST (Dec. 16, 2014), <https://www.washingtonpost.com/news/worldviews/wp/2014/10/08/why-kenyas-president-came-to-the-international-criminal-court-and-why-thats-a-problem-for-the-icc/> [<https://perma.cc/Q4YR-42M5>].

by the Kenyan government, namely that Kenyatta was innocent. Rather, she stated that Kenya breached its treaty obligations under the Rome Statute by obstructing her investigation.<sup>96</sup>

## VII. CONCLUSIONS AND IMPLICATIONS

The evidence outlined above does suggest that the ICC's enforcement powers in practice are not strong enough to compel compliance with either treaty terms or individual court orders. Kenya continues to generally adhere to a culture of impunity. Further, Kenya, for the most part, seems to have managed to keep the ICC from obtaining the evidence it needed to proceed against some of the suspects. This means that some individuals who have allegedly committed crimes against humanity will go free and will not face justice. Thus, in some respects, the Kenya case study confirms what other studies have concluded; that international human rights treaties are not necessarily effective at constraining states that commit human rights abuses such that they are induced to comply with treaty terms.

However, the case study has also produced some evidence consistent with the studies that suggest the ICC may have a more positive influence on state conduct than treaties with weaker enforcement mechanisms. Most importantly, the evidence indicates that the ICC played a significant role in producing elections in 2013 that were generally peaceful and not accompanied by the kind of ethnically-charged violence that has historically accompanied Kenyan elections. Specifically, the evidence shows that Kenyatta and Ruto preached peace after the ICC judge went on the record reminding them that hate speech could lead to additional charges. Recall that Kenyatta and Ruto are from different tribes and were each accused of instigating tribal violence in the aftermath of the 2007 elections. But they later found common ground: attacking the ICC in an effort to both insure their elections and defeat the ICC cases against them. This suggests that the

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<sup>96</sup> Cluskey, *supra* note 76.

spotlight of the ICC helped to prevent deaths and other violence like that associated with past elections. Kenyatta has managed to escape trial, and Ruto may also manage the same. But if the threat of additional charges for openly inciting violence helped to save hundreds of potential lives, then maybe the ICC has been effective in some meaningful way.

Given that the evidence of compliance or non-compliance is equivocal, what does this mean for the likely future of the prosecutor's *proprio motu* powers? Some commentators, such as Professor David Bosco, suggests that the Kenyatta case has damaged the court in lasting ways that may affect future decisions about whether to invoke the *proprio motu* power to investigate.<sup>97</sup> Professor Bosco argues that Kenyatta has written the model on impunity and demonstrated how others could similarly avoid a successful *proprio motu* prosecution by outwardly appearing to cooperate, while obstructing the prosecutor behind the scenes.<sup>98</sup>

Bosco may be right, but does this mean that the *proprio motu* power is so damaged that it cannot be a useful tool to demand compliance with treaty terms and positively impact behavior in the future? This Article concludes that there are reasons to answer this question in the negative. First, the Kenya case was the prosecutor's first use of *proprio motu* powers, and moreover, the court itself is in its infancy. It is bound to have some growing pains. It can learn from its experiences and seek out ways to insure its tools are more effective in the future. Second, as Professor Karen Alter argues, even if Kenyatta did write the manual on impunity, not all leaders will have the same "skill or political cache to carry off a repeat story."<sup>99</sup> Among other things, Kenyatta is the son of Kenya's first president, groomed from childhood for political office, and his family's business empire is so large that it can influence the personal future of many Kenyans (for

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<sup>97</sup> Bosco, *supra* note 83.

<sup>98</sup> *Id.*

<sup>99</sup> Alter, *supra* note 84.

example, potential witnesses). In fact, Kenyatta is the richest person in Kenya.<sup>100</sup> Moreover, Kenyatta is a popular leader who also was careful not to repeat behavior that led to his indictment by preaching peace.<sup>101</sup> The court may be able to better enforce compliance in other cases where the leaders are less astute, well-liked, or powerful.

This is not the first time a court has been faced with defendants who seek to obstruct justice or tamper with witnesses. In fact, the International Criminal Tribunal for Rwanda had similar difficulties getting Rwanda to cooperate and allow witnesses to testify at various proceedings—even though the United Nations Security Council created the tribunal and could ostensibly compel cooperation.<sup>102</sup> One way to ensure that the *proprio motu* powers are as strong in practice as they are in paper is to have the states that have committed to the court actually support the prosecutor's efforts. As Bosco notes, however, “[t]he course of the Kenyatta investigation . . . suggests that the court's most enthusiastic backers—including those in Europe—have not exerted enough political pressure on Kenya to work with the court.”<sup>103</sup> Indeed, states use a variety of tools to get other states to yield to their demands: they threaten or impose economic sanctions, or they threaten to cut off military or economic aid. The United States used just such tools under the Bush administration in order to convince other states to sign bilateral agreements precluding the state from surrendering American officials or military personnel to the court.<sup>104</sup> Though some states refused to sign those agreements, more than 100 succumbed to the pressure.<sup>105</sup> Not all states will have the same resources to exert such pressure. On the other hand, states that have joined the court

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<sup>100</sup> Perry, *supra* note 55.

<sup>101</sup> Alter, *supra* note 84.

<sup>102</sup> See VICTOR PESKIN, INTERNATIONAL JUSTICE IN RAWANDA AND THE BALKANS 187-88, 212-13 (2008).

<sup>103</sup> Bosco, *supra* note 83.

<sup>104</sup> The United States refused military assistance to States Parties to the ICC that refused to sign bilateral immunity agreements.

<sup>105</sup> The website for the Coalition for the International Criminal Court lists the states that had signed bilateral immunity agreements with the United States as of 2006. See *Status of Bilateral Immunity Agreements*, [http://www.iccnw.org/documents/CICCCFS\\_BIAstatus\\_current.pdf](http://www.iccnw.org/documents/CICCCFS_BIAstatus_current.pdf).



should at least assess what leverage they do have and exert it so that the ICC has an opportunity to fulfill its mandate—rather than, for instance, inviting an indicted president to visit their country.

We may never know with certainty whether Kenya tampered with witnesses. But, going forward, states parties could take a greater interest in determining the facts about a defendant's level of cooperation and then make it known that they are prepared to insist on cooperation by instituting some type of sanction. No institution's powers in practice are likely to equal those it possesses on paper unless it receives some backing. In this case, the police force that must back up the ICC is its member states. Otherwise, they too, are failing to live up to their obligations.

# THE ICC AND THE SECURITY COUNCIL: HOW MUCH SUPPORT IS THERE FOR ENDING IMPUNITY?

Stuart Ford\*

## I. INTRODUCTION

This past year (2014) was not a good one for the International Criminal Court (ICC). The event that received the most attention was the collapse of the case against Uhuru Kenyatta, the President of Kenya.<sup>1</sup> Mr. Kenyatta had been accused of being criminally responsible for murder, rape, and persecution committed during post-election violence in Kenya.<sup>2</sup> In early December 2014, Fatou Bensouda, the ICC's Prosecutor, withdrew charges against Mr. Kenyatta, claiming that the Kenyan government's refusal to cooperate had made it too difficult to obtain evidence against him.<sup>3</sup> This led Professor Kontorovich to argue that the ICC's goal of ending impunity for serious violations of international criminal law is a utopian dream that cannot be achieved given the current state of the world.<sup>4</sup> The dismissal of the case against Kenyatta does, indeed, raise serious questions, but Professor Dutton addresses the ramifications of the Kenyatta case in more detail.<sup>5</sup>

At almost the same time as the withdrawal of charges against Mr. Kenyatta, something else happened that received much less press coverage but may ultimately be as important to the future

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<sup>1</sup> See Marlise Simmons & Jeffrey Gettleman, *International Court Ends Case Against Kenyan President in Election Unrest*, NEW YORK TIMES, Dec. 5, 2014 at 1.

<sup>2</sup> See Prosecutor v. Kenyatta, ICC-01/09-02/11-382-Red, Decision on the Confirmation of Charges Pursuant to Article 61(7)(a) and (b) of the Rome Statute, Pre-Trial Chamber II, at para. 428 (Jan. 23, 2012). *Id.* at 5 (explaining Mr. Kenyatta was also accused of other crimes against humanity, including forcible transportation and inhumane acts).

<sup>3</sup> Prosecutor v. Kenyatta, ICC-01/09-02/11-983, Notice of withdrawal of the charges against Uhuru Muigai Kenyatta, at para. 1 (Dec. 5, 2014).

<sup>4</sup> See Eugene Kontorovich, *A Court's Collapse*, NATIONAL REVIEW ONLINE, Sept. 15, 2014, at 7.

<sup>5</sup> See Yvonne M. Dutton, *Enforcing the Rome Statute: Evidence of (Non) Compliance from Kenya*, 26 INDIANA INT'L & COMP. L. REV. 11-12 (2015).

of the court. On December 12, 2014, Ms. Bensouda appeared before the United Nations (UN) Security Council to update them on the progress of the ICC's investigations in Darfur. She told the Council that conditions had worsened in Darfur and that crimes within the court's jurisdiction were occurring, including the widespread commission of rape and other sexual crimes. She went on to note that those indicted by the court continue to evade arrest.<sup>6</sup> Then, in a stunning admission of defeat, she told the Security Council that she was suspending the investigation into events in Darfur and shifting the court's resources to other situations:

It is becoming increasingly difficult for me to appear before you and purport to be updating you when all I am doing is repeating the same things I have said over and over again. . . . Given this council's lack of foresight on what should happen in Darfur, I am left with no choice but to hibernate investigative activities in Darfur as I shift resources to other urgent cases.<sup>7</sup>

The government of Sudan promptly declared victory: "The Sudanese people have defeated the ICC and have refused to hand over any Sudanese to the colonialist courts."<sup>8</sup>

The suspension of the ICC's investigations in Darfur raises important questions about the court and its relationship with the Security Council. Can the court succeed without the Security Council's assistance? Why is the Security Council paralyzed? Is this situation likely to change? How much support is there for ending impunity in the Security Council and beyond? What do states mean when they say they support the ICC? By examining what states, both members of the

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<sup>6</sup> See Office of the Prosecutor, Twentieth Report of the Prosecutor of the International Criminal Court to the UN Security Council Pursuant to UNSC 1593 (2005), at para. 1 (Dec. 15, 2014), [http://www.icc-cpi.int/en\\_menus/icc/press%20and%20media/press%20releases/Pages/20-UNSC-Darfur-OTP.aspx](http://www.icc-cpi.int/en_menus/icc/press%20and%20media/press%20releases/Pages/20-UNSC-Darfur-OTP.aspx) (last visited Dec. 15, 2014). [<http://perma.cc/DH6R-3DV5>].

<sup>7</sup> BBC News, *ICC Prosecutor Shelves Darfur War Crimes Inquiries*, BBC NEWS, 1 (Dec. 12, 2014), <http://www.bbc.com/news/world-africa-30458347> (last visited Dec. 15, 2014) [<http://perma.cc/8YZN-D5PB>].

