

"NEVER AGAIN" AGAIN AND AGAIN: THE INTERNATIONAL CRIMINAL COURT'S INABILITY TO DETER MASS ATROCITIES AND THE SECURITY COUNCIL'S FAILURE TO ACT

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Should it be a weak and powerless institution, not only will it lack legitimacy, but it will betray the very human rights ideals that will have inspired its creation. In such a case, regardless of the number of ratifications, the [International Criminal] Court may be considered a retrograde development as it will not only fail to dispense fair justice, but it may exacerbate the sense of legitimate grievance of the disenfranchised. In short, I am not persuaded that a weak permanent Court is better than no Court at all.

Justice Louise Arbour¹

I. INTRODUCTION

In the last century, an incomprehensible number of people have died as a result of crimes against humanity, war crimes, and genocide. After World War II, the gesture to remove criminal accountability from the domain of geopolitics was coined "the Nuremberg Promise."² The Nuremberg Promise was the hope that someday there would be standards and effective mechanisms to hold all individuals accountable for the most serious crimes under international law.³ The Nuremberg principles established that humanity would be protected by an international legal shield and those responsible for crimes against humanity would be held criminally responsible and punished.⁴ However, forty years after

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¹ KRISTINA MISKOWIAK, THE INTERNATIONAL CRIMINAL COURT: CONSENT, COMPLEMENTARITY AND COOPERATION 10 (2000) (citing Statement by Justice Louise Arbour, Prosecutor for the International Criminal Tribunals for Yugoslavia and Rwanda, to the Preparatory Committee on the Establishment of the International Criminal Court, Fifth Session, New York, Dec. 8, 1997).

² Richard Falk, *War, War Crimes, Power and Justice: Toward a Jurisprudence of Conscience*, 10 ASIA-PACIFIC J. 3 (2012), available at <http://www.japanfocus.org/-Richard-Falk/3681>.

³ David Krieger, *The Nuremberg Promise and the International Criminal Court*, NUCLEAR AGE PEACE FOUND. (Dec. 1998), http://www.wagingpeace.org/articles/1998/12/00_krieger_nuremberg-icc.htm.

⁴ See *The Influence of the Nuremberg Trial on International Criminal Law*, ROBERT H. JACKSON CTR. [hereinafter *The Influence of the Nuremberg Trial*], <http://www.roberthjackson.org/the-man/speeches-articles/speeches/speeches-related-to->

Nuremberg, there has been little progress in developing international criminal law. Additionally, despite the Promise, international crimes have increased⁵ and acts of violence continue to take place in several countries. Nearly 170 million civilians have been subjected to genocide, war crimes, and crimes against humanity⁶ during the past century.⁷ The pledge that “never again”⁸ would similar events occur has gone unfulfilled. Sadly, genocide, war crimes, and crimes against humanity are not things of the past, but remain a reality. In fact, we continue to stand idle and inactive as we witness massacres, such as the one in Syria today. As a result, the leaders responsible for carrying out these atrocities usually go unpunished and escape justice. Not until after the shock of ethnic cleansing in the former Yugoslavia and the genocide in Rwanda did the international community finally take action.⁹ After these horrific events, the international community was finally prepared to address international criminal law,¹⁰ ultimately resulting in the statute for a permanent international criminal court.

There is no doubt that the establishment of the International Criminal Court (ICC or Court) was a major steppingstone for the international community. However, the statute establishing the Court is not nearly as perfect or as effective as some may have hoped. Perhaps the international community’s biggest mistake was creating the ICC through a treaty. Because the Rome Statute (or the Statute) is a treaty, it only binds parties if they sign and ratify it.¹¹ In order to give the

robert-h-jackson/the-influence-of-the-nuremberg-trial-on-international-criminal-law/ (last visited Feb. 2, 2014).

⁵ *Id.*

⁶ “Crimes against humanity” is defined in several international charters and statutes. Article 6(c) of the Nuremberg Charter defines “crimes against humanity” as “murder, extermination, enslavement, deportation, and other inhumane acts committed against civilian populations, before or during the war; or persecutions on political, racial or religious grounds in execution of or in connection with any crime within the jurisdiction of the Tribunal, whether or not in violation of the domestic law of the country where perpetrated.” “*Crimes Against Humanity*” *Definition*, WHITNEY R. HARRIS WORLD LAW INST., http://law.wustl.edu/harris/crimesagainsthumanity/?page_id=469 (last visited Feb. 2, 2014). Additionally, under Article 7(1) of the Rome Statute, a number of crimes, including murder, extermination, enslavement, rape, apartheid, when “committed as part of a widespread or systematic attack directed against any civilian population, with knowledge of the attack” constitute “crimes against humanity.” Rome Statute of the International Criminal Court, July 17, 1998, 2187 U.N.T.S. 90 (entered into force July 1, 2002) [hereinafter Rome Statute].

⁷ The Influence of the Nuremberg Trial, *supra* note 4.

⁸ The promise made following the events of World War II and the Holocaust was that genocide should “never again” be committed while others idly stand by. However, due to the several mass atrocities in the last fifty years, some view this phrase as nothing more than an empty promise, which no state has been willing to deliver. See Samantha Power, *Never Again: The World’s Most Unfulfilled Promise*, PBS.ORG (1998), <http://www.pbs.org/wgbh/pages/frontline/shows/karadzic/genocide/neveragain.html>.

⁹ The Influence of the Nuremberg Trial, *supra* note 4.

¹⁰ *Id.*

¹¹ See generally Rome Statute.

Court the authority required to pursue cases like the ones in Darfur and Syria, a United Nations (U.N.) Security Council resolution based on Chapter VII of the U.N. Charter should have been created, ultimately binding all members of the United Nations. Instead, the Rome Statute establishes how the Court is able to obtain jurisdiction, while relying entirely on states' cooperation to carry out its arrest warrants. Moreover, the ICC lacks a permanent and effective enforcement mechanism to ensure that states comply with its orders.

As a result, the President of Sudan, Omar al-Bashir, remains at large even after arrest warrants were issued for him in 2009 and 2010. The arrest warrants for al-Bashir were a big step for the ICC, as it was the first time the Security Council made a referral to the ICC, and it was the first time ever that a warrant had been issued for a sitting Head of State.¹² However, due to states' refusal to cooperate, especially Sudan, the ICC has been unable to carry out its warrants. In its August 2012 report to the General Assembly, the U.N. Secretary General explicitly stated that the Court needs strong political support in order to fulfill its mandate.¹³ There are currently twelve outstanding requests for arrests and surrenders issued by the Court.¹⁴ Clearly, the ICC cannot fulfill its obligations without the cooperation of other states. Therefore, an enforcement mechanism is required to mandate the cooperation of the international community. However, this leads to the ICC's second hurdle and downfall.

The second hurdle to achieving international peace, security, and action by the ICC is political interference and partisan interests; this is demonstrated by the five permanent members of the Security Council and their respective veto powers. Today, the ICC is unable to address the crisis in Syria because Syria's political allies continue to veto the Security Council's resolutions regarding action on Syria.¹⁵ Meanwhile, one of the worst humanitarian crises is ravaging Syria. Syria's citizens are being victimized, killed, and displaced every day as the rest of the world stands by and watches. According to current data, more than 115,000 people have been killed,¹⁶ with more than 6.5 million civilians displaced from their homes.¹⁷ Additionally, reports show that children are suffering disproportionately.¹⁸ There have been government attacks on schools, and children are being denied access to hospitals and dying in attacks on their

¹² *ICC Issues War Crimes Warrant for Sudan's Bashir*, COMMON DREAMS (Mar. 4, 2009), <http://www.commondreams.org/headline/2009/03/04-6>.

¹³ Rep. of the Int'l Crim. Ct., 67th sess, Aug. 14, 2012, U.N. Doc. A/67/308.

¹⁴ *Id.*

¹⁵ Julian Borger, *Syria Crises Widens Faultlines at Divided UN*, THE GUARDIAN (Sept. 24, 2012), <http://www.guardian.co.uk/world/2012/sep/24/syria-widens-faultlines-divided-un>.

¹⁶ Laura Stampler, *Group Says Syria Death Toll at 115,000*, TIME WORLD (Oct. 1, 2013), <http://world.time.com/2013/10/01/group-says-syria-death-toll-at-115000/>.

¹⁷ Tracy Shelton, *Syria "Hemorrhaging" Refugees as Number of Displaced Tops 6 Million*, GLOBAL POST (Sept. 3, 2013), <http://www.globalpost.com/dispatch/news/regions/middle-east/syria/130903/syria-refugees-two-million-united-nations-civil-war-assad>.

¹⁸ *Id.*

neighborhoods, in addition to being subject to torture, including sexual violence.¹⁹ Despite the horrifying situation in Syria, countries such as Russia, China, Brazil, India, and South Africa are using their leverage at the Security Council to forestall any action on Syria.²⁰ Three resolutions imposing sanctions have come before the Security Council; however, China and Russia, as two of the five permanent members who can veto resolutions, have vetoed all three.²¹ As allies of the Assad regime, both Russia and China refuse to support any Security Council resolutions that pressure Assad, even with the exclusion of military action.²² The most recent resolution regarding chemical weapons allows Assad to remain in power, continue killing innocent civilians and says nothing about holding anyone accountable for the mass atrocities. Further, Russia and China will not entertain the idea of an international criminal court investigation into the war crimes in Syria.²³ Unfortunately, unless the U.N. takes action, governments will continue to operate selectively and subordinate human rights to their own perceived partisan interests.²⁴

This note will analyze the ICC, its weaknesses, and whether the ICC has any chance at ever being the effective court that was imagined when the Rome Statute was created. Following this introduction, in Part II, I will briefly discuss the ICC, the Rome Statute, and its history. In Part III, I will discuss the situation in Darfur and the ICC's inability to act because of non-cooperation by Sudan and other member-states. In Part IV, I will discuss how politics and partisan interests, especially within the five permanent members of the Security Council, are reducing the legitimacy of the court and impeding the Security Council's maintenance of international peace and security. In addition, I will discuss how these partisan interests have played a role in both the situations in Darfur and Syria. In Part V, I will discuss the future of the ICC. Specifically, I will discuss the relationship between the ICC and the Security Council and how it has worked to undermine the ICC. I will also argue that we should eliminate geopolitics when it comes to criminal accountability. Finally, I will recommend amendments to the U.N. Charter, including giving the international community as a whole ultimate authority to overrule any veto power by the Security Council's five permanent members; this would apply when there is a consensus among the international community and most states or Security Council members agree that a specific situation should be referred to the ICC. An example of this would be the situation in Syria, where many State leaders have openly stated that they believe the situation should be referred to the ICC.

¹⁹ *Id.*

²⁰ Amnesty Int'l, *Amnesty International Report 2012: The State of the World's Human Rights* 46 [hereinafter *Amnesty Int'l Report*], available at http://files.amnesty.org/air12/air_2012_full_en.pdf.

²¹ Borger, *supra* note 15.

²² *Id.*

²³ *Id.*

²⁴ Amnesty Int'l Report, *supra* note 20, at 46.

II. THE ICC AND THE ROME STATUTE

A. Background

Attempts to establish an international criminal court have been made on a number of occasions, dating back to 1872, but all failed until the establishment of the Rome Statute.²⁵ In December 1989, at the end of the Cold War, the creation of an international criminal court was back on the United Nation's agenda; the U.N. General Assembly issued a resolution requesting the International Law Commission (the Commission) to consider the possibility of establishing an international criminal court.²⁶ In November 1992, the General Assembly asked the Commission to make it a priority to draft a statute for an international court.²⁷ Unable to settle differences that arose while drafting the statute, the General Assembly established a Preparatory Committee open to all member states in order to complete a widely-accepted Convention.²⁸ Interests clashed because states were in one of two groups: the progressive group or the restrictive group.²⁹ The progressive group opted for a powerful and effective court while the restrictive group insisted on state sovereignty and extensive state or Security Council control of the Court.³⁰ To no surprise, China, Russia, and the United States were all part of the restrictive group.

In April 1998, a final draft of the Convention on the Establishment of an International Criminal Court was completed, which became the basis for negotiations at the Rome Conference.³¹ On July 17, 1998, at the close of the Rome Conference, the Rome Statute was adopted by a vote of 120 in favor and 7 against, with 21 abstentions.³² On July 1, 2002, the Rome Statute, the ICC's founding document, came into force.³³ As of April 2012, 139 countries have signed the treaty and 122 countries have ratified it.³⁴ However, some of the

²⁵ Miskowiak, *supra* note 1, at 12–13 (explaining that several attempts have been made since 1872 to establish an international criminal court but all failed primarily for lack of political will).

²⁶ *Id.* at 13.

²⁷ *Id.*

²⁸ *Id.* at 14.

²⁹ *Id.* at 14–15.

³⁰ Miskowiak, *supra* note 1, at 12–13.

³¹ *Id.*

³² *Id.* at 15.

³³ *About the Court*, COALITION FOR THE INT'L CRIMINAL COURT, <http://www.iccnw.org/?mod=court> (last visited Feb. 14, 2014).

³⁴ *Rome Ratification Chart by Region*, COALITION FOR THE INT'L CRIMINAL COURT (Apr. 2, 2012), http://www.iccnw.org/documents/RATIFICATIONSbyRegion_2Arpil2012_eng.p df.

largest countries such as China, Russia, and the United States are not parties.³⁵ Despite this, as permanent members of the Security Council, they have a say over which cases can be referred to the ICC. Also, under President Omar al-Bashir, Sudan signed the Rome Statute on September 8, 2000, but did not ratify it.³⁶ Not surprisingly, in 2008, Sudan notified the Secretary-General of the United Nations that it had no intent of becoming a party to the statute.³⁷

1. Jurisdiction of the International Criminal Court

The ICC was established as a permanent court in order to exercise its jurisdiction over persons who have committed the most serious crimes of international concern.³⁸ The ICC has jurisdiction over the following crimes: (1) crimes of genocide; (2) crimes against humanity; (3) war crimes; and (4) aggression.³⁹ However, the Rome Statute is not retroactive, meaning the Court only has jurisdiction over those crimes that were committed after the Statute came into force.⁴⁰ There are three ways in which the Court can exercise jurisdiction with regard to a crime covered by the Statute: (1) a state party refers the situation to the Prosecutor; (2) the U.N. Security Council, acting under Chapter VII of the Charter of the United Nations, refers the situation to the Prosecutor; or (3) the Prosecutor initiates an investigation.⁴¹ In cases where a State Party refers the situation to the Court, the Court may only exercise jurisdiction if the alleged crimes were committed in the territory of a State Party or if the alleged perpetrators are nationals of a State Party.⁴² Therefore, by being a member state, states consent to the Court's jurisdiction. Additionally, a non-member state can also agree to accept the Court's jurisdiction and choose to surrender the individual.⁴³ However, because the Court is a court of complementarity, a case is

³⁵ It is important to note that the United States is not a party to the Rome Statute, but it has signed numerous bilateral agreements with States Parties and States not party to the Rome Statute. These agreements provide for the non-surrender of U.S. persons to ICC jurisdiction. Congress enacted the 2002 American Service Members' Protection Act, which restricted U.S. cooperation with the ICC and provided for the cutting off of assistance to states that refused to sign the agreements. SHIRLEY V. SCOTT, *INTERNATIONAL LAW, U.S. POWER: THE UNITED STATES' QUEST FOR LEGAL SECURITY* 80 (2012).

