

## Book Review

### The Council and the Court: Law and Politics in the Rise of the International Criminal Court

ROUGH JUSTICE: THE INTERNATIONAL CRIMINAL COURT IN A WORLD OF POWER POLITICS. By David Bosco. New York, NY: Oxford University Press, 2014. 312 pages. \$31.95.

David Kaye\* and Kal Raustiala\*\*

It is the rare international crisis today that does not receive the attention—or at least a demand for the attention—of the International Criminal Court (ICC). Name a conflict, and one is bound to find a coalition of states, nongovernmental organizations, and activists calling for ICC investigation, even where jurisdiction may be unavailing. From 2014 to early 2016, such conflicts have occurred in Afghanistan,<sup>1</sup> the Central African Republic,<sup>2</sup> Georgia,<sup>3</sup> Iraq,<sup>4</sup> Mali,<sup>5</sup> North Korea,<sup>6</sup> Palestine,<sup>7</sup> Syria,<sup>8</sup>

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\* Clinical Professor of Law at UC Irvine School of Law and United Nations Special Rapporteur on Freedom of Expression.

\*\* Professor of Law at UCLA Law School and Director of the UCLA Burke Center for International Relations.

1. David Bosco, *The War Over U.S. War Crimes in Afghanistan is Heating Up*, FOREIGN POL'Y (Dec. 3, 2014), <http://foreignpolicy.com/2014/12/03/the-war-over-u-s-war-crimes-in-afghanistan-is-heating-up-icc-hague/> [<http://perma.cc/Q58T-77LB>].

2. Press Release, Int'l Criminal Court, Office of the Prosecutor, Statement of the Prosecutor of the International Criminal Court, Fatou Bensouda, on Opening a Second Investigation in the Central African Republic (Sept. 24, 2014), [https://www.icc-cpi.int/EN\\_Menus/icc/press%20and%20media/press%20releases/pages/pr1043.aspx](https://www.icc-cpi.int/EN_Menus/icc/press%20and%20media/press%20releases/pages/pr1043.aspx) [<http://perma.cc/U8HU-788D>].

3. Press Release, Int'l Criminal Court, Office of the Prosecutor, ICC Pre-Trial Chamber I Authorizes the Prosecutor to Open an Investigation into the Situation in Georgia (Jan. 27, 2016), [https://www.icc-cpi.int/en\\_menus/icc/press%20and%20media/press%20releases/Pages/pr1183.aspx](https://www.icc-cpi.int/en_menus/icc/press%20and%20media/press%20releases/Pages/pr1183.aspx) [<https://perma.cc/HDU7-B2JM>].

4. Press Release, Int'l Criminal Court, Office of the Prosecutor, Prosecutor of the International Criminal Court, Fatou Bensouda, Re-Opens the Preliminary Examination of the Situation in Iraq (May 13, 2014), [https://www.icc-cpi.int/en\\_menus/icc/structure%20of%20the%20court/office%20of%20the%20prosecutor/reports%20and%20statements/statement/Pages/otp-statement-iraq-13-05-2014.aspx](https://www.icc-cpi.int/en_menus/icc/structure%20of%20the%20court/office%20of%20the%20prosecutor/reports%20and%20statements/statement/Pages/otp-statement-iraq-13-05-2014.aspx) [<http://perma.cc/F38H-B4A8>].

5. Press Release, Int'l Criminal Court, Office of the Prosecutor, Al Mahdi Case: Confirmation of Charges Hearing to Open on 1 March 2016 (Jan. 13, 2016), [https://www.icc-cpi.int/en\\_menus/icc/press%20and%20media/press%20releases/Pages/pr1182.aspx](https://www.icc-cpi.int/en_menus/icc/press%20and%20media/press%20releases/Pages/pr1182.aspx) [<https://perma.cc/7P2J-WQBU>].