<sup>8</sup> Shadi Bushra, *Sudan's Bashir Claims Victory Over ICC After Court Shelves Darfur Probe*, REUTERS (Dec. 13, 2014), <http://www.reuters.com/article/2014/12/13/us-sudan-icc-bashir-idUSKBN0JR0K520141213> (last visited Dec. 15, 2014) [<http://perma.cc/XX6Q-H7UV>].

Security Council and the broader membership of the General Assembly, have said recently about the ICC and impunity, I hope to draw some conclusions about the likelihood of long-term success for the ICC.

## II. BACKGROUND

While Sudan has had a history of conflict, violence and autocratic rule since it obtained independence, the conflict in Darfur began in late 2002 or early 2003 when rebel groups began an armed insurgency against Sudanese government forces.<sup>9</sup> The government responded with a campaign of indiscriminate attacks on villages in Darfur that killed tens of thousands of civilians and resulted in widespread torture, rape, and the destruction of property.<sup>10</sup> The attacks tended to follow a common pattern, with villages being attacked by a combination of Sudanese government soldiers driving vehicles and Janjaweed fighters riding horses and camels.<sup>11</sup> In some instances, the attacks were supported by helicopters and planes operated by the Sudanese armed forces.<sup>12</sup> The attackers would kill civilians, including women and children, burn houses, schools, and hospitals, and destroy wells.<sup>13</sup> They would then steal any movable property, including livestock, before leaving.<sup>14</sup> Several hundred thousand people died during the first several years of the conflict,<sup>15</sup> and the widespread destruction of villages caused approximately two million Darfurians to flee the violence.<sup>16</sup> The UN-appointed International Commission of Inquiry on Darfur investigated the

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<sup>9</sup> Report of the Int'l Comm'n of Inquiry on Darfur to the United Nations Secretary-General at paras. 62-63, UN Doc. No. S/2005/60 (Jan. 25, 2005).

<sup>10</sup> *Id.* at ¶¶ 184-186, 238-240.

<sup>11</sup> *Id.* at ¶ 242.

<sup>12</sup> *Id.* at ¶ 243.

<sup>13</sup> *Id.* at ¶ 242.

<sup>14</sup> *Id.*

<sup>15</sup> See BBC News, *Darfur Deaths Could be 300,000*, BBC NEWS (Apr. 23, 2008), <http://news.bbc.co.uk/2/hi/africa/7361979.stm> (noting that while the government of Sudan estimated that there had been 10,000 deaths, the World Health Organization had estimated that more than 200,000 people had died in Darfur) [<http://perma.cc/S2EM-FPUX>].

<sup>16</sup> Report of the Int'l Comm'n of Inquiry on Darfur, *supra* note 9, at ¶¶ 226, 229-230.

situation on behalf of the international community and concluded that the government of Sudan was responsible for acts that “very likely” constituted war crimes and crimes against humanity.<sup>17</sup>

In March 2005, the Security Council responded with a resolution that found the violence in Sudan constituted a threat to international peace and security, and “refer[red] the situation in Darfur . . . to the Prosecutor of the International Criminal Court.”<sup>18</sup> It also “decide[d] that the Government of Sudan . . . shall cooperate fully with and provide any necessary assistance to the Court and the Prosecutor. . . .”<sup>19</sup> The resolution passed with eleven affirmative votes and four abstentions. At the time, simply obtaining Security Council approval for a referral was considered a success<sup>20</sup> given U.S. opposition to the court.<sup>21</sup>

Shortly after Resolution 1593, the Prosecutor opened a formal investigation into the ongoing violence in Darfur.<sup>22</sup> In July 2008, the Prosecutor requested an arrest warrant be issued for Omar Al Bashir, the President of Sudan.<sup>23</sup> Several months later, Pre-Trial Chamber I granted the request.<sup>24</sup> Before doing so, it reviewed the information submitted by the Prosecution in support of the arrest warrant, and concluded that there were reasonable grounds to believe that President Bashir was criminally responsible for war crimes and crimes against humanity committed in Darfur.<sup>25</sup>

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<sup>17</sup> *Id.* at ¶ 630.

<sup>18</sup> S.C. Res. 1593, UN Doc. No. S/RES/1593 (2005), at para. 1 (Mar. 31, 2005).

<sup>19</sup> *Id.* at ¶ 2.

<sup>20</sup> See M. Cherif Bassiouni, *The ICC – Quo Vadis?*, 4 J. INT'L CRIM. JUST. 421, 425 (2006) (noting that the referral “engendered much initial euphoria”).

<sup>21</sup> See, e.g., Corrina Heyder, *The U.N. Security Council's Referral of the Crimes in Darfur to the International Criminal Court in Light of U.S. Opposition to the Court: Implications for the International Criminal Court's Functions and Status*, 24 BERKELEY J. INT'L L. 650, 660-661 (2006) (describing U.S. opposition to the ICC).

<sup>22</sup> Press Release from Luis Moreno-Ocampo, Chief Prosecutor, ICC, The Prosecutor of the ICC opens investigation in Darfur, Doc. No. ICC-OTP-0606-104 (2005).

<sup>23</sup> Public Redacted Version of the Prosecutor's Application under Article 58, Doc. No. ICC-02/05-157-AnxA, 1, 112 (July 14, 2008).

<sup>24</sup> See Prosecutor v. Bashir, Doc. No. ICC-02/05-01/09-1, Warrant of Arrest (Mar. 4, 2009).

<sup>25</sup> *Id.*

The ICC eventually issued arrest warrants against a number of senior Sudanese government officials for war crimes and crimes against humanity committed during the conflict in Darfur. In each case, the Pre-Trial Chamber reviewed the evidence submitted by the Prosecutor and concluded that there was reasonable grounds to believe that the accused person was criminally responsible for acts within the jurisdiction of the court.<sup>26</sup> These included warrants for the arrest of Ahmad Muhammad Harun, the former Minister of the Interior, and Abdel Raheem Muhammad Hussein, the current Minister of Defense.<sup>27</sup> And then, nothing happened.

### III. THE CURRENT SITUATION

Nearly ten years has passed since the Security Council's referral of Darfur to the ICC, yet there has been almost no tangible progress. The violence in Darfur has not stopped and government forces continue to engage in indiscriminate and disproportionate attacks against civilians.<sup>28</sup> Rather than improving over time, the situation in Darfur actually worsened in 2014.<sup>29</sup> Moreover, the most recent round of peace talks between the government of Sudan and various rebel groups collapsed in early December.<sup>30</sup> And the UN peacekeeping force in Darfur is set to shrink or even disappear, despite the increasing violence<sup>31</sup> because the peacekeepers have found it virtually impossible to be

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<sup>26</sup> See Rome Statute, Art. 58(1) (July 1, 2002) (requiring the Pre-Trial Chamber to examine the information submitted by the Prosecutor and determine whether there are "reasonable grounds to believe that the person has committed a crime within the jurisdiction of the Court" before issuing an arrest warrant).

<sup>27</sup> Int'l Crim. Ct., *Situation in Darfur*, INT'L CRIM. CT. (Mar. 1, 2012) [http://www.icc-cpi.int/en\\_menus/icc/situations%20and%20cases/situations/situation%20icc%202005/Pages/situation%20icc-0205.aspx](http://www.icc-cpi.int/en_menus/icc/situations%20and%20cases/situations/situation%20icc%202005/Pages/situation%20icc-0205.aspx) (last visited December 16, 2014) [<http://perma.cc/MQ9D-WBUN>].

<sup>28</sup> See U.N. SCOR, 69th Sess., 7337th Mtg. at 3, UN Doc. No. S/PV.7337 (Dec. 12, 2014) ("My Office's factual indicators seem to illustrate a similar pattern of indiscriminate and disproportionate attacks against civilians by the Rapid Support Forces.").

<sup>29</sup> See *Id.* at 2 (noting in her presentation to the Security Council, the Prosecutor noted that "the situation in Darfur continue[s] to deteriorate.").

<sup>30</sup> *Sudan: Peace Talks End Without Deal*, NEW YORK TIMES, Dec. 10, 2014, at A8.

<sup>31</sup> See Somini Sengupta and Jeffrey Gettleman, *U.N. Set to Cut Force in Darfur as Fighting Rises*, NEW YORK TIMES, Dec. 24, 2014, at A8.

effective in the face of attacks by Sudanese forces and their proxies and the hostility of the Sudanese government.<sup>32</sup>

None of the indicted members of the government of Sudan have been handed over to the ICC. Indeed, the government of Sudan considers it a victory that it has been able to frustrate attempts to arrest the indictees.<sup>33</sup> ICC officials have never been permitted to conduct investigations in Sudan.<sup>34</sup> The government of Sudan refuses to communicate with the court and simply returns the court's correspondence unopened.<sup>35</sup> And the indicted officials, including President Omar Al Bashir, continue to make state visits to other countries.<sup>36</sup> At this stage, the Sudanese government can plausibly declare victory over the international community.

Thus, it was disheartening but unsurprising to hear the Prosecutor admit defeat. Now, it is true that it was not a complete defeat. The arrest warrants will continue to be in effect. And there is no statute of limitations for serious violations of international criminal law.<sup>37</sup> Thus, so long as the accused are alive there is the possibility that they will be arrested and stand trial. Moreover, the Prosecutor's language — she said the investigations would be put “on hold” rather than ended<sup>38</sup> — indicates that she could reopen her investigations later, if the circumstances change. Nevertheless, her decision to suspend the investigations was an admission that the success of the ICC's work in Darfur is almost entirely out of its hands. It depends on either a regime change in

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<sup>32</sup> *Id.*

<sup>33</sup> See Bushra, *supra* note 8.

<sup>34</sup> See Cécile Aptel Williamson, *Justice empowered or justice hampered: The International Criminal Court in Darfur*, 15 AFR. SECURITY REV. 20, 25-26 (2006) (noting that ICC investigators had not been allowed into Sudan). See also Victor Peskin, *Caution and Confrontation in the International Criminal Court's Pursuit of Accountability in Uganda and Sudan*, 31 HUM. RTS. Q. 655, 667 (2009).

<sup>35</sup> Twentieth Report of the Prosecutor, *supra* note 6, at ¶ 8.

<sup>36</sup> See Twentieth Report of the Prosecutor, *supra* note 6, at ¶ 10 (explaining that during the second half of 2014, Bashir traveled to Qatar, Saudi Arabia, Egypt, and Ethiopia).

<sup>37</sup> See, e.g., Rome Statute, Art. 29 (July 1, 2002) (“The crimes within the jurisdiction of the Court shall not be subject to any statute of limitations.”).

<sup>38</sup> See U.N. SCOR, 6th Sess., *supra* note 27, at 2.

Sudan that brings to power a government willing to cooperate, or much more muscular action by the Security Council to compel the existing Sudanese regime to cooperate. As things stand, neither seems likely in the short term.