³⁶ David Hoile, *Sudanese Position on the ICC and Darfur* (July 13, 2010), <http://www.sudani.co.za/news.php?a=7&printFriendly>

³⁷ Rome Statute at *Declarations and Reservations*.

³⁸ *Id.* art. 1.

³⁹ *Id.*

⁴⁰ *Id.* art. 11.

⁴¹ *Id.* art. 13.

⁴² Rome Statute art. 12.

⁴³ *Id.*

inadmissible if the situation is already being investigated or being prosecuted by a State that has jurisdiction over it.⁴⁴

2. Duty to Cooperate

State parties have a duty to fully cooperate with the Court in its investigation and prosecution of crimes within the Court's jurisdiction.⁴⁵ Thus, the Court has the authority to make requests for cooperation to state and non-state parties.⁴⁶ When a state party fails or refuses to comply with the Court's request to cooperate, the Court may refer the matter to the Assembly of State Parties or to the Security Council.⁴⁷ The Assembly of State parties may deploy political and diplomatic efforts to promote cooperation; however, its response would be non-judicial and would not replace any of the Court's determinations.⁴⁸ The Court cannot request that a state arrest and surrender a third party national if doing so would violate the requested state's obligations under international law or international agreements with respect to the State or diplomatic immunity of a person.⁴⁹ However, the Statute applies equally to all persons without any discretion based on official capacity, and immunities which may attach to the official capacity of a person, whether under national or international law, shall not bar the Court from exercising its jurisdiction over such persons.⁵⁰

B. Referrals to the ICC

Since the effective date of the Statute, there have been eight referrals to the ICC; four have been state referrals, two were investigations initiated by the Prosecutor, and two were referrals by the Security Council. In December 2003, the Ugandan president referred crimes committed by the Leader Rebel Army (LRA) to the Court.⁵¹ In 2004, the President of the Democratic Republic of Congo referred crimes committed within its territory to the Court, in January 2005, the government of the Central African Republic made a referral to the

⁴⁴ *Id.* art. 17 (explaining that the Court must defer to a State where the State is investigating or has investigated, even if they decided not to prosecute, unless the State is unwilling or unable to genuinely carry out the investigation or prosecution).

⁴⁵ *Id.* art. 86.

⁴⁶ *Id.* art. 87.

⁴⁷ Rome Statute art. 87.

⁴⁸ ICC, *Assembly Procedures Relating to Non-Cooperation*, at Annex, ICC-ASP/10/Res.5, ICC-ASP/10/20 (Dec. 21, 2011).

⁴⁹ Rome Statute art. 98.

⁵⁰ *Id.* art. 27.

⁵¹ Charles J. Jalloh, *Regionalizing International Criminal Law?* 447–48 (U. of Pittsburgh Sch. of Law, Working Paper No. 2009-20, 2009).

Court,⁵² and in July 2012 the Republic of Mali made a referral to the Court.⁵³ However, the referral of the situation in Darfur, Sudan in 2005 was the first Security Council referral since the Statute came into force. After receiving reports of violations of humanitarian law, the Security Council, acting under Chapter VII of the U.N. Charter, issued Resolution 1593, allowing the Prosecutor to investigate crimes allegedly committed in Darfur.⁵⁴ The Security Council made a second referral in February 2011 when it asked the ICC to investigate the Libyan government's response to the Libyan civil war. With regard to the aforementioned cases, some trials have been completed, others are set for the near future, and some suspects still remain at-large.⁵⁵ Despite ongoing investigations and open cases, this note will focus on the referral pertaining only to Darfur.

III. THE SITUATION IN DARFUR

A. Background

In early 2003, an internal armed conflict erupted in Darfur between governmental authorities and organized armed groups.⁵⁶ The conflict began when two African rebel groups, the Sudan Liberation Army (SLA) and the Justice and Equality Movement (JEM), rebelled against the government, claiming a chronic neglect of Darfur and its people.⁵⁷ Subsequently, in April 2003, the rebel groups attacked government military forces in El Fashir in northern Darfur.⁵⁸ The Government of Sudan, not having sufficient military resources to respond, hired a militia consisting of mostly Arab members of local tribes, known as the "Janjaweed."⁵⁹ The government's response was a counter-insurgency campaign against the rebel groups, which included aerial bombardment, forced displacement of rural civilians, and indiscriminate killing of civilians.⁶⁰

Due to the continuing violence between the two groups, the Security Council issued Resolution 1556, calling for the Sudanese government to disarm the Janjaweed militias and bring justice to the Janjaweed leaders and others

⁵² *Id.*

⁵³ *Situations and Cases*, ICC, http://www.icc-cpi.int/en_menus/icc/situations%20and%20cases/Pages/situations%20and%20cases.aspx (last visited Feb. 2, 2014).

⁵⁴ S.C. Res. 1593, U.N. Doc. S/RES/1593 (Mar. 31, 2005).

⁵⁵ *See Situations and Cases*, *supra* note 53 (summarizing all situations and cases).

⁵⁶ Int'l Comm'n of Inquiry on Darfur, *Report of the International Commission of Inquiry on Darfur to the Secretary-General*, ¶ 76, U.N. Doc. S/2005/60 (Feb. 1, 2005) [hereinafter *Commission's Report*], available at <http://www.securitycouncilreport.org/atf/cf/%7B65BF9B-6D27-4E9C-8CD3CF6E4FF96FF9%7D/WPS%20S%202005%2060.pdf>.

⁵⁷ NIDAL NABIL JURDI, *THE INTERNATIONAL COURT AND NATIONAL COURTS: A CONTENTIOUS RELATIONSHIP* 199 (2011).

⁵⁸ *See Commission's Report*, *supra* note 56, ¶ 65.

⁵⁹ JURDI, *supra* note 57, at 199.

⁶⁰ *See Commission's Report*, *supra* note 56, ¶ 65.

responsible for violating international humanitarian law and other crimes.⁶¹ Despite Resolution 1556, the Sudanese government took no action, allowing the situation to worsen.⁶² As a result, the Security Council then issued Resolution 1564, which established the International Commission of Inquiry into the crimes in Darfur.⁶³ The Commission's report established links between the Sudanese government and the Janjaweed militias.⁶⁴ Additionally, the Commission found evidence of attacks on villages, and other acts, which were part of widespread and systematic attacks directed against civilians.⁶⁵ As a result, the Commission "strongly recommended" that the Security Council immediately refer the situation in Darfur to the ICC because the crimes committed met the requirements of Articles 7(1), 8(1), and 8(f) of the Statute.⁶⁶ Pursuant to the Commission's recommendation and report, the Security Council made a determination that the situation in Sudan continued to constitute a threat to international peace and security, and therefore, it issued Resolution 1593 on March 31, 2005, referring the situation in Darfur to the ICC.⁶⁷

B. Indictment of President Al-Bashir and Others

Following the issuance of Resolution 1593, the Court's Prosecutor conducted an investigation into the situation in Darfur and submitted the information he collected to the Pre-Trial Chamber.⁶⁸ Acting under Article 58 of the Rome Statute, on April 27, 2007, the Chamber issued arrest warrants for Ahmed Mohamed Haroun, Minister of the Interior, and militia leader Ali Mohamed Abdel Rahman.⁶⁹ Subsequently, Sudan argued that the ICC did not have jurisdiction over its citizens because it was not a state party to the Statute.⁷⁰ However, in response to Sudan's objections, in its decision, the Chamber stated:

⁶¹ S.C. Res. 1556, U.N. Doc. S/RES/1556 (Jul. 30, 2004).

⁶² ERROL MENDES, PEACE AND JUSTICE AT THE INTERNATIONAL CRIMINAL COURT 52 (2010).

⁶³ S.C. Res. 1564, U.N. Doc. S/RES/1564 (Sept. 18, 2004).

⁶⁴ Commission's Report, *supra* note 56, ¶¶ 111–16.

⁶⁵ *Id.* at 3–5.

⁶⁶ *Id.* at 5.

⁶⁷ S.C. Res. 1593, *supra* note 54.

⁶⁸ Prosecutor v. Ahmad Muhammad Harun and Ali Muhammad Ali Abd-Al-Rahman, Case No. ICC-02/05-01/07, Decision on the Prosecution Application Under Article 58(7) of the Statute, ¶¶ 4–7 (Pre-Trial Chamber I Apr. 27, 2007) [hereinafter *Prosecutor v. Harun and Rahman*].

⁶⁹ *Id.* ¶ 16.

⁷⁰ Aziz El-Kaissouni, *Sudan Rejects ICC Jurisdiction, Says One Suspect Held*, REUTERS (Feb. 27, 2007), http://www.reuters.com/article/2007/02/27/idUSL27385823._CH_.2400 (stating that the ICC has no jurisdiction to try to any Sudanese citizens).

Regarding the territorial and personal parameters, the Chamber noted that Sudan is not a state party to the Statute. However, article 12(2) does not apply where a situation is referred to the Court by the Security Council acting under Chapter VII of the Charter, pursuant to article 13(b) of the Statute. Thus, the Court may, where a situation is referred to it by the Security Council, exercise jurisdiction over crimes committed in the territory of States which are not Party to the Statute and by nationals of States not party to the Statute.⁷¹

Therefore, the Chamber confirmed the Court's jurisdiction over non-member states and its citizens. On July 14, 2008, the Prosecutor also applied for an arrest warrant against Sudanese President Omar al-Bashir.⁷² Again, Sudan challenged the Court's jurisdiction.⁷³ Nonetheless, on March 4, 2009, al-Bashir was indicted on five counts of crimes against humanity and two counts of war crimes.⁷⁴

Despite Sudan's arguments that the ICC did not have jurisdiction over it or its citizens, the Chamber held that the Court did have jurisdiction and Sudan was obligated to fully cooperate with the Court.⁷⁵ Once it was determined that the situation in Sudan "continue[d] to constitute a threat to international peace and security,"⁷⁶ the Security Council had authority to refer the situation in Darfur to the Court under Chapter VII of the Charter.⁷⁷ The Chamber thus confirmed that where a situation is referred by the Security Council, the Court may exercise jurisdiction over crimes committed in the territory of a non-member State and by nationals of non-member States.⁷⁸ The Chamber traced its analysis back to the U.N. Charter and member states' duties under it. The Chamber noted that according to Articles 24(1) and 25 of the U.N. Charter, members of the United Nations "confer on the Security Council primary responsibility for the maintenance of international peace and security, and agree that in carrying out its duties under this responsibility the Security Council acts on their behalf" and "agree to accept and carry out the decisions of the Security Council in accordance with the present Charter."⁷⁹ The Chamber also cited Article 103 of the U.N. Charter which states that "[i]n the event of a conflict between the obligations of

⁷¹ *Id.*; see also *Prosecutor v. Harun and Rahman*.

⁷² *Prosecution v. Omar Hassan Ahmad Al-Bashir*, Case No. ICC-02/05-01/09-3, Decision on Application for a Warrant of Arrest, ¶ 4 (Mar. 4, 2009) [hereinafter *Warrant of Arrest for al-Bashir*].

⁷³ *Sudan Reiterates Rejection of ICC Jurisdiction*, CHINA DAILY (July 14, 2008), http://www.chinadaily.com.cn/world/2008-07/14/content_6843988.htm.

⁷⁴ *Omar Hassan Ahmad al-Bashir*, THE HAGUE JUSTICE PORTAL, <http://www.haguejusticeportal.net/index.php?id=9502> (last visited Jan. 15, 2014).

⁷⁵ *Warrant of Arrest for al-Bashir*, Case No. ICC-02/05-01/09-3, ¶ 4.

⁷⁶ *Id.* ¶ 244.

⁷⁷ *Id.* ¶ 243.

⁷⁸ *Id.* ¶ 40.

⁷⁹ *Id.* ¶ 245.

the members of the United Nations under the present U.N. Charter and their obligations under any other international agreement, their obligations under the present Charter shall prevail.”⁸⁰ Sudan is a member state of the United Nations; therefore, Sudan has obligated itself to obey the U.N. Charter and resolutions of the Security Council made pursuant to Chapter VII of the U.N. Charter.⁸¹ Although not a member state to the Rome Statute, because Security Council Resolution 1593 was enacted pursuant to Chapter VII, Sudan is thus obligated to cooperate with the ICC pursuant to its responsibilities under the U.N. Charter.

More importantly, the Chamber answered the question of whether al-Bashir, as a Head of State, was entitled to immunity. The Chamber ultimately held that al-Bashir’s position did not affect the Court’s jurisdiction.⁸² In its decision, the Chamber highlighted two factors:

1) The core goal of the Statute’s preamble is “to put an end to impunity for the perpetrators of the most serious crimes of concern to the international community as a whole, which ‘must not go unpunished;’”⁸³ and

2) Article 27(1) and (2) of the Statute provide that:

(i) the Statute “shall apply equally to all persons without any distinction based on official capacity;”

(ii) . . . “official capacity as a Head of State or Government . . . shall in no case exempt a person from criminal responsibility under this Statute . . . ;” and

(ii) “[i]mmunities or special procedural rules which may attach to the official capacity of a person, whether under national or international law, shall not bar the Court from exercising its jurisdiction over such a person.”⁸⁴

Thus, the Chamber’s decision was significant because it established that Heads of State would not be immune from the Court’s jurisdiction.