6. Human Rights Council, Rep. of the Comm'n of Inquiry on Human Rights in the Democratic People's Republic of Korea, U.N. Doc. A/HRC/25/63, at 16 (Feb. 7, 2014).

and Ukraine,<sup>9</sup> to name a handful among many others. Each situation presents a charged dynamic, in which the promoters of the rule of law seem pitted against the powers of global politics. The Syria situation in particular is marked by clear violations of international humanitarian law across the spectrum of participants during years in which hundreds of thousands have lost their lives, leading to competing calls for justice and rejections of such a process within the United Nations Security Council. President Omar al-Bashir of Sudan, subject to an ICC arrest warrant for his alleged role in atrocities in the Darfur region, escaped arrest with the assistance of authorities in South Africa in mid-2015. His assisted escape called attention to the refusal of some ICC member-states to support the Court in a case the Security Council referred to it years earlier.<sup>10</sup> The ICC, in a historically short period of time, has become the central player in a contemporary battle over the place of justice in international politics.

In *Rough Justice: The International Criminal Court in a World of Power Politics*, David Bosco ably documents both the long history of international justice efforts and the surprisingly rapid rise of the ICC.<sup>11</sup> At its heart, *Rough Justice* tells a story suffused with the deep tensions between peace and justice, politics and law, and power and norms. The push and pull between these antinomies is of course not new. And it is not uncommon for power, politics, and the desire for peace to override law, norms, and the quest for justice—especially on the international plane, where mechanisms of justice have for decades, if not centuries, been more aspiration than reality.<sup>12</sup> Yet the long and uncertain search for international justice and accountability for terrible crimes has taken on an entirely new

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7. *Palestine*, INT'L CRIM. CT., [https://www.icc-cpi.int/en\\_menus/icc/structure%20of%20the%20court/office%20of%20the%20prosecutor/comm%20and%20ref/pe-ongoing/palestine/Pages/palestine.aspx](https://www.icc-cpi.int/en_menus/icc/structure%20of%20the%20court/office%20of%20the%20prosecutor/comm%20and%20ref/pe-ongoing/palestine/Pages/palestine.aspx) [<http://perma.cc/5MAY-268P>]; *The Situation on Registered Vessels of the Union of the Comoros, the Hellenic Republic and the Kingdom of Cambodia*, INT'L CRIM. CT., [https://www.icc-cpi.int/en\\_menus/icc/situations%20and%20cases/situations/situation-ICC-01-13/Pages/default.aspx](https://www.icc-cpi.int/en_menus/icc/situations%20and%20cases/situations/situation-ICC-01-13/Pages/default.aspx) [<http://perma.cc/5JMR-W68T>].

8. Colum Lynch, *Exclusive: U.S. to Support ICC War Crimes Prosecution in Syria*, FOREIGN POL'Y (May 17, 2014, 6:45 PM), <http://foreignpolicy.com/2014/05/07/exclusive-u-s-to-support-icc-war-crimes-prosecution-in-syria/> [<http://perma.cc/QA4B-VFME>].

9. *Ukraine*, INT'L CRIM. CT., [http://www.icc-cpi.int/en\\_menus/icc/structure%20of%20the%20court/office%20of%20the%20prosecutor/comm%20and%20ref/pe-ongoing/ukraine/Pages/ukraine.aspx](http://www.icc-cpi.int/en_menus/icc/structure%20of%20the%20court/office%20of%20the%20prosecutor/comm%20and%20ref/pe-ongoing/ukraine/Pages/ukraine.aspx) [<http://perma.cc/4YAZ-8C7L>].

10. Norimitsu Onishi, *Omar al-Bashir, Leaving South Africa, Eludes Arrest Again*, N.Y. TIMES (June 15, 2015), <http://www.nytimes.com/2015/06/16/world/africa/omar-hassan-al-bashir-sudan-south-africa.html> [<http://perma.cc/BW24-SHU5>].