#### **IV. THE ICC HAS THE LEGAL AUTHORITY TO CONDUCT INVESTIGATIONS AND PROSECUTIONS ARISING OUT OF THE VIOLENCE IN DARFUR**

The legal issues that arise out of the relationship between the ICC and the Security Council are relatively straightforward: the ICC has the necessary legal authority to succeed. Unfortunately, as the ICC's experience with Darfur shows, legal authority is at best only weakly connected to success. First of all, the Rome Statute gives the Security Council the authority to refer matters to the ICC, and this serves as a proper jurisdictional basis for the court to investigate the situation,<sup>39</sup> although using this authority may not always be a good idea.<sup>40</sup> Next, the Security Council has authority under Chapter VII of the United Nations Charter to take measures not including the use of armed force to resolve threats to international peace and security.<sup>41</sup> This includes the authority to subject Sudan to the jurisdiction of the court against its will and to order Sudan to cooperate with the court.<sup>42</sup> Thus, there is little doubt that the referral was lawful, the ICC properly has

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<sup>39</sup> See Luigi Condorelli & Annalisa Ciampi, *Comments on the Security Council Referral of the Situation in Darfur to the ICC*, 3 J. INT'L CRIM. JUST. 590, 592 (2005) (addressing the Security Council's referral of the situation in Darfur to the ICC was consistent with Article 13(b) of the Rome Statute, which permits the Court to exercise jurisdiction when a situation is "referred to the Prosecutor by the Security Council acting under Chapter VII of the Charter of the United Nations.").

<sup>40</sup> See Louise Arbour, *The Relationship Between the ICC and the UN Security Council*, 20 GLOBAL GOVERNANCE: REV. MULTILATERALISM & INT'L ORGS. 195, 198 (2014) (arguing that the ICC's "legitimacy hinges to a large degree on voluntary acceptance of its complementarity jurisdiction" and that "Security Council referrals, by their nature a political and coercive measure, threaten to undermine the voluntary acceptance" of the court's jurisdiction).

<sup>41</sup> U.N. Charter, art. 41.

<sup>42</sup> Dapo Akande, *The Legal Nature of Security Council Referrals to the ICC and its Impact on Al Bashir's Immunities*, 7 J. INT'L CRIM. JUST. 333, 335 (2009) (noting that Sudan is not a member of the Rome Statute and would not, absent the Security Council resolution, have any obligation to cooperate with the ICC). See *infra* note 45 (noting that Article 86 of the Rome Statute imposes an obligation on member states to cooperate with the court).



jurisdiction over the situation in Darfur, and Sudan is legally obligated to cooperate with the court.<sup>43</sup>

The Security Council also possesses the authority to compel other states to cooperate with the ICC as part of its investigation in Darfur.<sup>44</sup> However, Resolution 1593 did not compel such cooperation. Rather, it simply “urge[d]” other states to cooperate.<sup>45</sup> This language, when used in Security Council Resolutions, is aspirational rather than mandatory.<sup>46</sup> On the other hand, the Rome Statute imposes a general obligation upon members to cooperate with the court.<sup>47</sup> The result is that Sudan is obligated to cooperate by virtue of Resolution 1593, while other members of the Rome Statute are obligated to cooperate by virtue of Article 86 of the Rome Statute. Non-member states, other than Sudan, are not obligated to do anything, although the Security Council did “urge” them to cooperate.

## V. SO WHY HAS THE ICC MADE SO LITTLE PROGRESS IN DARFUR?

As a matter of law, the ICC has most of what it needs to conduct its investigations and obtain custody of the accused — most notably jurisdiction over the situation and a Security Council Resolution requiring Sudan to cooperate. In practice, however, the legal issues have proved to be relatively unimportant compared to the political issues. This was recognized early on by a number of commentators. For example, Cherif Bassiouni, writing in 2006, described the Darfur referral as a “near mission impossible” because of the expected lack of political support from the Security Council and the likelihood that Sudan would not cooperate with the court.<sup>48</sup>

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<sup>43</sup> See Condorelli & Ciampi, *supra* note 38, at 592-593.

<sup>44</sup> *Id.* at 593 (noting that the Security Council could have used the authority granted to it under Article 41 of the United Nations Charter to obligate all states to cooperate with the ICC); Heyder, *supra* note 20, at 655 (“Under Article 41, the Security Council could adopt a resolution compelling all member states to give full effect to the Security Council’s decision to refer the Sudan case to the ICC.”).

<sup>45</sup> S.C. Res. 1593, UN Doc. No. S/RES/1593 (2005), at ¶ 2 (Mar. 31, 2005).

<sup>46</sup> See Condorelli & Ciampi, *supra* note 38, at 593.

<sup>47</sup> See Rome Statute, Art. 86 (July 1, 2002).

<sup>48</sup> See M. Cherif Bassiouni, *The ICC – Quo Vadis?*, 4 J. INT’L CRIM. JUST. 421, 425-426 (2006).

Ms. Bensouda laid the blame for the failure of the court's work in Darfur at the feet of Sudan and the Security Council. First, the Prosecutor blamed Sudan for its refusal to cooperate:

[T]he Government of Sudan . . . has the primary responsibility and is able to fully implement the Court's warrants of arrest consistent with its sovereign authority.

Notwithstanding this clear responsibility, it has consistently failed to do so. At the same time, it has also failed to provide any meaningful measure of justice at the national level.<sup>49</sup>

Next, the Prosecutor blamed the Security Council. She said that not once in ten years had the Security Council taken any concrete action to help the ICC succeed in Darfur.<sup>50</sup> And she told the Council that "unless there is a clear change of attitude and approach to Darfur in the near future," it was unlikely that the situation would change.<sup>51</sup> She said that the continued deterioration of the situation in Darfur should "shock" the Council into action.<sup>52</sup> Essentially she conceded that, without a dramatic change of heart by either the Council or Sudan, the ICC is unable to succeed in Darfur.

Of course, the Security Council has the authority to act to support the ICC. Sudan is in violation of its obligation to cooperate under Resolution 1593.<sup>53</sup> Resolution 1593 was issued under Chapter VII of the United Nations Charter after a finding by the Council that the situation in Darfur is a threat to international peace and security. The continuing violence suggests that it is still a threat to international peace and security. This means the Council could take a variety of actions to respond to Sudan's intransigence. These actions could range from formally finding Sudan to be in violation of its legal obligations under Resolution 1593, through the imposition of sanctions, all

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<sup>49</sup> See Record of the 7337<sup>th</sup> Mtg., *supra* note 27, at 3.

<sup>50</sup> *Id.* at 2.

<sup>51</sup> *Id.*

<sup>52</sup> *Id.*

<sup>53</sup> See Akande, *supra* note 41, at 335.

the way up to the authorization of the use of force against Sudan.<sup>54</sup> Just as clearly, the Security Council will do none of these things at the present time.

#### A. THE THREAT OF A RUSSIAN OR CHINESE VETO

The debate that followed the Prosecutor's dramatic announcement that she was suspending investigations in Darfur highlighted the divides among the Security Council's members. Ten states expressed support for the ICC, lamented the Security Council's paralysis, and criticized Sudan's refusal to cooperate. These were Australia,<sup>55</sup> Jordan,<sup>56</sup> the United Kingdom,<sup>57</sup> Luxembourg,<sup>58</sup> Argentina,<sup>59</sup> the United States,<sup>60</sup> Lithuania,<sup>61</sup> South Korea,<sup>62</sup> Chile,<sup>63</sup> and France.<sup>64</sup> Their language was clear and unequivocal. For example, the Australian representative said that the Council had "failed the victims of Darfur,"<sup>65</sup> while the representative of Luxembourg said that the ICC needed the "decisive support" of the Security Council,<sup>66</sup> and the French representative urged the Council to ensure that the ICC's arrest warrants were executed.<sup>67</sup> The U.S. representative called the Council's inaction a "travesty" and urged the Council to "wake from [its] slumber."<sup>68</sup>

The African states on the Security Council, on the other hand, were ambivalent about the ICC. The Nigerian representative, for example, condemned the violence in Darfur and called for

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<sup>54</sup> See Christopher D. Totten & Nicholas Tyler, *Arguing for an Integrated Approach to Resolving the Crisis in Darfur: The Challenges of Complementarity, Enforcement, and Related Issues in the International Criminal Court*, 98 J. CRIM. L. & CRIMINOLOGY 1069, 1110-1112 (2008).

<sup>55</sup> See Record of the 7337<sup>th</sup> Mtg., *supra* note 27, at 3-4.

<sup>56</sup> *Id.* at 6.

<sup>57</sup> *Id.* at 7.

<sup>58</sup> *Id.* at 7-8.

<sup>59</sup> *Id.* at 9-11.

<sup>60</sup> See Record of the 7337<sup>th</sup> Mtg., *supra* note 27, 11-13.

<sup>61</sup> *Id.* at 13.

<sup>62</sup> *Id.* at 13-14.

<sup>63</sup> *Id.* at 14.

<sup>64</sup> *Id.* at 15-16.

<sup>65</sup> See Record of the 7337<sup>th</sup> Mtg., *supra* note 27, at 4.

<sup>66</sup> *Id.* at 8.

<sup>67</sup> *Id.* at 16.

<sup>68</sup> *Id.* at 13.

peace, but did not express support for the ICC or criticize the Sudanese government's lack of cooperation.<sup>69</sup> Chad's representative did likewise, condemning the violence as a general matter, but hardly mentioning the ICC or Sudan's cooperation with the court.<sup>70</sup> The Rwandan delegate complained that the Security Council had refused to defer the proceedings against Bashir as requested by a number of African states<sup>71</sup> and that "continued reports of non-cooperation by African States" were counterproductive.<sup>72</sup> Underlying this ambivalence is a concern among some African states that the ICC's focus on African problems shows that it has become a tool of great power politics.<sup>73</sup>

Russia and China were even less supportive. The Russian delegate blamed the violence on "warring tribes" rather than the government of Sudan, praised the Sudanese government for its alleged attempts to maintain peace, and criticized the United States for imposing sanctions on Sudan.<sup>74</sup> More generally, Russia opposes any action by the Security Council against Sudan.<sup>75</sup> The Chinese delegate praised the Sudanese government for its efforts to "advance the political reconciliation process" and conspicuously did not call for Sudan to cooperate with the ICC.<sup>76</sup> In fact, the Chinese delegate only mentioned the ICC once in his presentation — when noting that the Chinese position regarding "the handling of the Darfur issue by the International Criminal

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<sup>69</sup> *Id.* at 4-5.

<sup>70</sup> *Id.* at 16.

<sup>71</sup> The Rome Statute grants to the Security Council the right to defer ICC proceedings for a period of one year by passing a resolution under Chapter VII of the United Nations Charter. *See* Rome Statute, Art. 16. A number of African states have asked for a deferral of the ICC's proceedings in Darfur, but the Security Council has not done so. *See* Charles C. Jalloh, Dapo Akande, & Max du Plessis, *Assessing the African Union Concerns about Article 16 of the Rome Statute of the International Criminal Court*, 4 AFR. J. LEGAL STUD. 5, 7-8 (2011).