Despite the Chamber’s ruling, Sudan and al-Bashir did not intend to cooperate with the Court. Since the issuance of the first two arrest warrants for Ahmad Harun and Ali Kushayb, the Government of Sudan refused to cooperate

⁸⁰ *Warrant of Arrest for al-Bashir*, Case No. ICC-02/05-01/09-3, ¶ 245; *see also* U.N. Charter art. 103.

⁸¹ U.N. Charter art. 48.

⁸² *Warrant of Arrest for al-Bashir*, Case No. ICC-02/05-01/09-3, ¶ 41.

⁸³ *Id.* ¶ 42.

⁸⁴ *Id.* ¶ 43; *see also* Rome Statute art. 27(1)–(2).

with the Court.⁸⁵ Sudan's central argument remained that the ICC did not have jurisdiction because Sudan had not ratified the Statute.⁸⁶ When served with the execution of the arrest warrants, the government refused to accept them.⁸⁷ Before and after the Chamber's issuance of his arrest warrant, al-Bashir made it publicly clear that the Court's decision and the ICC itself did not concern him.⁸⁸ After the arrest warrant was issued, al-Bashir denied the charges and dismissed the Court's ruling as worthless, stating that the Court could "eat" its warrant.⁸⁹ An aid to al-Bashir accused the judges and Court of being biased, targeting Sudan, and calling it a "mechanism of neo-colonialism."⁹⁰ Thus, from the very beginning, it was clear that the ICC could not count on Sudan's cooperation to carry out its arrest warrants.

C. States' Non-Cooperation

Due to Sudan's continued unwillingness to cooperate, the Chamber threatened sanctions, emphasizing that under Article 87(7) of the Statute, if the government of Sudan continued to fail to comply and did not cooperate, the Chamber could refer the matter to the Security Council.⁹¹ The Security Council, under Articles 41 and 42 of the U.N. Charter, could then "decide what measure not involving the use of armed forces are to be employed to give effect to its decisions, and it may call upon the Members of the United Nations to apply such measures."⁹² Despite these threats, Sudan refused to comply with ICC's requests to arrest and surrender al-Bashir.⁹³ However, the ICC encountered more difficulties when the African Union⁹⁴ and Sudan's neighboring countries failed to

⁸⁵ *Warrant of Arrest for al-Bashir*, Case No. ICC-02/05-01/09-3, ¶ 228.

⁸⁶ Wasil Ali, *Sudan Accuses ICC of Working to Destabilize the Country*, SUDAN TRIBUNE (Feb. 23, 2009), <http://www.sudantribune.com/spip.php?article30268>; see also El-Kaissouni, *supra* note 70 (stating that the ICC has no jurisdiction to try any Sudanese citizens).

⁸⁷ *Warrant of Arrest for al-Bashir*, Case No. ICC-02/05-01/09-3, ¶ 229.

⁸⁸ *Sudan President Defiant in Darfur*, BBC NEWS (July 23, 2008), <http://news.bbc.co.uk/2/hi/africa/7520991.stm>.

⁸⁹ *Warrant Issued for Sudan's Leader*, BBC NEWS (Mar. 4, 2009), <http://news.bbc.co.uk/2/hi/7923102.stm>.

⁹⁰ *Id.*

⁹¹ *Warrant of Arrest for al-Bashir*, Case No. ICC-02/05-01/09-3, ¶ 248.

⁹² *Id.*

⁹³ See, e.g., Press Release, Security Council, Arrest of Indicted Prominent Sudanese Citizens Crucial for Peace in Darfur, Ending Impunity, International Criminal Court Prosecutor, U.N. Press Release SC/9950 (June 11, 2010) (noting Sudan's continued failure to comply with its obligations and cooperate with the Court).

⁹⁴ See *AU in a Nutshell*, AFRICAN UNION, <http://www.au.int/en/about/nutshell> (last visited Jan. 15, 2014).

comply as well. Some critics blamed the limited language of the Security Council's resolution for states' failure to cooperate.⁹⁵

Although Sudan is obligated to comply with the Court, the language of the Security Council's Resolution is more limited when it comes to obligating states other than Sudan to cooperate with the ICC.⁹⁶ Paragraph 2 of Resolution 1593 states that, other than the government of Sudan, non-State Parties to the Statute have no obligation to the ICC;⁹⁷ all other states are merely "urged" to assist and cooperate with the ICC.⁹⁸ Due to its limited language, the international community, specifically non-State Parties, have no obligation to cooperate with or support the ICC in fulfilling its task.⁹⁹

1. Response to Al-Bashir's Indictment

In July 2009, the Assembly of the African Union (AU) held its thirteenth ordinary session and discussed the ICC's arrest warrants. In its decision, the AU reiterated its request to the Security Council for a deferral in accordance with Article 16 of the Statute.¹⁰⁰ Additionally, the AU decided that because its request was never acted upon, AU member states would not cooperate pursuant to the provisions of Article 98 of the Statute relating to immunities.¹⁰¹

As a result, al-Bashir successfully traveled to AU member states without being arrested. On July 21, 2010, immediately before al-Bashir traveled to Chad, the ICC issued a second arrest warrant for al-Bashir; this was the first time that al-Bashir had traveled to a member state of the ICC since the arrest warrants had been issued.¹⁰² During his visit, organizations such as Human Rights Watch and Amnesty International urged Chad to arrest him, but it refused.¹⁰³ On August 27,

⁹⁵ S.C. Res. 1593, *supra* note 54; *see also* Jurdi, *supra* note 57, at 253 (noting that Resolution 1593 imposes an obligation on the Sudanese government to cooperate fully with and assist the ICC; however, the Resolution is weak when it comes to the obligations of other states. It merely 'urges' them to cooperate with the ICC, as opposed to obligating them to cooperate.).

⁹⁶ Lucas Buzzard, Comment, *Holding an Arsonist's Feet to the Fire? – The Legality and Enforceability of the ICC's Arrest Warrant for Sudanese President Omar Al-Bashir*, 24 AM. U. INT'L L. REV. 897, 934 (2009).

⁹⁷ *Id.*

⁹⁸ *Id.*

⁹⁹ *Id.*

¹⁰⁰ Assembly/AU/Dec. 243-267 (XII) Rev. 1, Assembly/AU/Decl.1-5(XIII), ¶ 9 (July 1-3, 2009) (asking the Security Council to defer the case for one year pursuant to Article 16 of the Rome Statute) [hereinafter Assembly of the African Union, 13th Sess.].

¹⁰¹ *Id.* ¶ 10.

¹⁰² Claire Soares, *Sudan's Leader Defies Genocide Warrant with Trip to Old Enemy Chad*, THE INDEP. (July 22, 2010), <http://www.independent.co.uk/news/world/africa/sudans-leader-defies-genocide-warrant-with-trip-to-old-enemy-chad-2032167.html>.

¹⁰³ *Id.*

2010, al-Bashir was welcomed by Kenya after being invited to attend a signing ceremony to honor Kenya's new constitution.¹⁰⁴ Again, al-Bashir was not apprehended. However, as member states of the ICC, both Chad and Kenya had an obligation to arrest al-Bashir.¹⁰⁵

In response to Chad's failure to arrest al-Bashir, the ICC reported the situation to the Chamber.¹⁰⁶ The Chamber reiterated Chad's obligation to cooperate with the Court in enforcing arrest warrants.¹⁰⁷ The Chamber then referred the situation to the Security Council and the Assembly of States Parties in order for them to take any measure they deemed appropriate.¹⁰⁸ The same day, the Chamber issued a similar decision with regard to Kenya and also referred the matter to the Security Council and Assembly of States Parties.¹⁰⁹

The AU responded to the Chamber's decision regarding Chad and Kenya and expressed its concerns.¹¹⁰ The AU noted that as member states of the AU, both Chad and Kenya had an obligation under the Constitutive Act of the African Union to comply with decisions and policies of the AU.¹¹¹ Additionally, it referenced its decision adopted during the 13th Ordinary Session of the Assembly of Heads of State and Government wherein the Assembly decided that member states were not to cooperate with ICC requests pursuant to Article 98 of the Statute.¹¹² The AU noted that these decisions were binding on Chad and Kenya, and that the ICC should not coerce them to violate their obligations to the AU.¹¹³ The AU also reiterated that it had requested that the Security Council defer the proceedings, but its requests had been ignored; therefore, there was no "moral

¹⁰⁴ *Indicted Sudanese President Visits Kenya, Defies Arrest Warrant on Genocide Charged*, FOXNEWS.COM (Aug. 27, 2010), <http://www.foxnews.com/world/2010/08/27/indicted-sudanese-president-visits-kenya-defies-arrest-warrant-genocide-charges/>.

¹⁰⁵ Prosecutor v. Bashir, Case No. ICC-02/05-01/09-107, Decision Informing the United Nations Security Council and the Assembly of the States Parties to the Rome Statute About Omar Al-Bashir's Presence in the Territory of the Republic of Kenya, at 3 (Aug. 27, 2010) [hereinafter *Decision on al-Bashir's Visit to Kenya*]; Prosecutor v. Bashir, Case No. ICC-02/05-01/09-109, Decision Informing the United Nations Security Council and the Assembly of the States Parties to the Rome Statute about Omar Al-Bashir's Recent Visit to the Republic of Chad (Aug. 27, 2010) [hereinafter *Decision on al-Bashir's Visit to Chad*].

¹⁰⁶ *Decision on al-Bashir's Visit to Chad*, Case No. ICC-02/05-01/09-109.

¹⁰⁷ *Id.*

¹⁰⁸ *Id.*

¹⁰⁹ *Decision on al-Bashir's Visit to Kenya*, Case No. ICC-02/05-01/09-107.

¹¹⁰ Press Release, African Union, On the Decision of the Pre-Trial Chamber of the ICC Informing the U.N. Security Council and the Assembly of the State Parties to the Rome Statute About the Presence of President Omar Hassan Al-Bashir of the Sudan in the Territories of the Republic of Chad and the Republic of Kenya (Aug. 29, 2010) [hereinafter Press Release, African Union, Decision of the Pre-Trial Chamber].

¹¹¹ *Id.*

¹¹² *Id.*; see also Assembly of the African Union, 13th Sess., *supra* note 100.

¹¹³ Press Release, African Union, Decision of the Pre-Trial Chamber, *supra* note

authority” for the Chamber to make these decisions.¹¹⁴ Moreover, because Chad and Kenya are neighbors of Sudan, the AU noted their interest in ensuring peace and stability through continuous engagement with Sudan and its government.¹¹⁵ The AU accused the ICC of pressuring African countries to support the ICC, stated that it would continue to fight against impunity on its own, and requested that all African countries reject any Security Council resolutions on this matter.¹¹⁶

Despite the ICC’s failure to execute its warrant on al-Bashir, the ICC’s attempts were not completely disregarded. In September 2010, Kenya was to hold a special summit to which al-Bashir had been invited.¹¹⁷ However, after receiving a request from the ICC that it inform the Court about “any problem which would impede or prevent the arrest and surrender” of al-Bashir, Kenya notified the Court that it would no longer be hosting the summit or al-Bashir.¹¹⁸ Additionally, other member states openly warned al-Bashir that they would arrest him if he stepped on their soil.¹¹⁹ Noting that al-Bashir was being isolated more and more, former ICC Prosecutor Roberto Moreno-Ocampo believed that it was just a matter of time before he was caught.¹²⁰

Despite some success, in 2011, al-Bashir visited three other member states. On May 8, 2011, al-Bashir traveled to Djibouti for the President’s inauguration ceremony.¹²¹ Having been notified of this visit, the Chamber issued a decision similar to its previous ones with regard to Djibouti’s failure to cooperate and referred the matter to the Security Council and the Assembly of the State Parties.¹²² On August 7, 2011, he again traveled to Chad for the Head of State’s inauguration ceremony.¹²³ Again, the Chamber reiterated Chad’s obligation to arrest al-Bashir and its failure to do so. Noting that it was the second time Chad’s government had allowed al-Bashir into its territory without arresting

¹¹⁴ *Id.*

¹¹⁵ *Id.*

¹¹⁶ *Id.*

¹¹⁷ Prosecutor v. Al Bashir, Case No. ICC-02/05-01/09-116, Prosecution Notification of Possible Travel to a State Party in the Case of the Prosecutor v. Omar Al Bashir, ¶ 9 (Oct. 22, 2010).

¹¹⁸ Prosecutor v. Al Bashir, Case No. ICC-02/05-01/09-119, Transmission of the Reply from the Republic of Kenya, ¶ 3 (Oct. 29, 2010).

¹¹⁹ Julius Barigaba, *We’ll Get Bashir, Kony Soon, Says ICC*, THE EAST AFRICAN (June 14, 2010), <http://www.theeastafrican.co.ke/news/-/2558/937546/-/pdvbwoz/-/index.html> (stating that Turkey openly announced that it would arrest al-Bashir if he attended a conference that was to be held in Turkey).

¹²⁰ *Id.*

¹²¹ Prosecutor v. Al Bashir, Case No. ICC-02/05-01/09-129, Decision Informing the United Nations Security Council and the Assembly of the States Parties to the Rome Statute about Omar Al-Bashir’s Recent Visit to Djibouti (May 12, 2011).

¹²² *Id.*

¹²³ Prosecutor v. Al Bashir, Case No. ICC-02/05-01/09-132, Decision Requesting Observations About Omar Al-Bashir’s Recent Visit to the Republic of Chad (Aug. 18, 2011).

him, the Chamber asked Chad to submit a response to the Court in regard to its failure to comply with the Court's Cooperation Requests.¹²⁴ Then, on October 14, 2011, al-Bashir visited Malawi, who is also a member state of the ICC, without being arrested.¹²⁵ After finding out about his visit, the ICC sent a note to Malawi's Embassy, while al-Bashir was in Malawi, reminding the Embassy of its obligations and asking for its cooperation in arresting and surrendering al-Bashir; however, Malawi did not respond.¹²⁶ The Chamber later issued a decision regarding Malawi's failure to comply and requested that it too submit a response with regard to its failure to comply.¹²⁷

2. The Pre-Trial Chamber's Response to States' Failure to Comply

Pursuant to the Chamber's request, Malawi submitted its response with regard to its failure to comply with the Court.¹²⁸ In its response, Malawi admitted that al-Bashir attended a summit in its country and stated that because al-Bashir is a sitting Head of State, they accorded him all the immunities and privileges guaranteed to every Head of State in accordance with the principles of public international law, which included freedom from arrest and prosecution within the territories of Malawi.¹²⁹ Moreover, Malawi stated that because Sudan is not a party to the Rome Statute, Article 27 of the Statute waiving the immunity of a Head of State and Government was not applicable.¹³⁰ Lastly, Malawi noted that as a member of the AU, it shared the same position as the AU with regard to the indictment of sitting Heads of State and Government of countries that are not parties to the Statute.¹³¹

Nonetheless, the Chamber found Malawi failed to cooperate with the Court.¹³² The Chamber noted that Malawi failed to respect its obligation to cooperate under Article 86 of the Statute, and with respect to not being able to comply with the Court due to conflicting interests, Malawi failed to bring the

¹²⁴ *Id.*

¹²⁵ Prosecutor v. Al Bashir, Case No. ICC-02/05-01/09-139, Decision Pursuant to Article 87(7) of the Rome Statute on the Failure by the Republic of Malawi to Comply with the Cooperation Requests Issued by the Court with Respect to the Arrest and Surrender of Omar Hassan Ahmad Al Bashir, ¶ 5 (Dec. 12, 2011) [hereinafter *Decision on Failure by Malawi to Comply*], available at <http://www.icc-cpi.int/iccdocs/doc/doc1287184.pdf>.