11. DAVID BOSCO, *ROUGH JUSTICE: THE INTERNATIONAL CRIMINAL COURT IN A WORLD OF POWER POLITICS* 1–10 (2014).

12. See generally GARY JONATHAN BASS, *STAY THE HAND OF VENGEANCE: THE POLITICS OF WAR CRIMES TRIBUNALS* (2000).

tenor in the era of the ICC. Bosco notes that, as the first standing international criminal court in history, the ICC “represents a remarkable transfer of authority from sovereign states to an international institution.”<sup>13</sup>

The birth of the ICC represents the climax of the groundbreaking development of international criminal law that began after the end of the Cold War, about which we say more below.<sup>14</sup> The ICC is, for some at least, a stirring symbol of justice and law. But the Court was not born, nor does it reside, in a political vacuum. Its most important political interlocutor is the United Nations Security Council. The Council has long been seen as the apex of the international order, but it is also a body in which politics and power are paramount. The Council has the authority to compel or authorize everything from economic sanctions (as in the case of Iran’s nuclear program) to outright invasions of sovereign states (as in Iraq over two decades ago).<sup>15</sup> Its ambit is the peace and security of the entire world. And it has been continuously operating, sometimes more and sometimes less effectively, since 1945. The fledgling ICC has consequently had to find a way to live and partner with the Council, acknowledging and leveraging the Council’s power while charting its own independent course. This is an innately challenging task. And it has been made even harder by the fact that three of the five permanent members of the Security Council—Russia, China, and the United States—have declined to join the ICC and at various times have expressed views ranging from benign neglect to active hostility.

The ICC has nonetheless survived and, as Bosco shows in *Rough Justice*, even thrived in the thirteen years since its establishment. “Rough justice” may indeed be what results when the process of criminal adjudication is deeply permeated by politics. And some would argue that there has been precious little justice, rough or otherwise. Yet in the years since the 1998 Rome Conference that gave birth to the ICC, the Court has developed an impressive record of activity: thirty-six individuals indicted, nine investigations opened, and proceedings against ten accused completed.<sup>16</sup> With 123 member states—though, as noted, some very significant omissions—the ICC has also drawn considerable, if uneven, political support from around the world.<sup>17</sup>

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13. BOSCO, *supra* note 11, at 2.

14. See *About the Court*, INT’L CRIM. CT., [https://www.icc-cpi.int/en\\_menus/icc/about%20the%20court/Pages/about%20the%20court.aspx](https://www.icc-cpi.int/en_menus/icc/about%20the%20court/Pages/about%20the%20court.aspx) [http://perma.cc/PFC2-QAC5] (describing the creation of the Court). See generally ANTONIO CASSESE ET AL., CASSESE’S INTERNATIONAL CRIMINAL LAW (3d ed. 2013).

15. U.N. Charter arts. 33–51.

16. As of October 15, 2015. *Situations and Cases*, INT’L CRIM. CT., [http://www.icc-cpi.int/en\\_menus/icc/situations%20and%20cases/Pages/situations%20and%20cases.aspx](http://www.icc-cpi.int/en_menus/icc/situations%20and%20cases/Pages/situations%20and%20cases.aspx) [http://perma.cc/MHT7-284Q].

17. See *The States Parties to the Rome Statute*, INT’L CRIM. CT., [https://www.icc-cpi.int/en\\_menus/asp/states%20parties/Pages/the%20states%20parties%20to%20the%20rome%20](https://www.icc-cpi.int/en_menus/asp/states%20parties/Pages/the%20states%20parties%20to%20the%20rome%20)

The time is ripe for a careful and accessible analysis of the ICC, its evolving role in international law, and its relationship to power politics. *Rough Justice*, a strikingly well-written and engaging book, does exactly that. As Bosco argues, “The letter and spirit of the court’s governing statute reject the idea that power or political influence should influence the course of justice. But the new court operates in a turbulent world where power matters.”<sup>18</sup> Exactly how power matters and what power means for the quest for international justice are at the heart of this excellent work of scholarship and history.