<sup>72</sup> *See* Record of the 7337<sup>th</sup> Mtg., *supra* note 27, at 9.

<sup>73</sup> *See* Jalloh et al., *supra* note 71.

<sup>74</sup> *See* Record of the 7337<sup>th</sup> Mtg., *supra* note 27, at 5.

<sup>75</sup> *See* Somini Sengupta and Jeffrey Gettleman, *U.N. Set to Cut Force in Darfur as Fighting Rises*, NEW YORK TIMES, Dec. 25, 2014 (noting that Russia "staunchly backs the Bashir government" and the existence of "Russian resistance" to action by the Security Council) [<http://perma.cc/D6A5-TXHD>].

<sup>76</sup> *See* Record of the 7337<sup>th</sup> Mtg., *supra* note 27, at 8.

Court remains unchanged.”<sup>77</sup> While he did not spell out that position explicitly, China’s position is that it will veto any resolution that pressures Sudan to cooperate with the ICC.<sup>78</sup>

Despite the Security Council’s paralysis, it is important to recognize that there is considerable support for the ICC and that the paralysis essentially comes down to the threat of a Russian or Chinese veto. Even if we assume the African states would vote against Security Council action rather than simply abstain, the number of states on the Security Council supporting the ICC outnumbers those who would vote against it ten to five. Thus, there are sufficient votes to pass a Security Council resolution providing support to the ICC, if there were no permanent member veto.<sup>79</sup> However, those who oppose Security Council action include Russia and China, both of whom wield the veto.<sup>80</sup> As a result, the Security Council is paralyzed and will not take any action to support the ICC or pressure Sudan to cooperate. Nor is this the only recent situation in which the threat of a veto has paralyzed the Council. The vote on referral of the situation in Syria to the ICC in May 2014 broke down along similar lines. Thirteen of the fifteen Security Council members supported referral, but the measure was vetoed by Russia and China.<sup>81</sup>

It would be wrong to conclude from the Security Council’s paralysis in Darfur and Syria that the Security Council is opposed to action to end impunity. There is, in fact, broad support for

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<sup>77</sup> *Id.*

<sup>78</sup> See *ICC Charges Against Uhuru Kenyatta Defended by Ocampo*, BBC NEWS AFRICA (Dec. 16, 2014, 08:19 AM), <http://www.bbc.com/news/world-africa-30498266> (“China is an ally of Sudan in the UN Security Council, and is bound to veto any action against [President Bashir], correspondents say.”); Giorgio Cafiero, *China’s Sudan Challenge*, FOREIGN POL’Y IN FOCUS (Feb. 7, 2013), [http://fpif.org/chinas\\_sudan\\_challenge/](http://fpif.org/chinas_sudan_challenge/) (“China’s veto power has provided the Sudanese regime with impunity at the United Nations Security Council (UNSC). Beijing’s threat to veto all resolutions targeting Sudan has empowered Bashir’s regime to pursue its aggressive policies in Darfur without the threat of economic sanctions being imposed by the UNSC.”) [<http://perma.cc/2XEU-XN4A>].

<sup>79</sup> See UN Charter, art. 27(3) (noting that Security Council decisions need affirmative votes by nine members but also require “the concurring votes of the permanent members”).

<sup>80</sup> See UN Charter, art. 23(1) (noting that Russia and China are permanent members of the Security Council).

<sup>81</sup> See Record of the 7180<sup>th</sup> Mtg., UN Doc. No. S/PV.7180, dated May 22, 2014, at 4 (noting that China and Russia voted against the draft resolution referring the situation in Syria to the ICC while the other thirteen members of the Security Council voted in favor of it).

the ICC within the Council. Opposition to action, on the other hand, is narrow. Essentially, the opposition consists of Russia and China, and, absent the permanent member veto, the Security Council would already have acted in Sudan and Syria.

#### **B. BROAD SUPPORT FOR THE ICC IN THE GENERAL ASSEMBLY**

There is also considerable support for the ICC among the membership of the UN as a whole. On October 23, 2014, the Security Council held an open debate on the functioning of the Security Council and cooperation with the ICC.<sup>82</sup> Thirty-four countries urged greater Security Council support for the ICC.<sup>83</sup> Thirty-one countries spoke in support of limiting the permanent member veto in situations of mass atrocities.<sup>84</sup> Moreover, a number of countries that spoke in support of the ICC, did so on behalf of coalitions of states. For example, Switzerland spoke on behalf of the Accountability, Coherence and Transparency Group (ACT). ACT is a group of twenty-three states that supports both the ICC and limiting the permanent member veto.<sup>85</sup> Saint Lucia spoke on behalf of the “L.69 group,” a group of 42 developing countries that supports “comprehensive reform” of the Security Council.<sup>86</sup> Although the representative from Saint Lucia did not specifically mention the ICC, reforming the Security Council to limit or remove the

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<sup>82</sup> See Record of the 7285<sup>th</sup> Mtg., UN Doc. No. S/PV.7285, dated Oct. 23, 2014. So many states wished to speak that the meeting was adjourned and then resumed after lunch. See Record of the 7285<sup>th</sup> Mtg., UN Doc. No. S/PV.7285 (Resumption 1), dated Oct. 23, 2014.

<sup>83</sup> The author read all of the speeches and coded them for support of ICC, support for Security Council reform (generally), and support for limiting the permanent member veto.

<sup>84</sup> There have been several recent proposals to have the permanent members of the Security Council commit not to use their vetoes in situations where mass atrocities are occurring. The most prominent recent proposal along these lines came from France. See, e.g., Laurent Fabius, *A Call for Self-Restraint at the U.N.*, NEW YORK TIMES, Oct. 4, 2013. Such a voluntary code of conduct would avoid the problem that any proposal to amend the Charter to eliminate the veto would itself be subject to veto by any of the permanent members. See United Nations Charter, art. 108.

<sup>85</sup> See Record of the 7285<sup>th</sup> Mtg., UN Doc. No. S/PV.7285, dated Oct. 23, 2014, at 26-27 (noting that the Swiss representative spoke in his “capacity as the Coordinator of the Accountability, Coherence and Transparency (ACT) group, a cross-regional group of 23 states” and expressing ACT’s support for both the ICC and limiting the permanent member veto).

<sup>86</sup> *Id.* at 27-28.

permanent member veto would effectively empower the Security Council to support the ICC.<sup>87</sup> In other words, there is broad support among UN member states for changes that would remove the permanent member roadblock and permit the Council to support the ICC.<sup>88</sup>

In contrast, only four states were openly critical of the ICC or the Security Council's relationship with the ICC: Russia, Rwanda, Chad, and Egypt.<sup>89</sup> The Russian delegate, for example, argued that the Security Council was already cooperating sufficiently with the ICC as evidenced by the fact that the Security Council permitted the Prosecutor to address it regularly.<sup>90</sup> He went on to suggest that the problem of Sudanese non-cooperation was the court's fault for trying to bring to justice senior public officials of states.<sup>91</sup> The Rwandan delegate chastised the Council for failing to take any action on the request by African states for a deferral of the ICC's proceedings in Darfur, although he also said that Rwanda remained committed to "ensur[ing] accountability for the most serious crimes."<sup>92</sup> The representatives from Chad and Egypt echoed Rwanda's concerns about deferral of the ICC's investigations in Darfur.<sup>93</sup> The Chinese delegate was ambiguous rather than overtly critical ("We believe that the ICC's efforts to seek justice should take into account the urgent needs of maintaining regional peace and stability"<sup>94</sup>) but in practice, China is opposed to action by the Security Council to support the ICC.

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<sup>87</sup> See *supra* text accompanying notes 79-81 (noting that absent a permanent member veto, the Security Council would have already acted to support the ICC).

<sup>88</sup> See also *infra* notes 179-180 (noting that General Assembly Resolution 68/305, which expresses support for the ICC, had sixty-six sponsors and passed by consensus).

<sup>89</sup> See *infra* text accompanying notes 90-93.

<sup>90</sup> See Record of the 7285<sup>th</sup> Mtg., UN Doc. No. S/PV.7285, dated Oct. 23, 2014, at 12.

<sup>91</sup> *Id.* at 12-13.

<sup>92</sup> *Id.* at 14-15.

<sup>93</sup> *Id.* at 16; Record of the 7285<sup>th</sup> Meeting of the Security Council, UN Doc. No. S/PV.7285 (Resumption 1), dated October 23, 2014, at 31.

<sup>94</sup> See Record of the 7285<sup>th</sup> Mtg., UN Doc. No. S/PV.7285, dated Oct. 23, 2014, at 11.

The debate demonstrates that the positions of states within the General Assembly are quite similar to the positions of states within the Security Council. A clear majority of states spoke in favor of supporting the ICC and very few states spoke against it.<sup>95</sup> Nor was the court's support limited to Western democracies. While most European states urged support for the ICC, so did many Central and South American states (including Costa Rica,<sup>96</sup> Guatemala,<sup>97</sup> Chile,<sup>98</sup> Mexico,<sup>99</sup> Uruguay,<sup>100</sup> Argentina,<sup>101</sup> and Brazil<sup>102</sup>) as well as a number of Asian states (including South Korea<sup>103</sup> and Japan<sup>104</sup>).

The position of African states warrants particular study because, apart from Russia and China, opposition to the ICC appears to come largely from African states. Rwanda, Chad, and Egypt all criticized the Council's refusal to defer the proceedings in Darfur,<sup>105</sup> but not all African states were negative about the court. Three African states were neutral (Morocco, Algeria, and Côte d'Ivoire),<sup>106</sup> while two states, Nigeria and Botswana, called for greater support for the ICC.<sup>107</sup> Moreover, even Rwanda and Egypt, two of the African states that were critical of the ICC,

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<sup>95</sup> See *supra* text accompanying notes 83-94 (noting that thirty-four states urged greater support of the ICC, while only four states were critical of the ICC).

<sup>96</sup> See Record of the 7285<sup>th</sup> Mtg., UN Doc. No. S/PV.7285, dated Oct. 23, 2014, at 28-29.

<sup>97</sup> Record of the 7285<sup>th</sup> Meeting of the Security Council, UN Doc. No. S/PV.7285 (Resumption 1), dated October 23, 2014, at 4-5.

<sup>98</sup> See Record of the 7285<sup>th</sup> Mtg., UN Doc. No. S/PV.7285, dated Oct. 23, 2014, at 8-9.

<sup>99</sup> Record of the 7285<sup>th</sup> Meeting of the Security Council, UN Doc. No. S/PV.7285 (Resumption 1), dated October 23, 2014, at 7-8.

<sup>100</sup> *Id.* at 14-15.