¹²⁶ *Id.*

¹²⁷ *Id.* ¶ 7.

¹²⁸ *Id.* ¶ 8.

¹²⁹ *Id.*

¹³⁰ *Decision on Failure by Malawi to Comply*, Case No. ICC-02/05-01/09-139, ¶ 8.

¹³¹ *Id.*; see also Rome Statute art. 98 (stating that the Court cannot proceed with a request for surrender or assistance which would require the requested State to act inconsistently with its obligations under international law or international agreements).

¹³² *Decision on Failure by Malawi to Comply*, Case No. ICC-02/05-01/09-139, ¶ 12.

matter to the Chamber's attention in order for it to resolve the issue.¹³³ More importantly, the Chamber addressed Malawi's arguments justifying its refusal to arrest al-Bashir; the Chamber addressed the conflicting issue with Article 98, which states that the Court cannot proceed with a request for surrender or assistance that would require the requested state to act inconsistently with its obligations under international law.¹³⁴ Specifically, the Chamber addressed the argument that, with respect to states not parties to the Statute, international law affords immunity to Heads of States in proceedings before international courts.¹³⁵

The Chamber ultimately held that Heads of States were not immune from proceedings before international courts.¹³⁶ The Chamber cited to statements made both after the First and Second World Wars, noting that even if a sovereign is exempt from prosecution in a national court, the same does not apply before an international court.¹³⁷

In 1946, the International Military Tribunal in Nuremberg issued a judgment stating that:

The principle of International Law, which under certain circumstances protects the representatives of a State, cannot be applied to acts which are condemned as criminal by International Law. The authors of these acts cannot shelter themselves behind their official position in order to be freed from punishment in appropriate proceedings.¹³⁸

Additionally, the Chamber noted that the United Nations General Assembly adopted the "Principles of International Law Recognised in the Charter of the Nuremberg Tribunal and in the Judgment of the Tribunal," which states that although a person committing a crime under international law is acting as Head of State or a Government official, it does not relieve him from responsibility under

¹³³ *Id.*; see also ICC, Rules of Procedure and Evidence art. 195(1), U.N. Doc. PCNICC/200/1/Add.1 (2000) (stating that when a requested State notifies the Court that a request for surrender raises a problem of execution in respect of Article 98, the requested State shall provide any information relevant to assist the Court in the application of Article 98).

¹³⁴ Rome Statute art. 98. The AU used Article 98 to justify why its position is compatible with the Statute. See *Decision on Failure by Malawi to Comply*, Case No. ICC-02/05-01/09-139, ¶ 15.

¹³⁵ *Decision on Failure by Malawi to Comply*, Case No. ICC-02/05-01/09-139, ¶ 18.

¹³⁶ *Id.* ¶ 36.

¹³⁷ *Id.* ¶ 23.

¹³⁸ *Id.* ¶ 25 (noting that the Charter of the International Military Tribunal contained provisions which stated that the official position of defendants did not free them from responsibility for any crime for which they were charged).

international law.¹³⁹ More importantly, the Chamber noted that the International Tribunal for the Former Yugoslavia Statute and International Tribunal for Rwanda Statute contained articles that stated the official position of an accused person, whether as Head of State or Government official, did not relieve him from criminal responsibility.¹⁴⁰ As a successor to these tribunals, and considering the fact that the ICC was established to carry out the same mandate, there is no reason to believe that the same was not intended to apply with regard to the ICC and its jurisdiction over Heads of States.

More recently, the International Criminal Court of Justice (ICJ) noted that although customary international law provided immunity with regard to national courts, such immunities may not apply in criminal prosecutions before international courts.¹⁴¹ The reason for the distinction is that state officials are entitled to immunity before national courts so that prosecutions do not unduly impede or limit a foreign state's ability to engage in international action.¹⁴² As such, this danger does not arise with international courts because they are independent of states and "subject to strict rules of impartiality."¹⁴³ Therefore, the Chamber held that Head of State immunity could not be invoked to oppose prosecution by an international court.¹⁴⁴

The Chamber also addressed the inherent tension between Articles 27(2) and 98(1) of the Statute when the Court requests cooperation with regard to the arrest of a Head of State.¹⁴⁵ Again, it reiterated the many instances wherein courts have rejected immunity for Heads of State before international courts.¹⁴⁶ It noted that the existence of *ad hoc* tribunals and recent prosecutions of Heads of State shows that prosecuting Heads of State has gained recognition as an accepted practice.¹⁴⁷ Also, because Malawi has ratified the Statute and entrusted the Court with jurisdiction, it cannot use Article 98(1) to justify its failure to surrender al-Bashir.¹⁴⁸ Therefore, customary international law immunity creates an exception when Heads of States are sought by international courts for the commission of

¹³⁹ *Id.* ¶ 28. The Chamber also cited provisions in the Charter of the International Military Tribunal, which stated that the official position of a defendant did not relieve him from responsibility. *Id.* ¶¶ 24, 26.

¹⁴⁰ *Decision on Failure by Malawi to Comply*, Case No. ICC-02/05-01/09-139, ¶¶ 29–31.

¹⁴¹ *Id.* ¶ 33 (quoting comment by ICJ wherein it states that officials may be subject to criminal proceedings before certain international criminal courts, where they have jurisdiction, including the ICC).

¹⁴² *Id.* ¶ 34.

¹⁴³ *Id.*

¹⁴⁴ *Id.* ¶ 36.

¹⁴⁵ *Decision on Failure by Malawi to Comply*, Case No. ICC-02/05-01/09-139, ¶ 37.

¹⁴⁶ *Id.* ¶ 39 (noting the international prosecutions against Charles Taylor, Muammar Gaddafi, and Laurent Gbagbo).

¹⁴⁷ *Id.*

¹⁴⁸ *Id.* ¶ 41 (explaining that interpreting Article 98(1) in this way would disable the Court in a manner completely contrary to the purpose of the Statute).

international crimes.¹⁴⁹ As such, under Article 98(1), there was no conflict between Malawi's obligations toward the Court and international law.¹⁵⁰ Finding that Malawi should have arrested al-Bashir, the Chamber held that Malawi failed to comply with Article 87(7) of the Statute, preventing the Court from exercising its functions and powers under the Statute.¹⁵¹ The Chamber thus referred the matter to the Security Council and the Assembly of States Parties.¹⁵² The next day, the Chamber issued a similar decision with regard to Chad and also held that Chad had failed to cooperate by failing to arrest al-Bashir.¹⁵³

Despite critics' arguments about the ICC interfering with state sovereignty and the fear that the ICC will come to have universal jurisdiction, it is important to note that the ICC was established in order to prosecute the same crimes that were covered by *ad hoc* tribunals so that *ad hoc* tribunals would not have to be established every time situations like those in Yugoslavia and Rwanda occurred.¹⁵⁴ More importantly, the ICC only has jurisdiction over the most heinous crimes. Allowing Heads of State or any other government official with enough power to escape justice for the most heinous crimes does not further the international community's interests. Therefore, there is no reason that Head of State immunity should prevent the ICC from exercising its jurisdiction.

3. The African Union's Response to the Pre-Trial Chamber's Decisions

In January 2012, the AU issued a press release in response to the Chamber's decision on Malawi's and Chad's failure to comply.¹⁵⁵ The AU expressed its concern with the Chamber's decision and argued that the Chamber's decision was purporting to change international law.¹⁵⁶ The AU believed that the Chamber's decision rendered Article 98 of the Statute redundant, non-operational,

¹⁴⁹ *Id.* ¶ 43.

¹⁵⁰ *Decision on Failure by Malawi to Comply*, Case No. ICC-02/05-01/09-139, ¶ 43.

¹⁵¹ *Id.* ¶ 47.

¹⁵² *Id.*

¹⁵³ *See* Prosecutor v. Al Bashir, Case No. ICC-02/05-01/09-140, Decision Pursuant to Article 87(7) of the Rome Statute on the Refusal of the Republic of Chad to Comply with the Cooperation Requests Issued by the Court with Respect to the Arrest and Surrender of Omar Hassan Ahmad Al Bashir, ¶ 5 (Dec. 12, 2011) [hereinafter *Decision on Failure by Chad to Comply*].

¹⁵⁴ *See* Rome Statute at *Preamble*.

¹⁵⁵ Press Release, African Union, On the Decisions of the Pre-Trial Chamber I of the International Criminal Court (ICC) Pursuant to Article 87(7) of the Rome Statute on the Alleged Failure by the Republic of Chad and the Republic of Malawi to Comply with the Cooperation Requests Issued by the Court with Respect to the Arrest and Surrender of President Omar Hassan Al-Bashir of the Republic of Sudan (Jan. 9, 2012) [hereinafter Press Release, African Union, Decision of the Pre-Trial Chamber Regarding Malawi and Chad].

¹⁵⁶ *Id.*

and meaningless.¹⁵⁷ It also argued that the Chamber ignored the Constitutive Act of the AU, to which Chad and Malawi are State Parties, obligating member states to comply with the decisions and policies of the Union; it would be wrong to coerce them to violate or disregard their obligations to the AU.¹⁵⁸ The AU stated that the immunities provided by international law apply to both foreign-domestic courts and international courts; states cannot contract out their international legal obligations concerning third party states by establishing an international tribunal.¹⁵⁹ The AU argued that Article 98(1) was included in the Statute so that the Statute cannot remove the immunity that international law grants to State officials who are not parties to it.¹⁶⁰ Furthermore, it argued that State officials' immunity is the right of the State concerned, and a treaty only binds those that are parties to the treaty; therefore, a treaty cannot deprive non-party states of rights that they normally possess.¹⁶¹ Thus, AU contends that immunity applies to officials even if they are accused of committing an international crime.¹⁶² The AU explicitly stated that it would continue to oppose "any ill-considered, self-serving decisions of the ICC as well as any pretensions or double standards that become evident from the investigations, prosecutions and decisions by the ICC relating to situations in Africa" and that "the fight against impunity is too important to be left to the ICC alone."¹⁶³ And again, it requested that all African Union member states reject any resolution by the Security Council with the intention of sanctioning Malawi and Chad.¹⁶⁴

4. States' Willingness to Comply When Facing Sanctions

Due to states' unwillingness to voluntarily cooperate, threatening to withhold aid from states that do not cooperate may be one way to induce states to comply with the Security Council's resolutions. In May 2012, a U.S. House of Representatives committee voted on a provision that would cut off economic aid to any country that hosted President al-Bashir.¹⁶⁵ Consequently, in June 2012, the Malawi President announced that her country would arrest al-Bashir if he attended

¹⁵⁷ *Id.*

¹⁵⁸ *Id.*

¹⁵⁹ *Id.*

¹⁶⁰ Press Release, African Union, Decision of the Pre-Trial Chamber regarding Malawi and Chad, *supra* note 155.

¹⁶¹ *Id.*

¹⁶² *Id.*

¹⁶³ *Id.*

¹⁶⁴ *Id.*

¹⁶⁵ Susan Cornwell, *U.S. Lawmakers Want to Halt Aid to Nations Hosting Sudan's Bashir*, REUTERS (May 17, 2012), <http://www.reuters.com/article/2012/05/17/us-usa-sudan-aid-idUSBRE84G1G720120517>.

an African Union conference that was to be held in Malawi.¹⁶⁶ The Malawi President stated that her change in position resulted from the uproar that resulted between the Malawi government and western donors when Malawi hosted al-Bashir the previous year, and states withdrew aid and suspended budgetary support to Malawi.¹⁶⁷ Additionally, the United States suspended a U.S. \$58 billion energy grant to Malawi.¹⁶⁸ The Malawi President feared that she would destroy the relationship with donors that she was trying to mend if her country hosted al-Bashir.¹⁶⁹ Other countries, such as Zambia and South Africa, also stated that if al-Bashir visited their state, he would be arrested.¹⁷⁰ However, not all countries have refused to host al-Bashir. After Malawi refused to host al-Bashir, the summit was moved to Ethiopia.¹⁷¹ Today, President al-Bashir continues to visit countries that are willing to accept him, without any fear of arrest. President al-Bashir's defiance can do nothing more than encourage other perpetrators to do the same in the future.

Clearly, the ICC relies heavily on states' cooperation and the international community as a whole to carry out its arrest warrants. It is a paradox for the ICC; its jurisdiction derives from a state's lack of action or unwillingness to act, but then it is required to rely on that same state for cooperation.¹⁷² As one author puts it, the ICC is like a "giant without legs and arms;"¹⁷³ the arms and legs being states cooperating with the Court. Unfortunately, states' cooperation is also influenced by political considerations. Perhaps, the Statute should have included a detailed list of the types of judicial assistance that state parties would be expected to render to the Court. That way, states would know what their obligations were under the Statute.

However, aside from a state's failure to cooperate, international justice also remains affected by conflicting political interests, ultimately undermining the Court's efficiency and the Security Council's ability to bring about international peace and security, as will be discussed below. The situation in Darfur proves that simply referring a situation to the ICC, without more, is not enough. Instead, the international community and the Security Council need to continue to support and cooperate with the ICC after the referral, either with resolutions imposing sanctions or other enforcement mechanisms to ensure that the ICC is able to carry out its duties.