### I. The Pursuit of Peace in the Postwar Order

At Dumbarton Oaks in the fall of 1944, as the Second World War still raged, the Allied powers laid down the basic structure of the postwar legal order.<sup>19</sup> By installing the “Big Five”—the United States, the United Kingdom, France, the Soviet Union, and China—at the very core of the new United Nations (UN) organization, the major powers sought to rectify one of the main ills of the visionary but flawed League of Nations: its lack of effective enforcement.<sup>20</sup> The newly created Security Council would be the executive committee of the postwar world, its members armed with an array of military forces and, as agreed at the Yalta conference, a veto for the five permanent members of the Council.<sup>21</sup> The veto—which would go on to deeply vex observers and participants throughout the twentieth century and which continues to stymie efforts to address atrocities in places such as Syria today—was created for one extremely important reason: to protect the most vital interests of the most powerful states in the system.<sup>22</sup> The veto, it

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statute.aspx [<http://perma.cc/4PJE-KMHC>] (listing the 123 states that are party to the Rome Statute of the International Criminal Court as of October 15, 2015).

18. BOSCO, *supra* note 11, at 1.

19. See generally ROBERT C. HILDERBRAND, *DUMBARTON OAKS: THE ORIGINS OF THE UNITED NATIONS AND THE SEARCH FOR POSTWAR SECURITY* 85–107 (1990).

20. PAUL KENNEDY, *THE PARLIAMENT OF MAN: THE PAST, PRESENT, AND FUTURE OF THE UNITED NATIONS* 26–32 (2006).

21. *Id.*

22. Scott Sheeran, *The U.N. Security Council Veto is Literally Killing People*, WASH. POST (Aug. 11, 2014), <https://www.washingtonpost.com/posteverything/wp/2014/08/11/the-un-security-council-veto-is-literally-killing-people/> [<http://perma.cc/69VC-ZJGQ>] (noting that the veto was agreed upon as a “quid pro quo for [those] powerful states which had carried the heavy burden in World War II” and describing the ways in which the veto has frustrated international efforts to address conflicts); see also DAVID L. BOSCO, *FIVE TO RULE THEM ALL: THE UN SECURITY COUNCIL AND THE MAKING OF THE MODERN WORLD* 30–31 (2009) (describing how the veto power given to the Security Council made the UN an institution that great powers could use to work together, rather than an institution for global governance); KENNEDY, *supra* note 20, at 26–27, 36 (explaining that the veto power was added to the UN Charter to give the United States and the Soviet Union sufficient power to convince the two to join the organization).

was believed, would keep these key players active within the new UN order, rather than outside it.<sup>23</sup>

The Security Council's architecture functioned in some ways as designed. The United States not only joined the new UN (unlike the original League); it remains committed to it and even serves as host nation for its headquarters.<sup>24</sup> With some minor exceptions, the Soviets, the British, the French, and the Chinese all stayed in too, and occasionally found the Council useful and important.<sup>25</sup> But as is well-known, in other ways the Security Council was a failure. With the onset of the Cold War, the Council quickly became a forum for superpower rivalry, deadlocked on almost any issue of paramount geopolitical importance.<sup>26</sup> Many newly independent states saw the design of the body as an illegitimate expression of Great Power dominance and resented the fact that the only permanent member from what would come to be called the "Global South" was China.<sup>27</sup>

Yet the Security Council remained at the center of the UN Charter system, and it had occasional successes when Soviet and American interests aligned or were weak.<sup>28</sup> And when the world emerged from the Cold War in the early 1990s, new life flowed into the Council.<sup>29</sup> As the dramatic rescue of Kuwait via the Gulf War demonstrated in 1991, the Council—when cooperative—has the power to unleash effective and legitimate

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23. See, e.g., BOSCO, *supra* note 22, at 36–37 (“In the end, the great powers fended off the challenge [to the veto] in the only way they could: by making clear that, without the veto, there would be no United Nations.”); KENNEDY, *supra* note 20, at 26–27, 36.