<sup>101</sup> See Record of the 7285<sup>th</sup> Mtg., UN Doc. No. S/PV.7285, dated Oct. 23, 2014, at 24-25.

<sup>102</sup> Record of the 7285<sup>th</sup> Meeting of the Security Council, UN Doc. No. S/PV.7285 (Resumption 1), dated October 23, 2014, at 5-6.

<sup>103</sup> See Record of the 7285<sup>th</sup> Mtg., UN Doc. No. S/PV.7285, dated Oct. 23, 2014, at 6-7.

<sup>104</sup> *Id.* at 30-31.

<sup>105</sup> See Record of the 7285<sup>th</sup> Mtg., UN Doc. No. S/PV.7285, dated Oct. 23, 2014, at 14-15 (Rwanda); *id.* at 16 (Chad); Record of the 7285<sup>th</sup> Meeting of the Security Council, UN Doc. No. S/PV.7285 (Resumption 1), dated October 23, 2014, at 31 (Egypt).

<sup>106</sup> Record of the 7285<sup>th</sup> Meeting of the Security Council, UN Doc. No. S/PV.7285 (Resumption 1), dated October 23, 2014, at 25-26 (Morocco); *id.* at 34-35 (Algeria); *id.* at 31-32 (Côte d'Ivoire).

<sup>107</sup> See Record of the 7285<sup>th</sup> Mtg., UN Doc. No. S/PV.7285, dated Oct. 23, 2014, at 13 (Nigeria); Record of the 7285<sup>th</sup> Meeting of the Security Council, UN Doc. No. S/PV.7285 (Resumption 1), dated October 23, 2014, at 33-34 (Botswana).



nevertheless called for a limit on the permanent member veto in situations involving mass atrocities.<sup>108</sup> And Rwanda, the most critical state, reaffirmed that it was committed to ending impunity for mass atrocities.<sup>109</sup>

In effect, it appears that African views about the ICC's involvement in Darfur are mixed, with some states opposed, some neutral and some states in favor of supporting the ICC. The positions of African states match up fairly closely with whether they are members of the Rome Statute. Of the states that have criticized the ICC, Chad is a member of the Rome Statute, while Rwanda and Egypt are not.<sup>110</sup> Of the states that were neutral, Côte d'Ivoire is a member state, while Morocco and Algeria are not.<sup>111</sup> Both states that were supportive of the ICC (Nigeria and Botswana) are members of the Rome Statute.<sup>112</sup> Given that there are thirty-four African states that are members of the Rome Statute,<sup>113</sup> this suggests that the majority of African states are probably still (quietly) supportive of the ICC, even if a vocal minority is critical of it. Moreover, even those African states that are critical of the ICC's involvement in Darfur claim to be broadly supportive of ending impunity and lifting the stranglehold imposed by the permanent member veto.<sup>114</sup>

Further, there is some reason to believe that African states view the situation in Darfur as something of a special case. For example, all three of the African members of the Security Council at the time (Chad, Rwanda, and Nigeria) voted in favor of draft Security Council referral of the

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<sup>108</sup> Record of the 7285<sup>th</sup> Mtg., UN Doc. No. S/PV.7285, dated Oct. 23, 2014, at 14-15 (Rwanda); Record of the 7285<sup>th</sup> Meeting of the Security Council, UN Doc. No. S/PV.7285 (Resumption 1), dated October 23, 2014, at 31 (Egypt).

<sup>109</sup> Record of the 7285<sup>th</sup> Mtg., UN Doc. No. S/PV.7285, dated Oct. 23, 2014, at 15 (noting that Rwanda shared the ICC's goal to "fight impunity and ensure accountability for the most serious crimes").

<sup>110</sup> See International Criminal Court, State Parties to the Rome Statute, available at [http://www.icc-cpi.int/en\\_menus/asp/states%20parties/Pages/the%20states%20parties%20to%20the%20rome%20statute.aspx](http://www.icc-cpi.int/en_menus/asp/states%20parties/Pages/the%20states%20parties%20to%20the%20rome%20statute.aspx) (last visited Dec. 28, 2014) [<http://perma.cc/8ATM-SF7C>].

<sup>111</sup> *Id.*

<sup>112</sup> *Id.*

<sup>113</sup> *Id.*

<sup>114</sup> See *supra* text accompanying notes 108-109.

situation in Syria to the ICC.<sup>115</sup> It is notable that Rwanda, the fiercest African critic of the ICC's handling of the situation in Darfur, was nonetheless willing to support the referral of the situation in Syria.<sup>116</sup> This suggests that African opposition may be specific to Darfur rather than a generalized opposition to the ICC.

The positions of states during the attempt to refer the situation in Syria to the ICC show a similar pattern. The draft resolution that China and Russia vetoed<sup>117</sup> had sixty-five sponsors.<sup>118</sup> That support came from all over the world including many states in Europe, Central and South America, Africa, and the Middle East. Once again, Africa deserves special attention. Seven of the measure's sixty-five sponsors were African states: Botswana, the Central African Republic, Côte d'Ivoire, the Democratic Republic of the Congo, Libya, Senegal, and the Seychelles.<sup>119</sup> Six of these seven countries (all but Libya) are also state parties to the Rome Statute.<sup>120</sup> So, while Rwanda and a few other African states have been outspoken in their criticism of the court's investigation in Darfur, it appears the majority of African states, particularly those that are ICC members, are still generally supportive of the ICC.

In short, there is ample evidence that support for the ICC is broad, while opposition to the court is narrow. This level of support for the court is not surprising given that there are 122 state parties to the Rome Statute.<sup>121</sup> To put that in perspective, there are only 193 members in the entire

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<sup>115</sup> See *supra* note 79.

<sup>116</sup> See Record of the 7180<sup>th</sup> Mtg., UN Doc. No. S/PV.7180, dated May 22, 2014, at 4 (noting that Rwanda voted in favor of the referral),

<sup>117</sup> *Id.*

<sup>118</sup> See Draft Resolution, UN Doc. No. S/2014/348, dated May 22, 2014.

<sup>119</sup> *Id.*

<sup>120</sup> See International Criminal Court, State Parties to the Rome Statute, available at [http://www.icc-cpi.int/en\\_menus/asp/states%20parties/Pages/the%20states%20parties%20to%20the%20rome%20statute.aspx](http://www.icc-cpi.int/en_menus/asp/states%20parties/Pages/the%20states%20parties%20to%20the%20rome%20statute.aspx) (last visited Dec. 28, 2014) [<http://perma.cc/8ATM-SF7C>].

<sup>121</sup> *Id.*

United Nations.<sup>122</sup> This means that more than 60% of all states are ICC members and thus presumably supporters of the ICC. Unfortunately, the states that oppose the ICC include China and Russia, both of which can use their veto power to block Security Council action. The result has been paralysis by the Council.

## VI. THE PERMANENT MEMBERS OF THE SECURITY COUNCIL

The key players in the relationship between the ICC and the Security Council are the permanent members. As shown above, but for the threat of a permanent member veto, it is likely that the Security Council would have already acted to support the ICC. Thus, understanding their motivations may make it easier to predict the future of relations between the Council and the court. For this purpose, I will use the framework developed by Professor Bosco in his book *Rough Justice*.<sup>123</sup> He argues that states will adopt one of three strategies for dealing with the ICC — marginalization, control, or acceptance.<sup>124</sup> States may try to marginalize the court by attacking the court's legitimacy or trying to prevent other states from supporting it.<sup>125</sup> Another strategy is for states to try and control the court to ensure that it undertakes activities the state wants while avoiding those it does not want.<sup>126</sup> This could be accomplished by conditioning state support on whether the court's actions are consistent with the state's interests. Finally, states can accept the court, which would entail consistently supporting the court even when its actions do not serve the state's political interests.<sup>127</sup>

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<sup>122</sup> See United Nations, Growth in United Nations Membership, 1945-present, available at <http://www.un.org/en/members/growth.shtml#text> (last visited Jan. 26, 2016).

<sup>123</sup> See generally DAVID BOSCO, *ROUGH JUSTICE: THE INTERNATIONAL CRIMINAL COURT IN A WORLD OF POWER POLITICS* (Oxford University Press 2014).

<sup>124</sup> *Id.* at 11-17.

<sup>125</sup> *Id.*

<sup>126</sup> *Id.*

<sup>127</sup> *Id.*

Britain and France are both firm supporters of the ICC and are often seen as the court's strongest allies on the Council.<sup>128</sup> They are parties to the Rome Statute and speak regularly in support of the ICC.<sup>129</sup> The United Kingdom describes itself as “a strong supporter of international justice in general and of the International Criminal Court in particular.”<sup>130</sup> Unlike Russia and China, who talk about balancing peace and justice, the United Kingdom takes the position that there cannot be lasting peace without justice<sup>131</sup> and has urged all states to become members of the ICC.<sup>132</sup> France similarly seems to favor justice in the peace vs. justice debate<sup>133</sup> and has taken the unusual step of promoting a “code of conduct” between the permanent members under which they would agree not to veto resolutions in situations where mass atrocities are being committed.<sup>134</sup> France and the United Kingdom also appear to be willing to go farther than most countries in taking concrete action to support the ICC.<sup>135</sup> In Professor Bosco's framework, France and the United Kingdom have accepted the ICC.<sup>136</sup>

The United States was initially quite hostile to the ICC,<sup>137</sup> even though it abstained from Resolution 1593 rather than vetoing it.<sup>138</sup> For example, President Bush “officially nullified the Clinton administration's signature of the Rome Statute” and discontinued participation in ICC

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<sup>128</sup> See David Kaye, *The Council and the Court: Improving Security Council Support of the International Criminal Court* (2013) at 9.

<sup>129</sup> *Id.*

<sup>130</sup> See Record of the 6849<sup>th</sup> Mtg., *supra* note 141, at 24.

<sup>131</sup> *Id.* (“We have learned from history that there cannot be lasting peace without justice, accountability and reconciliation.”).

<sup>132</sup> *Id.* (“We need all States that have not yet done so to become parties to the Rome Statute . . .”).

<sup>133</sup> *Id.* at 23 (“Silence has never served peace or justice. The inability of the Council to demonstrate its unity against mass crimes is, rather, an incitement to the Syrian authorities to pursue the path of violence.”).

<sup>134</sup> See Record of the 6849<sup>th</sup> Mtg., *supra* note 141, at 23.

<sup>135</sup> See *infra* notes 183-187 (noting that the United Kingdom and France have indicated their willingness to arrest ICC indictees, among other things).

<sup>136</sup> See DAVID BOSCO, *ROUGH JUSTICE: THE INTERNATIONAL CRIMINAL COURT IN A WORLD OF POWER POLITICS* (Oxford University Press 2014) at 15-17.

<sup>137</sup> See *Id.* at 71-75.