¹⁶⁶ Wezie Nyirongo, *Malawi President Joyce Banda Says Omar al-Bashir Will Be Arrested if He Attends African Union Conference*, NEWSTIME AFRICA (June 4, 2012), <http://www.newstimeafrica.com/archives/26021>.

¹⁶⁷ *Id.*

¹⁶⁸ *Id.*

¹⁶⁹ *Id.*

¹⁷⁰ *Id.*

¹⁷¹ *Ethiopia to Host Africa Union Summit After Omar al-Bashir Malawi Row*, BBC NEWS (AFRICA) (June 12, 2012), <http://www.bbc.co.uk/news/world-africa-18407396>.

¹⁷² JURDI, *supra* note 57, at 258.

¹⁷³ *Id.*

IV. POLITICAL PARTISAN INTERESTS AND THE ICC

Political partisan interests are undermining the ICC, limiting the pursuit of justice, and subordinating human rights. As with the situation in Darfur, the ICC does not have the enforcement mechanisms to coerce states to comply with the Court. However, when the Security Council acts under Chapter VII in referring a situation to the ICC, the Court's jurisdiction is then anchored in the U.N. Charter.¹⁷⁴ Therefore, when states fail to cooperate with the ICC or the Security Council's resolutions, the Security Council is able to impose sanctions on states. Unfortunately, as we have seen thus far, the Security Council has been unable to pursue these actions due to states choosing political partisan interests over the pursuit of international peace and security. Therefore, the Security Council has done nothing to back up its initial commitment to justice. Moreover, the Security Council's veto power has prevented the Security Council from taking any action in other situations, such as that in Syria.¹⁷⁵ Below, I will begin by explaining the relationship between the ICC and the United Nations that the drafters of the treaty intended. I will continue by explaining how partisan political interests have played a role in both Darfur and Syria.

A. The Relationship Between the ICC and the United Nations

During the Sixth Committee's discussions about the drafting of the Court's Statute, representatives proposed a relationship between the Court and the United Nations, and more specifically, the Security Council.¹⁷⁶ However, all proposals made it clear that the Court and Security Council should remain separate entities.¹⁷⁷ For example, a United States representative stated that the Court would need some oversight mechanisms by state parties, but those "*should not be intrusive in its independent functioning.*"¹⁷⁸ Additionally, Ghana's representative stated that while the Security Council's primary role "in the maintenance of peace and security must be preserved," it should not be at the expense of an international criminal court's principal of jurisprudence.¹⁷⁹ Specifically, he stated that the Security Council's political influences "must not be allowed to seep into or . . . taint structures [such as the Court,] established with the objective of dispensing justice."¹⁸⁰ Moreover, the Costa Rican representative

¹⁷⁴ See U.N. Charter arts. 39–51 (allowing the Security Council to take action when peace is threatened or breached).

¹⁷⁵ Borger, *supra* note 15.

¹⁷⁶ Press Release, General Assembly, United States Representative Tells Legal Committee International Criminal Court Should Not Be Direct Part of United Nations, U.N. Doc. GA/L/3046 (Oct. 23, 1997).

¹⁷⁷ *Id.*

¹⁷⁸ *Id.* (emphasis added).

¹⁷⁹ *Id.*

¹⁸⁰ *Id.*

stated that “[t]he Security Council should not be allowed to veto the consideration of cases by the Court.”¹⁸¹ Among the countries’ representatives, there was a consensus that the Court should not act as a subsidiary organ of the Security Council, should maintain its judicial independence, and most importantly, remain free from any Security Council political influence or interference, which would prevent prosecutions by the Court.¹⁸² The Czech Republic’s representative also mentioned that the Statute should contain a “rigid obligation by States to comply with the Court’s requests for assistance” and that the rule should not contain any exceptions.¹⁸³ On the other hand, states that wanted state sovereignty to trump fighting impunity, such as the United States, China, India, and Israel, wanted the Court to be subject to a Security Council veto on prosecutions.¹⁸⁴ However, subordinating the Court to the Security Council is incompatible with judicial independence and impartiality. Thus, it is not surprising that those favoring state sovereignty and opting for the Court to be subject to a Security Council veto include those countries that have refused to ratify the Statute and hold a veto power.

B. The Security Council and its Five Major Powers

The Security Council is made up of fifteen member states, five of which are permanent members.¹⁸⁵ The permanent members are China, France, Russia, the United Kingdom, and the United States. Under Article 27 of the U.N. Charter, Security Council decisions on all procedural matters require the affirmative votes of nine of the fifteen members.¹⁸⁶ Decisions on all other matters require an affirmative vote of nine members, including the concurring votes of the permanent members.¹⁸⁷ However, the five permanent members hold a veto power, ultimately allowing a permanent member to block the adoption of a resolution that it does not accept, even if it receives the required number of affirmative votes.¹⁸⁸ Therefore, although matters are voted on by the fifteen member states, the veto power ultimately leaves all decisions in the hands of the permanent members. In voting on specific matters, it is not completely irrelevant whether the permanent members themselves are parties or subject to the same sanctions they are imposing on others; Article 27 of the U.N. Charter states that in decisions under Chapter VI and under paragraph 3 of Article 52, a party to a dispute shall abstain from

¹⁸¹ Press Release, General Assembly, *supra* note 176.

¹⁸² *Id.*

¹⁸³ *Id.*

¹⁸⁴ MENDES, *supra* note 62, at 15–16.

¹⁸⁵ *The Security Council*, UNITED NATIONS, <http://www.un.org/en/sc/> (last visited Feb. 2, 2014).

¹⁸⁶ *Id.*

¹⁸⁷ *Id.*

¹⁸⁸ *Id.*

voting.¹⁸⁹ However, neither of these exceptions seems to apply to decisions made pursuant to Chapter VII. Therefore, it is not surprising that three of the five permanent members – the United States, China, and Russia – have refused to subject themselves to the jurisdiction of the ICC. Although they get to vote on who may ultimately be subjected to the Court’s jurisdiction, they themselves will never be subjected to the Court’s jurisdiction, especially since it is fair to assume that they will never vote to refer one of their own officials to the ICC.¹⁹⁰ In essence, permanent members are placed above the law and are permanently exempt from criminal accountability.

As a result, the ICC has not seriously effected the “hierarchical realities” of world politics, which one author describes as “exhibit[ing] an embrace of the Melian ethos when it comes to criminal accountability: ‘the strong do what they will, the weak do what they must.’”¹⁹¹ Double standards continue to exist. “Those who are enemies of the West or evildoers in Africa are targets of global prosecutorial zeal, while those in the West who [commit war crimes] continue to enjoy impunity, [at least] as far as formal legal proceedings are concerned.”¹⁹²

The permanent members’ use of the veto power is a perfect example of existing double standards. Permanent members’ abuse of their veto power has ultimately eroded the authority and legitimacy of international criminal law.¹⁹³ As one author points out, their actions can be seen as “the prostitution of law and institutions to geopolitical abuses and ambitions.”¹⁹⁴ A recent example of this is the Security Council’s willingness to refer the situations in Darfur and Libya to the ICC, but its unwillingness to refer the Syrian situation to the ICC. In Syria, we are witnessing the same mass murdering of innocent civilians, yet some of the Security Council’s permanent members have refused to budge due to personal state interests.¹⁹⁵

C. The Security Council’s Referral Power Under Article 13 of the Rome Statute

As previously mentioned, under Article 13 of the Statute, the Security Council has the power to refer situations to the Court. During the preparatory

¹⁸⁹ *Id.*

¹⁹⁰ *See, e.g.,* Scott, *supra* note 35 (explaining that the United States has signed bilateral agreements with many countries that provide for the non-surrender of U.S. persons to ICC jurisdiction, and Congress enacted the 2002 American Service Members’ Protection Act, which restricted U.S. cooperation with the ICC and provided for the cutting off of assistance to states that refused to sign the agreements).

¹⁹¹ Falk, *supra* note 2.

¹⁹² *Id.*

¹⁹³ *Id.*

¹⁹⁴ *Id.*

¹⁹⁵ Joel Wuthnow, *Why China Would Intervene in Syria*, NAT’L INTEREST (July 16, 2012), <http://nationalinterest.org/commentary/why-china-would-intervene-syria-7197>.

process, the Preparatory Committee on the Establishment of the ICC specifically discussed the Security Council's power under Article 13.¹⁹⁶ Some delegations supported the Security Council's power to initiate proceedings, while others opposed giving the Security Council any power whatsoever.¹⁹⁷ Those who opposed giving the Security Council this power argued that the Court would be subject to the decisions of a political body, ultimately undermining the Court's independence and credibility.¹⁹⁸ The opposition believed that this provision would be used against states *other* than the permanent members of the Council, since the latter could use their veto power to block referrals that would have an adverse impact on their interests.¹⁹⁹ The opposition was concerned that the Court would give the Security Council greater power than that conferred upon it by the Charter itself.²⁰⁰ Overall, the opposition's main concern was that the political nature of the Security Council would undermine and hinder the effectiveness of the Court.²⁰¹ Additionally, many representatives were skeptical about extending the Security Council veto to the ICC.²⁰²

For example, Libya's representative specifically expressed his concern that the Security Council would apply its functions selectively and be used as a "sword in the hand" of hegemonic great Powers,²⁰³ because it would be allowed to extend its vetoes to the ICC.²⁰³ Argentina's representative questioned how a government could be party to a treaty that would apply to all state parties, except for permanent members of the Security Council,²⁰⁴ since a permanent member obviously would never refer one of its own to the ICC. Iran's representative argued that the Security Council never had to justify its decisions, while the Court would have to justify its decisions; therefore, the Security Council possessed broad discretionary powers that the Court should not possess.²⁰⁵ On the other hand, those in favor of the Security Council's role argued that it was the Security

¹⁹⁶ See generally ROY S. LEE, *THE INTERNATIONAL CRIMINAL COURT: THE MAKING OF THE ROME STATUTE: ISSUES, NEGOTIATIONS, RESULTS* 146–49 (1999) (explaining the different positions regarding the Security Council's ability to initiate proceedings under Article 13 of the Rome Statute).

¹⁹⁷ *Id.* at 146.

¹⁹⁸ *Id.* at 146–47.

¹⁹⁹ *Id.* at 147.

²⁰⁰ Press Release, Preparatory Committee on Establishment of International Criminal Court, Conflict Between Security Council Powers, International Court, Discussed in Preparatory Committee, U.N. Press Release L/2777 (Apr. 4, 1996), available at <http://www.iccnw.org/documents/ConflictSCandCourt4Apr96.pdf>.

²⁰¹ *Id.*

²⁰² *Id.*

²⁰³ *Id.*

²⁰⁴ *Id.*

²⁰⁵ Press Release, Preparatory Committee on Establishment of International Criminal Court, *supra* note 200.

Council's responsibility to pursue international peace and security, thus, they should play a role in the referral process.²⁰⁶

Clearly, the Court was intended to be impartial and independent of the Security Council to prevent exactly what is occurring today; the Security Council's five major powers are using their veto power to pursue their political interests. Thus, it is undermining the efficiency of the ICC and its credibility by preventing it from taking action. In both the situation in Darfur and Syria, Russia, and China have been very reluctant to approve any actions that may force government officials to comply with Security Council resolutions.²⁰⁷ Sadly, those who feared that the Security Council would misuse its power and pursue political interests were correct. Now, it may not be so surprising to know that permanent members like the United States and Russia were among the group insisting that the Statute should not, in any way, limit the powers of the Security Council.²⁰⁸ Obviously, they have a lot to lose if they lose their veto power. Below I will describe some examples of how the permanent members of the Security Council have chosen to pursue their political interests over the pursuit of international peace and security.

D. Political Partisan Interests in Sudan

The Security Council's referral of Sudan to the ICC was not an easy one. Prior to referring the situation in Sudan to the ICC, the Security Council's inaction demonstrated the priority of national interests over human rights concerns, particularly those of China and Russia. Sudan relied on China and Russia to protect it from any sanctions that would be imposed.²⁰⁹ In fact, Sudan's allies, China, Russia, and Algeria, were found to create obstacles when it came to the Sanctions Committee imposing sanctions for violations of Resolution 1591, which imposed travel bans and froze the assets of those impeding the peace process in Darfur.²¹⁰ It is evident that they created such obstacles in order to ensure that any sanctions imposed would not impede the country's ability to pursue its interests. For example, China had strong oil interests in Sudan, and was also the main

²⁰⁶ *Id.*

²⁰⁷ See Press Release, Security Council, Security Council Imposes Travel Ban, Assets Freeze on Those Impeding Peace Process in Darfur, Adopting Resolution 1591 (2005) by 12-0-3, U.N. Press Release SC/8346 (Mar. 29, 2005) (noting that China and Russia abstained when it came to voting on resolutions that would place sanctions on Darfur); see also Borger, *supra* note 15 (explaining that China and Russia refused to consider any resolutions which would impose sanctions upon Syria).

²⁰⁸ Press Release, Preparatory Committee on Establishment of International Criminal Court, *supra* note 200.

²⁰⁹ MENDES, *supra* note 62, at 52.

²¹⁰ Press Release, Security Council, Security Council Imposes Travel Ban, *supra* note 207 (providing that all three States abstained because of their reservations about the Resolution's text).

supplier of military equipment to Sudan.²¹¹ Therefore, while the Sudanese government was killing its own citizens, it was doing so with weapons provided by China.²¹² However, China was not the only country being obstinate; Russia supplied arms to Khartoum at the time as well.²¹³ Providing evidence of China's inaction, a U.S. official experienced with the working of the Security Council stated:

It's a mistake to assume that the Security Council will be the leader on any issue. It doesn't work that way and the system has been broken most of the time. Each time we tried to bring up Darfur, even sanctions in general, China blocked it. Russia and China would not even turn up for meetings to discuss sanctions. We wanted to see oil sanctions immediately, which we think would have sent a strong message to the government to get serious. Everything gets watered down and a one page resolution becomes seven pages. We couldn't even mention the word sanctions, we had to call them measures.²¹⁴

Moreover, in addition to being the main supplier of military equipment used by Sudanese armed forces, there was evidence that Sudan was providing China with more than two-thirds of China's overseas oil production.²¹⁵ In addition to China and Russia's involvement with Sudan, there was evidence that four of the five permanent members of the Security Council had brokering arms contracts with the Sudanese government and three of the five permanent members had major investments in the Sudanese oil sector.²¹⁶ Therefore, it is not surprising that the Sudanese government did not comply with the Security Council's resolutions to disarm the militias. The United States, being fully aware of the situation in Darfur, did not take any action to enforce effective sanctions either.²¹⁷

Although the situation in Darfur was successfully referred to the ICC without any veto by China or Russia, the major powers did not seem willing to continue cooperating by imposing further sanctions when states failed to comply

²¹¹ MENDES, *supra* note 62, at 52.