24. Elisabeth Zoller, *The National Security of the United States as the Host State for the United Nations*, 1 PACE Y.B. INT’L L. 127, 127–28 (1989).

25. See KENNEDY, *supra* note 18, at 53, 56–57 (describing the Great Powers’ use of vetos or the threat of vetos to advance security interests and lesser issues of national preference and discussing times of fissure, such as Russia’s one-time withdrawal from the Security Council over the exclusion of the People’s Republic of China or the power imbalance among the Great Powers that the Suez Crisis revealed).

26. *Id.* at 55–56 (observing that lack of agreement among the Big Five dashed the larger ambitions for the Security Council and that unanimity was difficult to obtain except on issues of small import).

27. This view continued and arguably accelerated after the end of the Cold War. See, e.g., Non-Aligned Movement, *12th Summit Conference of Heads of State or Government of the Non-Aligned Movement: Final Document—Global Issues—Disarmament and International Security*, ¶ 66(b) (Sept. 3, 1998), [http://cns.miiis.edu/nam/documents/Official\\_Document/12th\\_Summit\\_FD\\_Durban\\_Declaration\\_1998.pdf](http://cns.miiis.edu/nam/documents/Official_Document/12th_Summit_FD_Durban_Declaration_1998.pdf) [<https://perma.cc/GY2C-VDJ5>] (“The Non-Aligned Countries are grossly under-represented in the Council. This under-representation should, therefore, be corrected by enlargement of the Security Council . . . to reflect the universal character of the world body, and to correct existing imbalances in the composition of the Security Council in a comprehensive manner . . .”).

28. See KENNEDY, *supra* note 20, at 58–59 (noting the impact on the Security Council of the general distrust between the Soviets and Americans but referencing less divisive issues that provided opportunities for agreement among the permanent council members).

29. See *id.* at 63–64 (discussing the unprecedented cooperation among the permanent council members resulting from the thawing of the Cold War).

coercive authority.<sup>30</sup> When hamstrung or inattentive, it can—as designed—remain impotent, even in the face of massive and horrific threats to global order and human life.<sup>31</sup>

The framers of the United Nations also created a legislature in the General Assembly, a judiciary in the International Court of Justice, and a bureaucracy led by a Secretary-General, giving the new system the rough outlines of a constitutional order.<sup>32</sup> The Charter gave the United Nations (via the Council) the power to make rules and decisions that would be binding on states.<sup>33</sup> In doing so, it ushered in a new era in international law and order. Security Council resolutions, many of them legally binding, flowed out of Turtle Bay, ranging from mild sanctions to the ultimate punishment: the authorization to use military force against a state.<sup>34</sup> But for all its detail, the Charter did not create any mechanism for applying criminal sanctions to those individuals who control the actions of states (and other armed groups) and who thus bear ultimate responsibility for the grave crimes and atrocities that made the twentieth century the bloodiest in history.<sup>35</sup>

Indeed, the Charter is very much a Westphalian document. States, and their sovereignty, are central to its design.<sup>36</sup> Individuals appear but far less prominently.<sup>37</sup> Indeed, the Charter speaks only of the *rights* of individuals; individual criminal penalties arrived in international law later, in such ancillary instruments as the Genocide Convention of 1948 and the Geneva Conventions of 1949.<sup>38</sup> Yet states are abstractions, legal entities; indi-

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30. *See id.* at 64–65 (describing the Council’s unified resolve regarding its actions in response to the Gulf War).

31. *See id.* at 52, 59 (quoting U.S. Senator Arthur Vandenberg as saying that “the system worked” after an early use of the veto by the U.S.S.R. in response to the 1946 crisis in Lebanon and Syria and referencing instances of Council divisiveness regarding matters that might lead to a major war and threaten the collapse of the international security system).

32. U.N. Charter art. 7, ¶ 1.

33. *Id.* art. 25.