<sup>138</sup> See *supra* notes 21-22.

meetings.<sup>139</sup> His ambassador to the United Nations, John Bolton, characterized the ICC as a threat to fundamental American values.<sup>140</sup> Despite this initial hysteria, it was always likely that the United States would moderate its opposition to the ICC given that they share many similar goals. For example, the U.S. representative to the Security Council has said that “[s]trengthening the global system of accountability for the worst atrocities remains an important priority for the United States” and described preventing mass atrocities as both a “core national security interest” of the United States and a “moral responsibility.”<sup>141</sup> These are also core goals of the ICC.<sup>142</sup> Indeed, President Obama has been considerably more supportive of the ICC than President Bush. For example, the United States has argued in favor of Security Council action to support the ICC’s investigations in Darfur,<sup>143</sup> and the United States voted for the referral of the situation in Syria to the ICC.<sup>144</sup>

Moreover, the United States has also worked behind the scenes to support the ICC. The United States is an active participant in meetings of the Assembly of States, it transferred ICC indictee Bosco Ntaganda to the court after he surrendered himself to the U.S. Embassy in Kigali, and the United States has deployed military advisers to help search for members of the Lord’s Resistance Army who have been indicted by the ICC.<sup>145</sup> Professor Kaye has described the United States as having a “close working relationship” with the court,<sup>146</sup> although the recent self-referral

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<sup>139</sup> See Heyder, *supra* note 21, at 661.

<sup>140</sup> *Id.*

<sup>141</sup> See Record of the 6849<sup>th</sup> Mtg., UN Doc. No. S/PV.6849, dated Oct. 17, 2012 at 8.

<sup>142</sup> See Rome Statute, Preamble (noting that the ICC was established to ensure that “the most serious crimes of concern to the international community as a whole [do] not go unpunished” and to “put an end to impunity for the perpetrators of these crimes and thus contribute to the prevention of such crimes”).

<sup>143</sup> See *supra* notes 60, 68.

<sup>144</sup> See *supra* note 81.

<sup>145</sup> See Kaye, *supra* note 128, at 10.

<sup>146</sup> *Id.* at 9.

by Palestine<sup>147</sup> may cause tension in that relationship.<sup>148</sup> Ultimately, the goals of the United States and the ICC are broadly aligned, but the United States has reservations about the existence of a truly independent international court that could constrain its conduct or indict its nationals. Given that the potential for ICC constraints on U.S. action would be greatest if the United States became a party to the Rome Statute,<sup>149</sup> it seems unlikely that the United States will join the ICC in the foreseeable future.

The United States does not fit neatly into Professor Bosco's framework. While it had a program of active marginalization under President Bush, it now broadly supports the objectives of the court, which makes it seem like it accepts the court in some key ways. At the same time, it is committed to using its position on the Security Council to prevent the court from obtaining jurisdiction over U.S. nationals,<sup>150</sup> which looks like a control strategy. The United States thus seems to shift between acceptance and control strategies depending on the issue. As a result, the United States does appear to be qualitatively different from Russia and China, which appear to simply be interested in controlling the court.

Russia has often blocked support for the ICC. At the same time, Russia claims to support the goals of the ICC: "It is clear that persons guilty of particularly serious crimes under international law must be brought before the Court."<sup>151</sup> What should one make of what Russia says

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<sup>147</sup> See "The Prosecutor of the International Criminal Court, Fatou Bensouda, opens a preliminary examination of the situation in Palestine," ICC Press Release dated Jan. 16, 2015, Doc. No. ICC-OTP-20150116-PR1083 (noting that the Prosecutor had opened a preliminary examination into the situation in Palestine following Palestine's accession to the Rome Statute and its request for an investigation).

<sup>148</sup> See Kaye, *supra* note 128, at 10.

<sup>149</sup> This would have the effect of granting the ICC jurisdiction over acts committed by US nationals. See Rome Statute, Art. 12(2)(b).

<sup>150</sup> This can be seen, for example, in the language that was inserted into Security Council Resolution 1593 that "decide[d] that nationals, current or former officials or personnel from a contributing State outside Sudan which is not a party to the Rome Statute . . . shall be subject to the exclusive jurisdiction of that contributing State . . ." See Security Council Resolution 1593, UN Doc. No. S/RES/1593 (2005), dated March 31, 2005, at ¶ 7.

<sup>151</sup> See Record of the 6849<sup>th</sup> Mtg., *supra* note 141, at 20.

versus what it does? Russia attempts to justify its position by focusing on the relationship between the court and the Council. So, for example, the Russian representative has noted the difficulty of achieving “a proper balance between the interests of peace and punishing the guilty.”<sup>152</sup> He has also stressed the need for the Council and the court to “interact within the framework of their respective mandates and with mutual respect.”<sup>153</sup> There are legitimate debates about how to balance peace and justice, but it seems more likely that Russia’s position is about power, specifically the question of whether the ICC will be subordinate to the Security Council. Implicit in the Russian position is a belief that the ICC should either be formally subordinated to the Security Council<sup>154</sup> or that, at the very least, the ICC should defer to the Security Council’s leadership.<sup>155</sup> Not coincidentally, this would give Russia an effective veto over ICC action by virtue of its veto over Security Council action. All this suggests that Russia’s opposition to the ICC is pragmatic rather than principled. It also suggests that Russia will sometimes support the ICC and sometimes oppose it depending on whether it thinks ICC action advances Russian interests.<sup>156</sup> Russia is using a strategy of control rather than marginalization.

Of all the permanent members, China appears to be the only one with a principled opposition to the ICC, although power concerns are also present. Historically, China has given great weight to the principles of non-intervention and sovereignty.<sup>157</sup> This has carried through to

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<sup>152</sup> *Id.* at 19.

<sup>153</sup> *Id.*

<sup>154</sup> *See, e.g., Id.* at 20 (suggesting that the ICC should not be able to exercise jurisdiction over the crime of aggression “in the absence of a definition of aggression by the Security Council” and that “in the absence of a direct instruction, Security Council resolutions do not abrogate the norms of general international law on the immunity of heads of State in office”).

<sup>155</sup> *See, e.g., Id.* at 19 (characterizing the ICC as a “new tool” that the Council can use in maintaining international peace and security).

<sup>156</sup> *See* Kaye, *supra* note 128, at 13 (noting that Russia is likely to take a “case-by-case approach” to the ICC that will not depend particularly on principles of accountability and justice).

<sup>157</sup> *See, e.g.,* Chen Tiquang, *The People’s Republic of China and International Law*, 8 DALHOUSIE L.J. 3, 23-25 (1984) (describing Chinese support for the Five Principles of Peaceful Coexistence, including “mutual respect for each other’s territorial integrity and sovereignty” and “mutual non-interference in each other’s internal affairs”).

the present, with the Chinese representative to the Security Council stressing that the Council must be guided in its work by the “fundamental principles of respect for national sovereignty and non-interference in the internal affairs of States.”<sup>158</sup> Thus, while China views the ICC as an “integral part of the international system,” it believes that the ICC must also abide by the principles of non-intervention and sovereignty.<sup>159</sup> This suggests that China will generally be supportive of or at least ambivalent about the ICC’s work when a state has consented to the Court’s jurisdiction, but will generally oppose the use of the Security Council to subject a state to the court’s jurisdiction against its will.<sup>160</sup>

On the other hand, Professor Kaye suggests that concerns about non-interference and sovereignty may be less relevant today than they have been in the past for China.<sup>161</sup> Particularly as China becomes more powerful militarily and politically, it may be less committed to a policy of non-interference because of the constraints such a policy imposes on its freedom of action. As with Russia and the U.S., there also appears to be a concern that a strong independent Court could be a potential threat.<sup>162</sup> Like Russia, China thinks the best solution to the potential difficulties created by an independent ICC is to have the ICC defer to the Security Council.<sup>163</sup> This would, of course, give China an effective veto over ICC action. Ultimately, China will be predisposed to oppose Security Council action that subjects a state to ICC jurisdiction against its will, although it

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<sup>158</sup> See Record of the 6849<sup>th</sup> Mtg., *supra* note 141, at 12.

<sup>159</sup> *Id.*

<sup>160</sup> *Id.* (“States bear the primary responsibility to punish international crimes, eliminate impunity and achieve justice. The ICC can supplement but not replace national jurisdictions”). See also Record of the 7285<sup>th</sup> Mtg., *supra* note 82, at 11 (“The ICC should strictly abide by the principle of complementarity . . .”).

<sup>161</sup> See Kaye, *supra* note 128, at 11.

<sup>162</sup> *Id.* at 10 (“Officials of both countries are said to harbor concerns about a possible ICC focus on their own domestic conflicts. . .”).

<sup>163</sup> See Record of the 6849<sup>th</sup> Mtg., *supra* note 141, at 12 (“Since the Charter entrusts the Security Council with the primary responsibility for the maintenance of international peace and security, we hope that the ICC will exercise caution in carrying out its functions and avoid impeding the work of the Security Council . . .”). See also Record of the 7285<sup>th</sup> Meeting of the Security Council, *supra* note 82, at 12 (“The ICC should . . . support the Council’s efforts to fulfil its responsibilities under the Charter.”).



will also factor in pragmatic considerations of how ICC action would affect its interests.<sup>164</sup> Like Russia, China seeks to control the court rather than accept it.<sup>165</sup>

The ICC can count on France and Britain to support it.<sup>166</sup> They have both accepted the ICC's goals and methods. The ICC can also probably count on U.S. support on most issues, unless it initiates a prosecution of a U.S. national, at which point the U.S. might shift back to a strategy of active marginalization.<sup>167</sup> By the same token, the ICC can probably count on Russia and China to use their position as permanent members of the Security Council to try to control the court.<sup>168</sup> This will mean that Russia and China will use their vetoes to protect themselves and their allies. To the extent that the court is willing to defer to Russia and China's interests in its selection of situations to investigate, it could probably neutralize that opposition, but sacrificing its independence would be anathema to the court, which is founded on the ideal of an "independent permanent International Criminal Court . . . with jurisdiction over the most serious crimes of concern to the international community as a whole."<sup>169</sup>

## VII. WHAT DOES IT MEAN FOR STATES TO SUPPORT THE ICC?

Throughout this Article, I have talked about whether states support the ICC. States are described as supporting the ICC if their representatives call for supporting the court before the Security Council. But what does it mean to support the ICC? Take, for example, the statement of Chile during the Security Council debate that followed the Prosecutor's announcement that she was suspending investigations in Darfur. Chile's representative reiterated his country's "support

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<sup>164</sup> See, e.g. *ICC Charges Against Uhuru Kenyatta Defended by Ocampo supra* note 78, at 4 (suggesting that China has blocked action on Darfur, in part, because Sudan is an ally).

<sup>165</sup> See *Bosco, supra* note 136, at 14-15.

<sup>166</sup> See *supra* text accompanying notes 128-136.

<sup>167</sup> See *supra* text accompanying notes 137-150.

<sup>168</sup> See *supra* text accompanying notes 151-165.