²¹² *Id.* (explaining that BBC reports demonstrated that China had broken U.N. arms embargo by supplying fighter aircraft so they could be used against defenseless civilians, including children, in Darfur and noting reports also documented hard evidence that Chinese military trucks equipped with lethal firepower crossed into Darfur and were being used against civilians).

²¹³ *Id.* at 73.

²¹⁴ *Id.* at 53.

²¹⁵ *Id.* at 52.

²¹⁶ JURDI, *supra* note 57, at 254.

²¹⁷ MENDES, *supra* note 62, at 54 (noting that the United States could have taken more effective measures, such as imposing tougher unilateral sanctions against the oil production that fed the Sudanese military and targeted economic sanctions).

with the ICC.²¹⁸ For example, as I discussed earlier, the Pre-Trial Chamber found that Chad and Malawi had failed to comply with Article 87(7) of the Statute.²¹⁹ Thus, the Chamber referred the situation to the Security Council and Assembly of State Parties for further action. However, no sanctions were ever imposed on either state. Therefore, seeing that there is no repercussion for violating the Security Council's resolutions, there is clearly no reason why states will feel obligated to cooperate with the ICC. We have a cycle of non-cooperation followed by no sanctions; therefore, Resolution 1591 and successor resolutions have simply turned out to be empty threats and further show that the Security Council does not have the international community's best interests at heart or those of the thousands of innocent civilians who are victims of these mass atrocities. Until the Security Council decides to follow through and uphold its resolutions, these resolutions will remain empty threats. Meanwhile, the ICC will take the reputational hit and continue to be perceived as inefficient and useless due to its inability to carry out its arrest warrants.

E. Political Partisan Interests in Syria

Today, political partisan interests are preventing the horrific situation in Syria from being referred to the ICC. Permanent members, specifically China and Russia, have remained faithful to their ally, Syria's President, Bashar al-Assad, and have vetoed three resolutions that have come before the Security Council.²²⁰ First, in October 2011, Russia and China vetoed a European-backed Security Council resolution that threatened sanctions against the Syrian government if it did not immediately cease its military crackdown against civilians.²²¹ Russia's ambassador, Vitaly Churkin, stated that Russia opposed the resolution because it was "based on a philosophy of confrontation," contained "an ultimatum of sanctions," and was against a peaceful settlement.²²² Despite his position, the Ambassador denied that his country supported the Assad regime or the ongoing violence.²²³ On the other hand, China's ambassador claimed his country opposed the resolution because "sanctions, or threat of sanctions, do not help the situation

²¹⁸ *Id.* at 53 (noting China and Russia's unwillingness to impose sanctions on Darfur for its failure to comply with Security Council resolutions).

²¹⁹ See *Decision on Failure by Malawi to Comply*, Case No. ICC-02/05-01/09-139, ¶ 12; *Decision on Failure by Chad to Comply*, Case No. ICC-02/05-01/09-140, ¶ 5.

²²⁰ Borger, *supra* note 15.

²²¹ *Russia and China Veto UN Resolution Against Syrian Regime: Anger from Europe and US as Two Security Council Powers Argue Implied Threat of Sanctions Will Not Bring Peace*, THE GUARDIAN (Oct. 4, 2011), <http://www.guardian.co.uk/world/2011/oct/05/russia-china-veto-syria-resolution> [hereinafter *Russia and China Veto UN Resolution Against Syrian Regime*].

²²² *Id.*

²²³ *Id.*

in Syria but rather complicates the situation.”²²⁴ British, French, and U.S. ambassadors were quick to criticize the resolution’s veto. U.S. Ambassador Susan Rice stated that the people of Syria could “now clearly see who on [the] council supports their yearning for liberty and human rights – and who does not.”²²⁵ Ambassador Rice also accused Russia and China of wanting to sell arms to the Syrian government,²²⁶ likely implying that is part of the reason for their objections to the resolution. However, those opposing a resolution expressed their concern that a new resolution might be used as a pretext for armed intervention in Syria.²²⁷ Moreover, they felt that any resolutions should contain language holding the Syrian regime’s opposition accountable for the violence as well.

In February 2012, Russia and China vetoed a Western-Arab Security Council resolution, which backed an Arab League plan for the Syrian President to step aside.²²⁸ Again, Russia’s ambassador attacked the resolution, claiming it was a biased attempt at regime change in Syria.²²⁹ Then, on July 19, 2012, Russia and China again vetoed a British-sponsored resolution that would have punished the Syrian government with economic sanctions for failing to carry out a peace plan which called for a cease-fire, and which President Assad accepted back in April 2012, but failed to carry out.²³⁰ Explaining his reason for yet another veto, Russian Ambassador Vitaly Churkin stated that they could not “accept a document under Chapter [VII of the U.N. Charter], one which would open the path for pressure of sanctions and further to external military involvement in Syrian domestic affairs.”²³¹ China and Russia have been greatly criticized for vetoing all three resolutions, and even blamed for the continuing bloodshed.²³² As a result, the Security Council has not even been able to agree on a humanitarian relief.²³³ Due to China and Russia’s position, the Security Council has been divided “to the point of paralysis.”²³⁴ Russia and China have refused to support

²²⁴ *Id.*

²²⁵ *Russia and China Veto UN Resolution Against Syrian Regime, supra* note 221.

²²⁶ *Id.*

²²⁷ *Id.*

²²⁸ Lois Charbonneau & Patrick Worship, *Russia, China Veto U.N. Draft Backing Arab Plan for Syria*, REUTERS (Feb. 4, 2012), <http://www.reuters.com/article/2012/02/04/us-syria-idUSTRE80S08620120204>.

²²⁹ *Id.*

²³⁰ Rick Gladstone, *Friction at the U.N. as Russia and China Veto Another Resolution on Syria Sanctions*, N.Y. TIMES (July 19, 2012), <http://www.nytimes.com/2012/07/20/world/middleeast/russia-and-china-veto-un-sanctions-against-syria.html>.

²³¹ *Id.*

²³² See Rosa Prince, *Russia and China Block British Attempts at UN to End Syria Bloodshed*, THE TELEGRAPH (Mar. 12, 2012), <http://www.telegraph.co.uk/news/worldnews/middleeast/syria/9139210/Russia-and-China-block-British-attempts-at-UN-to-end-Syria-bloodshed.html>.

²³³ Borger, *supra* note 15.

²³⁴ *Id.*

any Security Council resolution that will place pressure on Assad, even though it does not involve any military action.²³⁵

Critics believe that Russia and China maintain their position because of their personal interests in Syria.²³⁶ Damascus is a Russian ally and purchases Russian arms;²³⁷ China has also been accused of selling arms to the Syrian regime.²³⁸ Additionally, the Syrian port of Tartus is the only Russian military base located outside of Russia.²³⁹ It was also reported that Russia was manning Syria's more sophisticated air defenses.²⁴⁰ According to one article, the upgrades were supplied by Moscow as a safeguard against "western-imposed regime change and protection of a longstanding investment in Syria."²⁴¹ There have also been reports of Russian deliveries, including mobile missile launch and radar systems.²⁴² Sources have also confirmed the presence of Russian air-defense crews inside Syria to help man and train the Syrian crews; alone, the Syrians are unable to use the equipment to its full capacity.²⁴³ However, Russia has denied accusations that it is providing support to the Assad regime.²⁴⁴

Notwithstanding Russia and China, most other states support resolutions which would end the bloodshed in Syria.²⁴⁵ In fact, many state leaders have called on the ICC to take action in Syria.²⁴⁶ The only success thus far is the most recent

²³⁵ *Id.*

²³⁶ *See id.* (accusing Russia and China of wanting to sell arms to the Syrian regime); *see also* Jaime A. FlorCruz, *Why China Didn't Back U.N. Plan for Syria*, CNN (Feb. 9, 2012), <http://www.cnn.com/2012/02/09/world/asia/syria-china-florcruz/> (noting that China was ranked as the third-largest supplier of imports to Syria in 2010); Joel Wuthnow, *supra* note 195 (noting Russia's continued arm sales to the Assad regime and China's large stakes in Syria's oil industry, as well as the fact that China's exports to Syria totaled more than U.S. \$2.4 billion in 2011).

²³⁷ Borger, *supra* note 15.

²³⁸ *Id.*

²³⁹ Felix Imonti, *How Vladimir Putin and Russia Hope to Win Big – In Syria*, CNBC (Feb. 26, 2013), <http://www.cnbc.com/id/100496808>.

²⁴⁰ Julian Borger, *Russian Military Presence in Syria Poses Challenge to US-Led Intervention*, THE GUARDIAN (Dec. 23, 2012), <http://www.guardian.co.uk/world/2012/dec/23/syria-crisis-russian-military-presence>.

²⁴¹ *Id.*

²⁴² *Id.*

²⁴³ *Id.*

²⁴⁴ *Id.*

²⁴⁵ *See Russia and China Veto UN Resolution Against Syrian Regime*, *supra* note 221 (noting that French, British, and U.S. ambassadors attacked China's and Russia's vetos of the resolutions threatening sanctions against the Syrian regime); *see also Security Council Members Should Consider Limited Veto Right, New Zealand Tells UN Debate*, UN NEWS CENTRE (Sept. 29, 2012), <http://www.un.org/apps/news/story.asp?NewsID=43148&Cr=General+Debate&Cr1> (noting that the Minister for Foreign Affairs of New Zealand criticized the Security Council for its failure to take action in Syria).

²⁴⁶ *See* Michael Spindelegger et al., *Time to Refer Syria Crisis to ICC*, CNN WORLD (Jan. 10, 2013), <http://globalpublicsquare.blogs.cnn.com/2013/01/10/time-to-refer-syria->

resolution which requires Syria to cooperate fully with U.N. inspectors charged with securing and destroying the country's chemical weapons stockpile.²⁴⁷ Syria has agreed to cooperate, but if it fails to comply, consequences will again depend on the Security Council passing another resolution for non-compliance.²⁴⁸ However, there have been no discussions that would entail referring the matter to the ICC.

Although Russia and China may argue that its approval of the most recent resolution is a step in the right direction, many critics would argue otherwise. Some believe that Assad's willingness to cooperate is merely part of his strategic plan to buy himself time to defeat the opposition and remain in power.²⁴⁹ The resolution itself lacks any teeth.²⁵⁰ It mentions nothing about holding anyone accountable,²⁵¹ and it surely has not done anything to cease the killing of innocent civilians or the opposition. Quite to the contrary, Syria's jets and helicopters have been redeployed and conventional weapons continue to be used against the rebels.²⁵² Thus, it is no surprise that many have called the Russian-brokered deal a victory for Syria.²⁵³ In fact, Syrian rebels viewed the agreement as a blow to the attempt to remove Assad from power and believe the deal allows Assad to escape being held accountable for the killings.²⁵⁴ Therefore, it would be foolish to call this resolution a breakthrough or a success at this point in time.

crisis-to-icc/ (providing an opinion piece by foreign ministers from Austria, Slovenia, Ireland, and Denmark calling for a referral to the ICC); *see also* Michelle Nichols, *Over 50 Countries Ask Security Council to Refer Syria to Court*, THE DAILY STAR (Jan. 14, 2013), <http://www.dailystar.com.lb/News/Middle-East/2013/Jan-14/2013164-55-countries-demand-un-council-orders-syria-war-crimes-case.ashx#axzz2I3trjLs5>.

²⁴⁷ Ryan Lucas & Bassem Mroue, *Syria Vows to Abide By UN Security Council Resolution, Cooperate with Inspectors Destroying Chemical Weapons Stockpile*, HUFFINGTON POST (Sept. 28, 2013), http://www.huffingtonpost.com/2013/09/28/syria-un-resolution_n_4009863.html.

²⁴⁸ *Id.*

²⁴⁹ *See Assad's U.N. Partners: Syria's Chemical Weapons Declaration is Far from Complete*, WALL ST. JOURNAL (Sept. 29, 2013), <http://online.wsj.com/news/articles/SB10001424052702304526204579101353079118202>.

²⁵⁰ *Id.*

²⁵¹ *Id.*

²⁵² *Syrian Rebels Slam U.S.-Russia Deal, Say Assad Is Moving Chemical Weapons to Lebanon and Iraq*, WORLD POST (Sept. 14, 2013), http://www.huffingtonpost.com/2013/09/14/syrian-rebels-chemical-weapons-deal_n_3926151.html.

²⁵³ *Id.*

²⁵⁴ *Id.*

1. Background of Situation in Syria

What began as small pro-reform demonstrations in February 2011 turned into mass protests in March.²⁵⁵ Demonstrators exercised their right to peaceful protests; however, government forces begin using excessive force and unlawfully detaining protesters, including children.²⁵⁶ Protests began to spread rapidly as government forces continued to use brute force against protesters, including the use of snipers to shoot into peaceful crowds.²⁵⁷ Consequently, hostilities continued to rage between government forces and anti-government armed groups, ultimately resulting in an armed conflict.²⁵⁸ In August, the U.N. Human Rights Council established an Independent International Commission of Inquiry.²⁵⁹ The Commission concluded that both the government forces and anti-government armed groups committed crimes against humanity of murder and of torture, war crimes, and gross violations of international human rights law and international humanitarian law, including unlawful killing, sexual violence, indiscriminate attacks, pillaging, and destruction of property.²⁶⁰ Although violations and abuses by anti-government armed groups did not reach the gravity or frequency of those committed by government forces, they were still violating international law and committing war crimes.²⁶¹

On February 23, 2012, the United Nations and the League of Arab States appointed a joint special envoy, Kofi Annan, and attempted to implement a six-point plan that would bring about the cessation of violence by all parties; however, efforts to find a solution brought little progress, if any.²⁶² The armed violence has continued to increase in intensity and spread to new areas, including outside Syria's borders.²⁶³ There have been several attacks by both sides, including air strikes by the Syrian government, which continue to kill innocent civilians.²⁶⁴ The government knowingly targets innocent civilians, striking attacks in residential areas.²⁶⁵ One such attack was the Houla Massacre, which included attacks on several small Muslim villages near the Syrian city of Homs, and demonstrated the tragic civilian vulnerability to the government's violence.²⁶⁶ Reports showed that

²⁵⁵ Amnesty Int'l Report, *supra* note 20, at 325.