34. *See* KENNEDY, *supra* note 20, at 99–100 (describing the variety of Security Council resolutions passed in response to the Balkan Wars).

35. *See* U.N. Charter, arts. 41–42 (making no mention of criminal penalties in the list of available sanctions).

36. *Id.* art. 2, ¶ 1 (“The Organization is based on the principle of the sovereign equality of all its Members.”).

37. *See id.* (making few references to individuals throughout, with the notable exception of the preamble, which indicates its purpose “to reaffirm faith in fundamental human rights, in the dignity and worth of the human person, in the equal rights of men and women”).

38. Convention on the Prevention and Punishment of the Crime of Genocide, Dec. 9, 1948, 78 U.N.T.S. 277; Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field, Aug. 12, 1949, 75 U.N.T.S. 31; Geneva Convention for the Amelioration of the Condition of the Wounded, Sick and Shipwrecked Members of Armed Forces at Sea, Aug. 12, 1949, 75 U.N.T.S. 85; Geneva Convention Relative to the Treatment of Prisoners of War, Aug. 12, 1949, 75 U.N.T.S. 135; Geneva Convention Relative to the Protection of Civilian Persons in Time of War, Aug. 12, 1949, 75 U.N.T.S. 287.

viduals are beings of flesh and blood who, ultimately, are the motive and culpable force behind abuses of human rights and violations of international law. At the landmark postwar trials at Nuremberg, which took place within a year of the Charter's adoption, the judgments would recognize individual culpability.<sup>39</sup> The Charter itself did not.<sup>40</sup> While Nuremberg was an early high-water mark for international justice, it would take many decades for individual justice to become embedded in the global legal order.

## II. The Turn to Justice

It was the end of the Cold War that allowed individualized justice to begin to take center stage. This shift was not only accompanied by a significant surge in Council cooperation and coercion; it was a direct result of it.<sup>41</sup> After the fall of the Berlin Wall, an invigorated Council embraced individual accountability for heinous crimes by creating two criminal tribunals: the International Criminal Tribunal for the former Yugoslavia (ICTY) in 1993 and, shortly thereafter, for Rwanda (ICTR) in 1994.<sup>42</sup> These Council-created courts broke new ground, and they have shaped international criminal law into a major field during their twenty years of existence. Ad hoc solutions to particular conflicts, the Yugoslavia and Rwanda tribunals nonetheless inspired governments and activists to believe that the international community could establish a permanent tribunal to address war crimes, crimes against humanity, and acts of genocide.<sup>43</sup> A permanent tribunal would not depend on Council cooperation (the creation of the ad hoc tribunals avoided a veto, but the threat was always present).<sup>44</sup> Moreover, a permanent court would stand as a deterrent to would-be *genocidaires* and war criminals.

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39. Richard Overy, *Making Justice at Nuremberg, 1945–1946*, BBC (Feb. 17, 2011), [http://www.bbc.co.uk/history/worldwars/wwtwo/war\\_crimes\\_trials\\_01.shtml](http://www.bbc.co.uk/history/worldwars/wwtwo/war_crimes_trials_01.shtml) [https://perma.cc/LT3U-LBR6].

40. See U.N. Charter arts. 1–70 (lacking provisions to hold individuals accountable).

41. See KENNEDY, *supra* note 20, at 191–93 (describing the shift in focus to human rights following the fall of the Berlin Wall in 1989 and the end of the Cold War).

42. WILLIAM A. SCHABAS, *THE UN INTERNATIONAL CRIMINAL TRIBUNALS: THE FORMER YUGOSLAVIA, RWANDA AND SIERRA LEONE* 3–4 (2006); Payam Akhavan, Current Developments, *The International Criminal Tribunal for Rwanda: The Politics and Pragmatics of Punishment*, 90 AM. J. INT'L L. 501, 501 (1996).