<sup>169</sup> See Rome Statute, Preamble.

for the Court and for the work of its Prosecutor.”<sup>170</sup> He urged the Prosecutor to continue investigating potential crimes in Darfur, stressed the need for the Council to work with the Court to ensure its success, and urged all states to cooperate with the Court.<sup>171</sup> He did not, however, make any concrete proposals for how to accomplish these goals. Nor is Chile alone. A number of states made similar statements of general support that lacked any proposals for specific action.<sup>172</sup>

It is impossible to tell from Chile’s statement if it would support any particular initiatives to put pressure on Sudan to cooperate with the court. It is possible that Chile would support concrete action, but it is equally possible that its support for the ICC extends only to praising it publicly. If the latter is true, then Chile’s support is empty. Unless states are willing to take some concrete action that pressures Sudan to cooperate, it is unlikely that support for the court will translate into success for the court. After all, even Russia and China have said they support the ideas of justice and accountability in the abstract,<sup>173</sup> even if in practice, they prevent the Security Council from acting to effectuate those principles.<sup>174</sup>

Luckily, there have been a number of calls for the Security Council to take specific actions. Looking at these can give us some sense of what states mean when they say they “support” the ICC, as well as an idea of what actions the Council would likely take if the threat of a permanent member veto was removed. The proposal that appears to have the most support is for the Security Council to create a monitoring mechanism, most likely in the form of a permanent subsidiary body, which would review state compliance with the Council’s ICC-related resolutions and recommend

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<sup>170</sup> See Record of the 7337<sup>th</sup> Mtg., *supra* note 28, at 14.

<sup>171</sup> *Id.*

<sup>172</sup> See, e.g., Record of the 7337<sup>th</sup> Mtg., *supra* note 28, at 13-14 (Republic of Korea).

<sup>173</sup> See, e.g., *supra* text accompanying note 151.

<sup>174</sup> See, e.g., *supra* text accompanying note 81 (noting that Russia and China vetoed referral of the situation in Syria to the ICC).

action the Council should take to achieve compliance. The creation of a formal monitoring mechanism has been endorsed by a significant number of states.<sup>175</sup>

Another proposal that has significant support is for the United Nations to pay for the costs of Security Council referrals. Both the Security Council resolution that referred the situation in Darfur to the ICC and the draft resolution that would have referred the situation in Syria stated that “none of the expenses incurred in connection with the referral . . . shall be borne by the United Nations.”<sup>176</sup> This was somewhat unexpected because the drafters of the Rome Statute had assumed that the United Nations would pay for the expenses incurred by referrals.<sup>177</sup> Several states have spoken against the Council’s refusal to pay for referrals.<sup>178</sup> In addition, a General Assembly resolution was passed by consensus in 2014 that noted the need to fund the ICC’s “expenses related to investigations and prosecutions” incurred as a result of “situations referred to the Court by the Security Council.”<sup>179</sup> The resolution was sponsored by sixty-six states and adopted by consensus in the General Assembly.<sup>180</sup>

There also appears to be moderate support for a number of slightly stronger proposals. For example, a number of states support a proposal that the Security Council should, as a matter of course, impose targeted sanctions on individuals who have been indicted by the ICC.<sup>181</sup> In addition,

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<sup>175</sup> See Record of the 7337<sup>th</sup> Mtg., *supra* note 28, at 4 (Australia); *id.* at 10 (Argentina); Record of the 7285<sup>th</sup> Meeting, *supra* note 82, at 13 (Nigeria); *id.* at 19 (Jordan); *id.* at 20 (Luxembourg); *id.* at 21 (United States of America); *id.* at 23 (France); *id.* at 26 (Switzerland); *id.* at 30 (Liechtenstein); Record of the 7285<sup>th</sup> Meeting of the Security Council (Resumption 1), *supra* note 82, at 3 (Romania); *id.* at 7 (Sweden); *id.* at 8 (Mexico); *id.* at 9 (The Netherlands); *id.* at 10 (Italy); *id.* at 11 (Germany); *id.* at 12 (Pakistan); *id.* at 16 (Czech Republic); *id.* at 18 (Portugal); *id.* at 35 (Poland); *id.* at 37 (Hungary).

<sup>176</sup> See S.C. Res. 1593, *supra* note 116, at ¶ 7. See also Draft Res., UN Doc. No. S/2014/348, at ¶ 8 (May 22, 2014).

<sup>177</sup> See Rome Statute, Art. 115(b).

<sup>178</sup> See Record of the 7337<sup>th</sup> Mtg., *supra* note 28, at 11 (Argentina); Record of the 7285<sup>th</sup> Mtg., Resumption 1), *supra* note 82, at 5 (Brazil); *id.* at 9 (The Netherlands); *id.* at 16 (Czech Republic).

<sup>179</sup> See G.A. Res. 68/305 at 2 (Sept. 16, 2014).

<sup>180</sup> See U.N. GAOR, 68<sup>th</sup> Sess., 107<sup>th</sup> plen. Mtg. at 20-22, UN Doc. A/68/PV.107, (Sept. 9, 2014).

<sup>181</sup> See Record of the 6849<sup>th</sup> Mtg., *supra* note 141, at 23 (France); Record of the 7337<sup>th</sup> Mtg., *supra* note 28, at 4 (Australia); Record of the 7285<sup>th</sup> Mtg., *supra* note 82, at 25 (Argentina); Record of the 7285<sup>th</sup> Mtg. (Resumption 1), *supra* note 82, at 3 (Romania).

a number of countries have stated quite baldly that Sudan is in violation of its obligation to cooperate with the Court in Resolution 1593.<sup>182</sup> The logical consequence of this would be passage of a second resolution declaring that Sudan has breached its legal obligations under Resolution 1593.

Several stronger proposals have also been made, but there appears to be weaker support for these proposals. So, for example, France has proposed that the Council and the United Nations adhere to a rule that would generally prohibit contact with anyone who has been indicted by the ICC.<sup>183</sup> A handful of other states also support this.<sup>184</sup> The United Kingdom has proposed that all future referrals by the Security Council should include a legally binding obligation on all states to cooperate with the Court.<sup>185</sup> The Netherlands supports this position.<sup>186</sup> A small number of states have also indicated that they would implement the arrest warrants if given the opportunity.<sup>187</sup> Finally, Hungary has proposed the creation of “clear and public criteria” that the Security Council would agree to follow in deciding both when to refer matters to the ICC and how to ensure accountability for such referrals.<sup>188</sup>

The first thing to note is that a significant number of states have said on the record that they would be willing to take concrete action to support the ICC. For most states, support does mean more than just praising the ICC during public debates. Moreover, it is quite likely that some of the states that took no position on particular proposals for action would nonetheless vote in favor of them if given the opportunity. On the other hand, it is also noticeable that the stronger the proposal,

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<sup>182</sup> See Record of the 7337<sup>th</sup> Mtg., *supra* note 28, at 12 (United States); *id.* at 13 (Lithuania); *Id.* at 15 (France); Record of the 7285<sup>th</sup> Meeting (Resumption 1), *supra* note 82, at 10 (Italy); *id.* at 15 (Uruguay).

<sup>183</sup> See Record of the 6849<sup>th</sup> Mtg., *supra* note 141, at 23.

<sup>184</sup> See Record of the 7337<sup>th</sup> Mtg., *supra* note 28, at 4 (Australia); *id.* at 10-11 (Argentina).

<sup>185</sup> See Record of the 6849<sup>th</sup> Mtg., *supra* note 141, at 24.

<sup>186</sup> See Record of the 7285<sup>th</sup> Mtg., (Resumption 1), *supra* note 82, at 9 (The Netherlands).

<sup>187</sup> See Record of the 7337<sup>th</sup> Mtg., *supra* note 28, at 7 (United Kingdom); *id.* at 10 (Argentina); *Id.* at 16 (France).

<sup>188</sup> Record of the 7285<sup>th</sup> Mtg., (Resumption 1), *supra* note 82, at 38.

the smaller the number of states willing to publicly endorse it. This suggests, unsurprisingly, that states vary in the strength of the action they would take to support the ICC, with a large number of states willing to take moderate action and a smaller number willing to take stronger action.

So, if the threat of a Russian or Chinese veto were lifted, what action could we expect the Security Council to take? And what effect would it have, if any, on the success of the Court? There is broad support for the creation of a formal body within the Security Council tasked with monitoring compliance with ICC-related resolutions. It is unclear, however, how useful that would be. At best, the monitoring body would be able to make recommendations to the Security Council. It is unlikely that it would be empowered to take action on its own authority. Thus, it would not lead automatically to concrete action. On the other hand, having formal recommendations for action might make it more likely that the Council acted on those recommendations.

There also appears to be broad support for having the United Nations pay the costs of Security Council referrals. This might well have permitted the Prosecutor to continue her investigations in Darfur by providing the court with a dedicated funding source for those investigations.<sup>189</sup> But, of course, simply continuing the investigations does not seem to materially increase the likelihood of success because Sudan would probably continue to block those investigations.

There appears to be moderate support for implementing targeted sanctions against ICC indictees and for a formal finding that Sudan is in violation of Resolution 1593. These steps would put greater pressure on Sudan, although they would also be less likely to occur. There is a debate about the utility of sanctions regimes, but in theory they apply pressure to the sanctioned

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<sup>189</sup> See Record of the 7337<sup>th</sup> Mtg., *supra* note 28, at 2 (suggesting that the decision to suspend the investigation in Darfur was driven in part by “an environment where [the OTP’s] limited resources for investigations are already overstretched”).

individuals to comply with their obligations.<sup>190</sup> A formal finding that Sudan was in violation of Resolution 1593 would similarly put pressure on Sudan by highlighting its intransigence and increasing its isolation in the international community. Of course, neither is likely to force Sudan into cooperating overnight.

Only a few states publicly support the strongest proposals, but these are also the proposals most likely to help the court succeed. Imposing a legal obligation on all states to cooperate with the ICC through a Security Council resolution passed under Chapter VII of the United Nations Charter would make it much harder for states to justify not arresting President Bashir if he could be found in their territory. This would, in turn, make it much harder for him to travel and further increase Sudan's isolation. Similarly, a public commitment by states to arrest ICC indictees would also serve to isolate President Bashir and apply pressure to his regime.

What is conspicuously missing is any proposal to use the Security Council's powers under Chapter VII of the Charter to authorize states to use force to arrest those indicted by the ICC. While this would have the strongest potential impact on the court's success, no state is willing to support such a proposal. Moreover, even if it were adopted by the Security Council, it seems relatively clear that no state would be willing to risk a confrontation with Sudan to enforce such a resolution.

Would any of these actions, assuming they were undertaken, improve the likelihood of the Court's success in Darfur? Counterfactual questions are impossible to answer with certainty. The most likely steps (a formal monitoring mechanism and payment of referral costs by the UN) seem to have the least chance of affecting Sudan's decision-making. The next most likely steps (placing ICC indictees on a sanctions list and formally finding that Sudan was in violation of Resolution

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<sup>190</sup> See generally, e.g., Jon Hovi et. al., *When Do (Imposed) Economic Sanctions Work?*, 57 *WORLD POLITICS* 470 (2005); Daniel W. Drezner, *Sanctions Sometimes Smart: Targeted Sanctions in Theory and Practice*, 13 *INTERNATIONAL STUDIES REVIEW* 96 (2011).