²⁵⁶ *Id.*

²⁵⁷ *Id.*

²⁵⁸ Rep. of the Independent Int'l Comm'n of Inquiry on the Syrian Arab Republic, 21st Sess., Aug. 16, 2012, U.N. Doc. A/HRC/21/50 [hereinafter GAOR Report], *available at* http://www.ohchr.org/Documents/HRBodies/HRCouncil/RegularSession/Session21/A-HRC-21-50_en.pdf.

²⁵⁹ Amnesty Int'l Report, *supra* note 20, at 325.

²⁶⁰ GAOR Report, *supra* note 258.

²⁶¹ *Id.*

²⁶² *Id.* at 6.

²⁶³ *Id.* at 7.

²⁶⁴ *Id.* at 60.

²⁶⁵ Amnesty Int'l Report, *supra* note 20, at 325–26.

²⁶⁶ Richard Falk, *Richard Falk: What Can Be Done About Syria?*, GUERNICA (June 4, 2012), <http://www.guernicamag.com/daily/richard-falk-what-can-be-done-about-syria/>.

approximately 108 civilians were executed at close-range, over fifty of whom were children under the age of ten.²⁶⁷ The most recent acts have been the reported chemical weapons attack, where more than 1,400 persons were killed.²⁶⁸ Today, reports estimate the death toll in Syria to be more than 115,000,²⁶⁹ and it is increasing every day, with more than 2.5 million civilians having fled their homes.²⁷⁰ Reports state that people are constantly moving, trying to escape the violence.²⁷¹ Three years later, the Syrian people continue to live in fear of attack as the international community continues to fail them. As U.N. Special Coordinator Michael Williams stated: “The whole concept of responsibility to protect has been forgotten”²⁷²

2. Action Taken Against Syria

Thus far, the United States has imposed sanctions against Syria and tightened sanctions involving energy imports, business connections, and weapons.²⁷³ The United States has also urged other countries not to support the Syrian regime and told them to “get on the right side of history.”²⁷⁴ In February 2012, the Tunisian government withdrew its recognition of Syrian leadership under President al-Assad.²⁷⁵ In May, the European Union imposed targeted sanctions on Syria’s leaders and later expanded them.²⁷⁶ In November, the League of Arab States suspended Syria and then imposed economic sanctions when the government defaulted on its pledge to the Arab League to withdraw its armed forces from Syria’s cities, halt the violence, and release people imprisoned in connection with the protests.²⁷⁷ Other countries, such as Turkey, Canada,

²⁶⁷ *Id.*

²⁶⁸ Joby Warrick, *More than 1,400 Killed in Syrian Chemical Weapons Attack*, U.S. SAYS, WASH. POST (Aug. 30, 2013), http://articles.washingtonpost.com/2013-08-30/world/41606663_1_obama-administration-u-s-intelligence-analysts-syrian-government.

²⁶⁹ See Stampler, *supra* note 16.

²⁷⁰ Stephanie Nebehay, *War Uproots 2.5 Million Syrians, Aid Groups Say*, REUTERS (Nov. 13, 2013), <http://www.reuters.com/article/2012/11/13/us-syria-crisis-displaced-idUSBRE8AC0LQ20121113>.

²⁷¹ *Id.*

²⁷² Borger, *supra* note 15.

²⁷³ Richard Falk, *Syria: Geopolitical Mentoring vs. Rehab for Addicted Geopolitical Leaders*, FOREIGN POLICY JOURNAL (Aug. 20, 2011), <http://www.foreignpolicyjournal.com/2011/08/20/syria-geopolitical-mentoring-vs-rehab-for-addicted-geopolitical-leaders/>.

²⁷⁴ *Id.*

²⁷⁵ Tarek Amara, *Tunisia “to Withdraw recognition” of Syria Government*, REUTERS (Feb. 4, 2012), <http://www.reuters.com/article/2012/02/04/us-syria-tunisia-flag-idUSTRE81301F20120204>.

²⁷⁶ Amnesty Int’l Report, *supra* note 20, at 325.

²⁷⁷ *Id.*

Australia, and Switzerland have also imposed sanctions.²⁷⁸ Additionally, as previously mentioned, the Security Council recently adopted a resolution that requires Syria to cooperate with U.N. inspectors charged with securing and destroying the country's chemical weapons stockpile.²⁷⁹ Outside of this, no action has been taken against Syria. If Russia, China, and other states continue to block proposed resolutions condemning the crimes and other abuses in Syria, it is unlikely that any action referring the situation to the ICC will be taken any time soon, if ever. Moreover, the ICC is unable to investigate or initiate a case against President al-Assad without a referral from the Security Council since Syria is not a party to the Rome Statute. Therefore, the ICC's hands are currently tied.

3. The Future of Syria

At this point in time, it is difficult to predict what will come of Syria, the Assad regime, and the Syrian people. Many leaders have called for an ICC intervention. On two occasions, U.N. High Commissioner for Human Rights Navi Pillay has called for Assad's case to be referred to the ICC.²⁸⁰ Additionally, in July 2012, Switzerland initiated a petition to bring those responsible for the situation in Syria to the ICC.²⁸¹ By January 2013, Switzerland managed to get fifty-four more states to join the movement, including five members of the Security Council (Great Britain, France, Australia, South Korea, and Luxemburg).²⁸² However, the petition may prove to be useless, as other efforts thus far. Without support from the Security Council, especially the permanent members, it is highly unlikely that the petition will have any impact.

Nonetheless, the countries wrote a letter to the Security Council stating that taking action would "send a clear signal to the Syrian authorities."²⁸³ In response, Russia stated that it opposed these countries' efforts to refer the situation in Syria to the ICC; it called the initiative "ill-timed and counterproductive" to the task of immediately ending the bloodshed in Syria.²⁸⁴

²⁷⁸ *Q&A: Syria sanctions*, BBC NEWS (Mar. 23, 2012), <http://www.bbc.co.uk/news/world-middle-east-15753975>.

²⁷⁹ See Lucas & Mroue, *supra* note 247.

²⁸⁰ Farida Hussain, *Is Prosecuting Assad a Better Option than Syria Strike?*, CBC NEWS (Sept. 7, 2013), <http://www.cbc.ca/news/world/is-prosecuting-assad-a-better-option-than-syria-strike-1.1699925>.

²⁸¹ Khadija Patel, *Human Rights Watch: SA Must Refer Syria to the ICC*, DAILY MAVERICK (Nov. 20, 2012), <http://dailymaverick.co.za/article/2012-11-20-human-rights-watch-sa-must-refer-syria-to-the-icc>.

²⁸² Alexander Mezyaev, *Syria and International Criminal Court: New Phase of Military and Diplomatic Stand-Off*, ORIENTAL REVIEW (Jan. 21, 2013), <http://orientalreview.org/2013/01/21/syria-and-international-criminal-court/>.

²⁸³ *Russia Opposes Syria Crisis War Crimes Court Referral*, REUTERS (Jan. 15, 2013), <http://www.reuters.com/article/2013/01/15/syria-crisis-russia-idUSL6N0AKCNB20130115>.

²⁸⁴ *Id.*

Seeing that Russia has not proposed any other alternatives, it is fair to say that Russia may never think it will be a “good time” to refer the Syrian crisis to the ICC. Syria’s U.N. ambassador, Bashar Ja’afari, also responded to the countries’ request. Ja’afari claimed that the request for an investigation into war crimes is only complicating the situation and delaying any attempt to end the crisis.²⁸⁵ In his letter to the U.N. Security Council, he asked that the sanctions imposed by the European Union, the United States, and others be lifted because they were punishing the Syrian people.²⁸⁶ According to Ja’afari, the sanctions have directly contributed to the deteriorating humanitarian situation and are depriving Syrians of basic commodities such as fuel, food, and medicine.²⁸⁷ Additionally, Ja’afari stated that before the situation can be referred to the ICC, domestic remedies should be exhausted; he claims that these remedies have not been exhausted here because “Syria has established an independent, transparent and credible national commission of inquiry to investigate complaints of human rights violations committed by civilians.”²⁸⁸ For these reasons, Ja’afari believes that countries calling for a referral to the ICC should be supporting efforts towards a “political solution based on national dialogue . . . instead of complicating the situation and hindering the search for an end to the crisis.”²⁸⁹

Although Syria’s U.N. Ambassador might have the best intentions, he offers an empty proposal. He focuses on exhausting domestic remedies; clearly, he has forgotten that all attempts to make agreements and negotiations with the Syrian regime have failed. This includes the most recent discussions that took place during the Geneva Conference. After two rounds of talks, both sides remain at opposite ends; they could not even agree on a resolution about humanitarian aid.²⁹⁰ It is hard to imagine that any future attempts will prove successful. Seeking non-domestic remedies, such as referring the case to the ICC and passing resolutions imposing sanctions, may be the only solution to ending the bloodshed in Syria.

However, not everyone has given up hope that Syria will be referred to the ICC. For some, the question is not if Syria will be referred to the ICC, but when. China has reversed its objection to ICC referrals twice in the past.²⁹¹

²⁸⁵ Michelle Nichols, *Syria Says ICC Call Hinders Search for End to Conflict*, REUTERS (Jan. 25, 2013), <http://www.reuters.com/article/2013/01/25/us-syria-crisis-un-idUSBRE90012C20130125>.

²⁸⁶ *Id.*

²⁸⁷ *Id.*

²⁸⁸ *Id.*

²⁸⁹ *Id.*

²⁹⁰ *No Progress from New Round of Syria Peace Talks*, AL JAZEERA AMERICA (Feb. 11, 2014), <http://america.aljazeera.com/articles/2014/2/11/no-early-progressfromnewroundofsyriapecetalks.html>.

²⁹¹ Kerry Sun, *Would an ICC Referral Help End the Violence in Syria?*, INT’L POLICY DIGEST (Jan. 26, 2013), <http://www.internationalpolicydigest.org/2013/01/26/would-an-icc-referral-help-end-the-violence-in-syria/> (noting that China reversed its objection allowing the referral of Sudan over Darfur in 2005 and that of Libya in 2011).

Therefore, China could again be persuaded to change its position.²⁹² Even then, considering Russia's firm stance at the moment, a referral is very unlikely.

Although the most recent unanimous resolution by the Security Council is a major breakthrough for some,²⁹³ as discussed above, the resolution may be nothing more than a strategic plan. Now that Assad has been spared from an attack, he has no incentive to negotiate. Thus, the deal allows Assad to escape punishment and may send the message that he can continue killing thousands of innocent civilians, as long as he does not use chemical weapons. Only time will tell what is to come of the thousands of innocent civilians.

V. THE FUTURE OF THE ICC

A. Current Debates Regarding the Relationship between the ICC and the Security Council

Due to the controversy surrounding the Syrian crisis, many of the General Assembly's recent meetings have included discussion of the situation, possible solutions, and more specifically, the importance of adhering to the rule of law. During the committee's meetings, several state delegates mentioned the existence of double standards and the need to reform the Security Council.²⁹⁴ Many believe that without this, international law cannot be applied in an equitable and transparent manner.²⁹⁵ In fact, on September 29, 2012, the Minister for Foreign Affairs of New Zealand called on the five permanent members of the Security Council to give up their veto right on issues involving mass atrocities.²⁹⁶ The Foreign Minister specifically referred to its failure to act in Syria, stating that it was reducing its credibility.²⁹⁷ The Foreign Minister did not hesitate to admonish the Security Council when he addressed the General Assembly during its debate, specifically asking, "If 25,000 deaths, countless thousands injured and many more thousands displaced and homeless is not enough to get the Security Council to act, then what does it take?"²⁹⁸ He went on to state that due to the current situation "the case for reform of the Security Council has become utterly

²⁹² *Id.* (noting that if China were lobbied by the Gulf States that China relies on for oil and energy, China may change its position).

²⁹³ See Lucas & Mroue, *supra* note 247.

²⁹⁴ Press Release, General Assembly, Syria Calls for Application of Rule of Law in "Unimaginable" Situation Facing Country, as Sixth Committee Concludes Rule of Law Debate: Delegates Urge Security Council Reform as Debate Begins on Special Charter Committee, U.N. Press Release GA/L/3437 (Oct. 11, 2012).

²⁹⁵ *Id.*

²⁹⁶ *Security Council Members Should Consider Limited Veto Right, New Zealand Tells UN Debate*, *supra* note 246.

²⁹⁷ *Id.*

²⁹⁸ *Id.*

compelling.”²⁹⁹ He asked that the permanent members voluntarily accept restrictions on their veto power since he acknowledged that seeking abolition of the veto would be “pointless” and “simply not happen.”³⁰⁰

On October 17, 2012, the Security Council held its day-long debate on the rule of law and the intertwined roles of the ICC and the Security Council in the pursuit of peace and justice.³⁰¹ The Guatemalan President specifically proposed that the open debate focus on “the interplay between legal and political understandings regarding the fight against impunity” to explore how the ICC can assist the Security Council in carrying out its mandate.³⁰² The President acknowledged that without cooperation between the Security Council and the ICC, some of the worst international crimes would never be tried.³⁰³ Additionally, the President addressed the Security Council’s referral power and its duty to exercise such powers effectively and responsibly.³⁰⁴ He addressed the importance of the Security Council following up on its referrals in order to assist the ICC in carrying out the prosecution and for the sake of the Security Council’s own credibility.³⁰⁵ Therefore, when the Security Council does refer a situation to the ICC, it should be committed to taking further measures to assure the ICC can prosecute the case, because when parties openly defy the law and the Council does nothing to prevent such defiance, the rule of law is undermined.³⁰⁶ For example, when the Court notifies the Security Council of states’ non-cooperation, the Security Council should follow-up on its referrals by calling on states to cooperate with the Court and impose sanctions, if necessary. Otherwise, the international community sees the Security Council as lacking the commitment necessary to pursue accountability. This becomes especially important since the ICC has limited enforcement resources, as we have seen with the situation in Darfur, and relies upon the cooperation and assistance of states, all of which can be enhanced through Security Council action. Furthermore, the President stated that the Security Council needed to be consistent in its referrals by voicing and adhering to

²⁹⁹ *Id.*

³⁰⁰ *Id.*

³⁰¹ Press Release, Security Council, Secretary-General Hails International Criminal Court as Centerpiece of ‘New Age of Accountability,’ Urges Enhanced Cooperation with the Security Council: Humanity’s ‘Worst Nightmares’ at Intersection of Bodies’ Respective Mandates, Court President Declares, Setting State for Council Debate on Justice, Rule of Law, U.N. Doc. SC/10793 (Oct. 17, 2012) [hereafter Security Council Debate on Accountability].