43. See Winston P. Nagan, *International Criminal Law and the Ad Hoc Tribunal for Former Yugoslavia*, 6 DUKE J. COMP. & INT'L L. 127, 128 (1995) (observing that the ad hoc tribunals created for the crimes in Yugoslavia and Rwanda “invigorated momentum for a permanent international criminal tribunal”).

44. See Diane Marie Amann & M.N.S. Sellers, *The United States of America and the International Criminal Court*, 50 AM. J. COMP. L. (SUPP.) 381, 386–87 (2002) (noting that the proposed permanent tribunal could investigate matters “without a Security Council request” and that its independence would “deprive permanent members of their veto”).

The creation of the standing International Criminal Court in 2002 was thus a watershed moment, historic in its reach and its ambition. The ICC takes international justice out of the direct control of the most political of international bodies—the Council—and thus moves the needle decisively toward law and away from politics. *Rough Justice* documents the difficulty, diplomacy, and long effort that accompanied this triumph of legalism. But the book also frankly acknowledges the many challenges that remain, many of which are driven by the complex relationship between law and politics that continues to vex the fledgling Court.

Bosco demonstrates, with considerable detail, that the ICC was born with major infirmities. Principal among them is that it has no police force nor any reliably effective means by which to oblige states to cooperate to bring perpetrators it identifies to justice.<sup>45</sup> This structural weakness compels the ICC to seek assistance from partners that have coercive powers.<sup>46</sup> And there is no international institution better situated to assist the ICC than the Security Council. The Security Council's legitimacy—shaky during the Cold War, stretched to the breaking point today—makes it an undeniably imperfect partner for the ICC. Yet the Council remains the one entity in the global legal order with the power to compel states to assist the Court if it deems it in the interest of peace. Together, then, the Council and the Court can be a formidable force for accountability. Apart, their flaws are readily apparent. This is especially so for the still-novel ICC, which has yet to receive the sort of support—from its own member states let alone the three very powerful permanent members of the Council that remain nonparties—that its success requires.

### III. The Council–Court Relationship

The preamble of the Rome Statute declares that the parties were determined “to establish an *independent* permanent International Criminal Court *in relationship with the [U]nited Nations system.*”<sup>47</sup> Yet exactly how to be both “independent” and “in relationship with” was left unstated: how can an institution that is formally outside the UN system yet intertwined with its network of political and logistical support be truly independent? The Relationship Agreement between the ICC and the UN, concluded in 2004, promises that the institutions will “respect each other’s status and

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45. See BOSCO, *supra* note 11, at 4, 56–57 (explaining that the ICC was born with significant lack of support and even opposition from several powerful states—including the United States—and noting that the Court relies entirely on state police and military forces for success in apprehending suspects).

46. *Id.* at 187–88 (discussing how the ICC has, over time, “become an instrument in the toolkit of [the] major powers” upon which it is dependent).

47. Rome Statute of the International Criminal Court pmb1., *opened for signature* July 17, 1998, 2187 U.N.T.S. 91 [hereinafter Rome Statute] (emphasis added).



mandate.”<sup>48</sup> Yet it goes beyond respect to include an obligation of cooperation, as the parties agreed “they shall cooperate closely, whenever appropriate, with each other and consult each other on matters of mutual interest.”<sup>49</sup>

In the years since the conclusion of the Relationship Agreement, the ICC has established working ties with the UN system as a whole.<sup>50</sup> Support for the Court, though often tinged with criticism, exists at all levels of the UN.<sup>51</sup> The relationship with the UN that really matters to the ICC, however, is the one with the Security Council. Yet this relationship remains uneven and uncertain. Over the past decade, the Council’s attitude and posture toward the ICC have been variable and arguably even mercurial. When convenient, the Council has offered rhetorical support for the Court’s work and even has, as with Libya and Darfur, actively engaged with it.<sup>52</sup> But that has not stopped the Council—largely driven by the agendas of its five permanent members—from ignoring or even damaging the ICC when that stance serves its particular interests.<sup>53</sup>