1593) would certainly apply pressure to the Sudanese regime and isolate it internationally, but the Sudanese regime has already survived years of international isolation. It is far from certain that these acts would change matters. The least likely steps (for example, imposing a legal obligation on all UN member states to arrest President Bashir) would arguably have the most impact, but even complete isolation from the international community might not be sufficient to pressure the Sudanese government to cooperate. On the other hand, sustained international pressure did cause Serbia to reverse course and cooperate with the International Criminal Tribunal for the former Yugoslavia,<sup>191</sup> so we cannot say with certainty that these actions would have no effect. Ultimately, the actions of a more democratic Security Council would probably increase the likelihood of the court's success in Darfur, although probably not by a large amount.

### VIII. CONCLUSION

There are several conclusions one can draw from all of this. First, the ICC is weak when compared to states. Even states that are themselves relatively weak and isolated, like Sudan, have been able to frustrate the ICC.<sup>192</sup> If the government simply refuses the ICC access to the country, it becomes extremely difficult to conduct investigations.<sup>193</sup> Moreover, prosecutions of senior leaders inevitably need insider witnesses who can tie those leaders to the crimes that are occurring. Governments are in an excellent position to apply pressure to such insiders to prevent them from testifying.<sup>194</sup> And, as the experience in Sudan has shown, the government can make it virtually impossible for the court to obtain custody over the accused. After many years of trying, the

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<sup>191</sup> See *supra* notes 199-200.

<sup>192</sup> See *supra* Section III (describing how Sudan has been able to frustrate the ICC's efforts to investigate the situation in Darfur). See also Dutton, *supra* note 5 (describing how Kenya was able to present the appearance of complying with its obligations to the ICC while simultaneously undermining and obstructing the ICC's investigations).

<sup>193</sup> See Record of the 7337<sup>th</sup> Mtg., *supra* note 28, at 7 (noting the inability of ICC officials to travel to Darfur).

<sup>194</sup> See Williamson, *supra* note 34, at 26.

Prosecutor has essentially admitted that the Darfur cases have reached a dead end as a result of Sudanese obstruction.<sup>195</sup>

Second, when the ICC is investigating senior public officials in a state that actively opposes the ICC's work, as it has been in the situations in Darfur, Libya, and Kenya, the ICC cannot succeed without the support of the international community. In these situations, the power imbalance between the ICC and the state means that the ICC will have a difficult time. The targets of the investigation will have a strong incentive to obstruct the investigation and can use the resources of the state to accomplish that goal.<sup>196</sup> To be successful, the ICC requires support from other states who can apply pressure to the recalcitrant state to persuade it to cooperate.<sup>197</sup> In theory, one of the best venues for coordinating support for the ICC is the Security Council because it has the authority to impose sanctions and other measures on a state that refuses to cooperate. In practice, this has not worked because both Russia and China oppose strong Security Council action.

Third, as much as the situation looks intractable now, there are ways that it could change. A change in the Sudanese regime that brought to power a new government that was not so invested in blocking the ICC action would change the situation radically.<sup>198</sup> As an example of this, Serbia opposed the International Criminal Tribunal for the former Yugoslavia (ICTY) when Slobodan Milošević was President. When a new government came to power, Serbia's position changed and

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<sup>195</sup> See *supra* text accompanying note 7.

<sup>196</sup> See *supra* notes 192-194.

<sup>197</sup> See Victor Peskin, *Caution and Confrontation in the International Criminal Court's Pursuit of Accountability in Uganda and Sudan*, 31 HUMAN RIGHTS QUARTERLY 655, 659-660 (2009).

<sup>198</sup> *Id.* at 677 (noting that President Bashir would "be most vulnerable to being arrested and handed over to [the ICC] if and when he falls from power in Khartoum").



Milošević was sent to The Hague to be tried.<sup>199</sup> Of course, this was partly a result of strong external pressure by the United States and others to comply with the ICTY's arrest warrants or face the loss of international aid,<sup>200</sup> which tends to support point two above about the necessity of international support for international tribunals to be successful.

The other way the situation could change is by breaking the deadlock in the Security Council. At the moment this looks unlikely. Russia and China are more interested in controlling the ICC than empowering it, and one can reasonably expect them to continue to wield their vetoes to protect their interests and their allies. However, that may not be the case forever. For a time in the 1990's, it seemed like Russia might align itself with the West. That seems less likely now, but could change in the future as the current Russian system is probably unstable.<sup>201</sup> China is already deeply embedded in the current international order and is becoming ever more closely tied to it,<sup>202</sup> and it may eventually transition to an electoral democracy.<sup>203</sup> In the event that Russia and China become liberal democracies, their strategies with regard to the court would probably shift from control to acceptance. At that point, the likelihood of a permanent member veto would go down dramatically.

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<sup>199</sup> See DIANE F. ORENTLICHER, OPEN SOCIETY JUSTICE INITIATIVE, SHRINKING THE SPACE FOR DENIAL: THE IMPACT OF THE ICTY IN SERBIA, 28 (2008) (noting that Milošević was sent to the ICTY after he lost an election and the incoming government authorized his transfer).

<sup>200</sup> *Id.* at 28-29. See also Bosco, *supra* note 136, at 67-68.

<sup>201</sup> See generally Lilia Shevtsova, *The Next Russian Revolution*, 111 CURRENT HISTORY 94 (Oct. 2012) (arguing that the current Russian government is unstable although it is unclear whether that will mean a shift towards liberalism, a long slow decline under increasingly autocratic and repressive regimes, or a violent collapse).

<sup>202</sup> See G. John Ikenberry, *The Illusion of Geopolitics: The Enduring Power of the Liberal Order*, FOREIGN AFFAIRS, May/June 2014, at 9-10.

<sup>203</sup> See Dingping Guo, *The Growth of Intra-Party Democracy and Its Implications for China's Democratic Future*, 7 FUDAN JOURNAL OF THE HUMANITIES AND SOCIAL SCIENCES 1 (2014) (suggesting that current reforms within the Chinese Communist Party could pave the way for broader democratic reforms). *But see* Eric X. Li, *The Life of the Party: The Post-Democratic Future Begins in China*, 92 FOREIGN AFFAIRS 34 (2013) (arguing that the Chinese Communist Party can sustain its grip on power and that there is no large constituency in China calling for democracy).

The fourth conclusion one can draw from the ICC's experience in Darfur is that there is broad support for ending impunity among the states of the world. As unlikely as an end to Security Council paralysis seems right now, it is important to keep that paralysis in perspective. Opposition to the ICC is narrow. It essentially boils down to two states that wield the veto. Support for the ICC, on the other hand, is broad and deep. It is strong in Europe, North America, Central America, and South America. There is still considerable support for the ICC in Africa, although there are also critics. Finally, there is some support for the ICC in Asia, with both South Korea and Japan supporting it.<sup>204</sup> Many Asian states, however, appear to be on the sidelines – neither actively supporting nor opposing the ICC.<sup>205</sup> There is no continent that is overwhelmingly opposed to the court. Should events occur that remove the threat of a Russian or Chinese veto, the Security Council could move rapidly to support the ICC.

Fifth, it appears that many states would be willing to take concrete action to support the ICC. If the threat of a Russian or Chinese veto was removed, the steps that would be both most likely to occur and most useful would be for the UN to pay for the cost of referrals, for ICC indictees to be put on the UN's targeted sanctions lists, and for the Security Council to formally find that Sudan is in breach of its obligations under Resolution 1593. While none of these would guarantee success, collectively they would support the ICC while pressuring Sudan to cooperate. A small number of states would favor even bolder action.

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<sup>204</sup> See *supra* text accompanying notes 103-104 (noting that Japan and South Korea support the ICC).

<sup>205</sup> For example, Thailand's representative never even mentioned the ICC when it spoke to the Security Council. See Record of the 7285<sup>th</sup> Meeting of the Security Council, UN Doc. No. S/PV.7285 (Resumption 1), dated October 23, 2014, at 2-3. The Indonesian representative similarly ignored the ICC. *Id.* at 18-19. The Malaysian representative at least mentioned the ICC, but his comment was so vague as to be virtually meaningless. *Id.* at 22 (noting that "the intersection of the roles of the Security Council and the International Criminal Court (ICC) also raises certain questions about the need to further clarify the relationship between the two bodies").

I agree with much of what Professor Kontorovich has said about the ICC's weakness compared to states.<sup>206</sup> It is true that the ICC, standing alone, has little chance of succeeding when governments are willing to use the machinery of the state to oppose it. But despite the recent failures in Kenya and Darfur, there is still reason to believe that the ICC can succeed. Of course, it cannot succeed on its own and will need support from the international community, but this is not as unlikely as Professor Kontorovich believes. He claims that the collapse of the Kenyatta case in Kenya "shows that supposed international norms have not been 'internalized' by the 'international community.'"<sup>207</sup> I disagree. While there is opposition to the ICC, that opposition is quite narrow and his claim that the international community has not internalized the norms of international criminal justice does not seem to be true. Rather, an examination of recent debates about the ICC shows that the majority of states do want an end to impunity and that many states would be willing to take concrete action to further that goal. This bodes well for the eventual success of the court.

States whose senior officials are under threat by the ICC are likely to be extremely motivated to obstruct the ICC, while those states that support international criminal justice are likely to be relatively diffuse in that support.<sup>208</sup> There will also be spoilers like China and Russia who see political or economic advantage in providing shelter to states like Sudan.<sup>209</sup> Thus, paralysis may well be the norm for the short to medium term. On the other hand, the majority of states do care about international criminal justice and ending impunity. Of course, it will rarely be the only thing they care about and states will weigh their concern for justice against their other

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<sup>206</sup> See Kontorovich, *supra* note 4.

<sup>207</sup> *Id.* at 5.

<sup>208</sup> See generally Kenneth A. Rodman, *Darfur and the Limits of Legal Deterrence*, 30 HUMAN RIGHTS QUARTERLY 529 (2008).

<sup>209</sup> See Ikenberry, *supra* note 202, at 9 (arguing that Russia and China are "spoilers at best" who are increasingly hemmed in by the rise of liberal democracies in Asia and Eastern Europe).

motivations when deciding how assertive to be in support of the ICC. But the fact that there is broad support for ending impunity among the majority of nations suggests that the trend over time will be towards greater enforcement. Or, to paraphrase Dr. Martin Luther King Jr., the evidence suggests that the arc of history will bend towards justice.<sup>210</sup>

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<sup>210</sup> Dr. King was himself paraphrasing the nineteenth century abolitionist Theodore Parker. See Jamie Stiehm, *Oval Office rug gets history wrong*, THE WASHINGTON POST, Sept. 4, 2010.