³⁰² U.N. President of the S.C., Letter Dated 1 October 2012 from the Permanent Representative of Guatemala to the United Nations Addressed to the Secretary-General, U.N. Doc. S/2012/731 (Oct. 1, 2012), [hereinafter U.N. President of the S.C., Letter].

³⁰³ *Id.* In this letter, the President was specifically discussing the *Lubanga* case, the first case in which the ICC handed down a verdict against Thomas Lubanga for the use of child soldiers.

³⁰⁴ *Id.*

³⁰⁵ *Id.*

³⁰⁶ *Id.*

criteria so that it is not seen as arbitrary in deciding which cases it refers to the Court.³⁰⁷ The Security Council should not use legal tools to pursue its goals, but then refuse to adhere to the law when it comes to its own activity.

The President of the ICC also addressed U.N. members and reiterated the fact that to effectively deal with the cases referred by the Security Council, it needs to be able to count on the full and continuing cooperation of all United Nations Members, whether they are parties to the Rome Statute or not.³⁰⁸ The ICC's Office of the Prosecutor also addressed the Security Council and stressed the need for the Security Council's support in implementing resolutions that require states to assist the ICC with its arrest warrants in order to stress the importance of accountability for those violating the law.³⁰⁹ State delegates also had an opportunity to speak during the debate. As usual, most delegates stated that they supported the ICC and wanted to see those committing heinous crimes held accountable.³¹⁰ Even states not party to the Statute, such as the United States, stated that they would like to see those responsible in Syria held accountable.³¹¹ Additionally, some delegates reminded the Security Council that the only way to strengthen international law was to avoid selectivity, partiality and double standards, as well as by freeing the Court of political considerations.³¹² Then, we would not have to be asking why situations similar to those previously referred to the Court are taking place, but have not provoked the Security Council's interest. Also, many state delegates agreed that the Security Council needed to follow-up on its referrals and take more action in cases of non-cooperation.³¹³ Some delegates went so far as to mention Security Council reform.³¹⁴ On the other hand, there were delegates, such as the Chinese, that seemed to want to prevent the Court from being so active, going so far as to say that it should exercise caution in carrying out its functions and avoid impeding the work of the Security Council by seeking political settlements to international and regional conflicts.³¹⁵ However, considering all the facts, it is quite clear that the Security Council is the one pursuing political settlements; clearly, as a permanent member of the Security Council, China has every reason to ensure that it retains the power it has.

A year later, these same concerns remain among country representatives. In an October 2013 General Assembly meeting, speakers stated that the Security

³⁰⁷ U.N. President of the S.C., Letter, *supra* note 302.

³⁰⁸ Security Council Debate on Accountability, *supra* note 301. This statement is powerful because of the President's remark that even those who are not parties to the Statute have a responsibility to cooperate with the Court. It is important especially since Darfur has always argued that it does not have to cooperate with the ICC because it is not a party state to the Rome Statute.

³⁰⁹ *Id.*

³¹⁰ *Id.*

³¹¹ *Id.*

³¹² *Id.*

³¹³ Security Council Debate on Accountability, *supra* note 301.

³¹⁴ *Id.*

³¹⁵ *Id.*

Council should improve its working methods by voluntarily suspending veto rights in cases involving mass atrocity crimes.³¹⁶ Members specifically blamed the abuse of the veto power for the Security Council's paralysis when it is faced with blatant humanitarian crises, such as that in Syria.³¹⁷ France went so far as to put forward a proposal requesting such measure, which many representatives supported.³¹⁸

Despite current discussions, one cannot expect the situation to dramatically improve any time in the near future. The debates that have been taking place sound all too familiar to member states present at the 1999 General Assembly's Annual meeting. In his 1999 annual address to the General Assembly, then U.N. Secretary General Kofi Annan reminded the Heads of States of the U.N.'s failure to act and stop ethnic cleansing that occurred earlier that year in Kosovo.³¹⁹ He acknowledged that changes needed to be made with regard to how the United Nations responds to political, human rights and humanitarian crises affecting the international community, as well as its willingness to act in some areas of conflict, while taking no action in many other crises whose daily death toll and suffering "ought to shame [them] into action."³²⁰ Secretary General Annan stated that the incident "ha[d] revealed the core challenge to the Security Council and the United Nations as a whole in the next century: to forge unity behind the principle that massive and systematic violations of human rights – wherever they may take place – should not be allowed to stand."³²¹ He also stated: "If the new commitment to intervention in the face of extreme suffering is to retain the support of the world's people, it must be – and must be seen to be – fairly and consistently applied, irrespective of region or nation. Humanity, after all, is indivisible."³²² Throughout his address, Secretary General Annan referred to the situations in Rwanda, where no action was taken, and Kosovo, where regional action was taken due to the Security Council's inability to agree on a course of action.³²³ He stressed the need for member states of the United Nations to find common ground when faced with humanitarian crises.³²⁴ The Secretary General believed that the Tribunals for Rwanda and the former Yugoslavia acted as a powerful tool of deterrence,³²⁵ just as the ICC was intended to do. However, we are again at a standstill and the ICC is unable to take any action without a

³¹⁶ Press Release, Security Council, Speakers Call For Voluntary Suspension of Veto Rights in Cases of Mass Atrocity Crimes, As Security Council Debates Working Methods, U.N. Press Release SC/11164 (Oct. 29, 2013).

³¹⁷ *Id.*

³¹⁸ *Id.*

³¹⁹ Press Release, General Assembly, Secretary-General Presents his Annual Report to General Assembly, U.N. Press Release SG/SM/7136, GA/9596 (Sept. 20, 1999).

³²⁰ *Id.*

³²¹ *Id.*

³²² *Id.*

³²³ *Id.*

³²⁴ U.N. Press Release SG/SM/7136, GA/9596, *supra* note 319.

³²⁵ *Id.*

referral from the Security Council. And, even if the case was referred to the Security Council, the ICC would need the international community's cooperation to ensure that Assad was captured and tried.

Considering the same discussions are taking place fifteen years later, it is hard to believe anything has changed, or ever will. We continuously see discussions filled with empty promises and no action being taken on plans proposed during these debates. However, one thing is clear: as long as states continue to place their personal and political interests before the pursuit of international peace and security, we will not win the fight against impunity; greater collective cooperation with the Court on the part of individual states is essential in order to fulfill this mandate.

B. Eliminating Geopolitics When it Comes to Criminal Accountability

As previously discussed, the greater powers and permanent members have been highly criticized for choosing their partisan interests over international peace and security. Many critics believe that when the application of international criminal law serves the powerful, it is always invoked; on the other hand, once it is turned against the powerful, the evildoers will not face punishment.³²⁶ If we ever want to fairly pursue international peace and justice, we cannot have states hiding behind their power; consistent and non-arbitrary decisions are required and expected of the Security Council's permanent members.

One way to overcome the current obstacle we are facing with the Security Council is to eliminate the permanent members' veto entirely when it comes to taking action against those responsible for genocide and other mass atrocities. If the veto power was removed from this equation, it is very likely that the Assad Regime would have already been referred to the ICC. Therefore, when nine of the fifteen members of the Security Council vote in favor of a resolution, it cannot be struck down by a permanent member's veto power. In addition to removing the veto power completely, an alternative would be to take all member states' vote into consideration. Because we are dealing with the most heinous crimes in these situations, it is not unreasonable to suggest that the international community as a whole should be able to vote on the issue. Therefore, the proposal could be brought before all member states, allowing each representative one vote. This is not to suggest that all member states should unanimously agree on a specific form of action. But, when there is a strong consensus among the international community and the proposal is backed by a majority, there is no reason why a single permanent member should have the power to veto it. This would prevent unilateral action by any permanent member against the

³²⁶ Richard Falk, *Opening the Other Eye: Charles Taylor and Selective Criminal Accountability*, FOREIGN POLICY JOURNAL (Apr. 28, 2012), <http://www.foreignpolicyjournal.com/2012/04/28/opening-the-other-eye-charles-taylor-and-selective-criminal-accountability/>.

international community's desire and interest. If there is a majority vote in the affirmative, the situation should be referred to the ICC.

In the alternative, the United Nations could amend its charter to increase the number of permanent members on the Security Council.³²⁷ Although some countries are in favor of this idea, it is unlikely to occur any time in the near future. Additionally, this alternative is unlikely to solve the problem. The veto power itself carries with it too much power; therefore, as long as it remains a tool in cases of humanitarian intervention, there will always be one country willing to use it, without any explanation necessary. However, an alternative to doing away with the veto completely would be to limit the use of the veto power; for example, the veto power cannot be used when considering a serious humanitarian crisis. Therefore, resolutions that received a sufficient number of votes would pass. As was previously mentioned, France has proposed this idea; however, it is uncertain whether it will actually make any difference. Alternatively, a super majority of the Security Council or General Assembly could also overrule a veto.

Additionally, the United Nations could encourage more states to impose sanctions and cut off assistance completely. More importantly, the United Nations should prohibit countries from shipping arms to the country involved in the civil war. The United Nations should make clear that anyone who does participate in the arms trade will be sanctioned, and actually enforce these sanctions when they are violated.

Proposals to adopt even more resolutions are also unlikely to solve the problem. In 2005, the General Assembly adopted the doctrine of "the responsibility to protect."³²⁸ The Responsibility to Protect (R2P) was a principle adopted by the United Nations in the 1990s, stating that the international community had to intervene to protect civilian populations when their states were unwilling or unable to do so.³²⁹ Still, we had the failures in Somalia, Rwanda, and Bosnia because the international community did nothing. In 2006, the Security Council adopted Resolution 1674, committing the Security Council to take action to protect civilians in an armed conflict.³³⁰ However, judging by the international

³²⁷ This is an issue that has been widely discussed, and one that I will not cover in depth here. There have been extensive discussions among the international community about increasing the number of permanent members on the Security Council. However, reform seems highly unlikely since the current five permanent members would have to agree to reform. The five permanent members have consistently insisted on retaining their veto power over amendments to the U.N. Charter. See Thomas G. Weiss, *The Illusion of UN Security Council Reform*, 26 WASH. QUARTERLY 147, 147–61 (2003).

³²⁸ G.A. Res. 60/1, ¶ 138, U.N. Doc. A/RES/60/1 (Oct. 24, 2005).

³²⁹ Borger, *supra* note 15.

³³⁰ S.C. Res. 1674, U.N. Doc. S/RES/1674 (Apr. 28, 2006), available at <http://www.responsibilitytoprotect.org/files/final%20poc%20resolution.pdf> (noting that the Resolution "reaffirms the provisions of paragraphs 138 and 139 of the 2005 World Summit Outcome Document regarding responsibility to protect populations from genocide, war crimes, ethnic cleansing, and crimes against humanity").

community's response in Syria today, it is fair to say that the doctrine of R2P remains nothing more than words written on paper.

Seeing that the adoption of resolutions and doctrines serves no purpose unless they are actually carried out in practice, the best solution seems to be to limit the use of the permanent members' veto power. Only then can we ensure that humanitarian crises will be dealt with in a prompt and just manner.

Although there is one more alternative to be considered, it would completely defeat the purpose of the ICC. This alternative would involve establishing a Special Court or Tribunal for Syria, such as the ones established for Sierra Leone, Rwanda, and the former Yugoslavia. While it is possible that this could ultimately prove effective, I believe it would seriously undermine the ICC. An important reason for establishing a permanent international court was to replace the use of *ad hoc* tribunals. Therefore, by simply giving in and conceding that the ICC will never accomplish its mandate would undermine the whole purpose of having the Court in the first place.

VI. CONCLUSION

The truth of the matter remains that without the international community's support, an institution such as the ICC cannot be successful in carrying out its mandate. Nor does the geopolitical manipulation of law help anyone here. Every single doctrine or resolution adopted by the Security Council remains nothing more than words on paper when they are not applied in practice. The fact that the situation in Syria continues three years later is a sad but true fact. Furthermore, four years after his indictment, Omar al-Bashir continues to travel the world and enjoy the perks of a statesman. In Sudan, violence is still ongoing and al-Bashir continues to ethnically cleanse Sudan's non-Arab population with impunity. In fact, the United Nations stopped counting the number of deaths after the number reached 300,000 in 2006.³³¹ And still, several fugitives remain wanted by the ICC. Clearly, those committing these mass atrocities do not feel that they have anything to fear. Unless the Security Council finally decides to come to its senses and do its job of maintaining international peace and security, Darfur's and Syria's innocent civilians will not be the last victims to suffer as the rest of the world idly stands by and watches.

Although some may argue that an ICC referral will do nothing to alter the circumstances in Syria, it could improve the current circumstances. An ICC referral could at least influence Assad to stop persecuting opposition groups. For example, although al-Bashir remains free, it can be argued that the ICC referral had an effect on his actions when he eventually allowed South Sudan the right to vote for its independence. Since we can agree that no action taken will have a

³³¹ Olivia Warham, *Africa Views – Four Years Later – Was the ICC Right to Indict Sudan's Bashir?*, THOMSON REUTERS FOUND. (Mar. 4, 2013), <http://www.trust.org/alertnet/blogs/africa-views/four-years-later-was-the-icc-right-to-indict-sudans-bashir>.

dramatic effect from one day to the next, any improvement to the current situation would be a step in the right direction.

Without the Security Council's and international community's support and cooperation, the ICC will continue taking the reputational hit and be perceived as an inefficient system which fails to deter violators by the threat of international criminal justice. The Security Council, especially its permanent members, must avoid blocking vital referrals to the ICC by using its veto power. And, states should also consider placing human rights concerns before self-serving national interests. The international community has an obligation to cooperate and ensure that offenders are brought to justice. As we have seen, the ICC does not have the enforcement power to carry out its arrest warrants; it relies heavily on the international community's cooperation. When the international community decides to work together to fight against impunity and assist the ICC, then we may be able to make some progress. Until then, the "never again" promise will remain more of an "over and over again" promise.