The exercise of power is thus central to this story. Accordingly, in *Rough Justice* Bosco presents a politically grounded argument about how states—in particular, powerful states—have reacted to the arrival of the ICC. States, he argues, face a choice among accommodating, marginalizing, or controlling the new Court.<sup>54</sup> More often than not, Bosco claims, they try to construct mechanisms of control.<sup>55</sup> Since the creation of the ICC means that “some of the world’s most powerful states lost ownership of international justice,” they often have responded by trying to rein the Court in and regain control.<sup>56</sup> This struggle is central to the still-emerging story of the birth and growth of the ICC.

Bosco highlights many examples of state “control behavior” throughout *Rough Justice*, wisely focusing on the permanent five members of the Council (the so-called P5) and a handful of other key states and

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48. Negotiated Relationship Agreement Between the International Criminal Court and the United Nations art. 2, ICC-ASP/3/Res.1 (Sept. 7, 2004).

49. *Id.* at 3.

50. See INT’L PEACE INST., THE RELATIONSHIP BETWEEN THE ICC AND THE SECURITY COUNCIL: CHALLENGES AND OPPORTUNITIES 2 (2013) (explaining the “complex and delicate relationship” currently shared by the ICC and the UN).

51. See Zoe Pearson, *Non-Governmental Organizations and the International Criminal Court: Changing Landscapes of International Law*, 39 CORNELL INT’L L.J. 243, 252 (2006) (explaining that support for the ICC is complex and can often be contentious).

52. See generally S.C. Res. 1970 (Feb. 26, 2011) (expressing concern about the violence in Libya and offering support); S.C. Res. 1593 (Mar. 31, 2005) (pledging to take all necessary action to prevent violations of human rights in Darfur).

53. See BOSCO, *supra* note 11, at 39–45 (asserting that the five permanent members make decisions to protect their own interests).

54. *Id.* at 11–15.

55. *Id.* at 14–15.

56. *Id.* at 21, 23.

nongovernmental organizations.<sup>57</sup> But it is not solely a story of control. The first term of President George W. Bush's administration, for instance, presents a textbook case of marginalization, characterized by avowedly anti-ICC legislation and multiple U.S. efforts to shield Americans from the Court's jurisdiction.<sup>58</sup> By contrast, the broad European embrace of the ICC—ratifying the Rome Statute, regularly pressing for more political support—reflects acceptance and accommodation.<sup>59</sup> Chinese and Russian attitudes toward the Court are less open and pronounced, and they are less discussed in *Rough Justice*.<sup>60</sup> It is evident that China and Russia are accommodationist when accommodation is in their interests, but both have been generally transactional in their attitudes toward the ICC, their positions varying according to the policy interests at play.<sup>61</sup>

To be sure, the ICC's success is neither guaranteed by Council cooperation nor foreclosed by Council disregard. The ICC has achieved successes and failures that have little to do with the Council's assistance. Its on-again, off-again saga during the trial of Thomas Lubanga Dyilo, who was ultimately convicted of war crimes, had more to do with prosecutorial decisions than UN cooperation.<sup>62</sup> Its lengthy trials result mainly from the structure of the Rome Statute and the failure of the chambers to streamline proceedings and resist the avalanche of motions from all parties, including victim participants.<sup>63</sup> The collapse of the case against Kenya's President Uhuru Kenyatta has roots in the prosecution's approach, the intimidation of

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57. See *id.* at 39–45 (giving examples of how the P5 has tried to control the ICC, such as by screening complaints and suggesting that any new court should be controlled by the Security Council).

58. See *id.* at 71–75 (explaining that after the attacks on September 11, 2001, the U.S. government developed an aggressive antiterrorism policy and sought to give American citizens immunity from the ICC).

59. See *id.* at 84, 179 (noting the understanding that “the European powers were the principal movers behind” the ICC and the European Union’s encouragement of the ratification of the Rome Statute).

60. See *generally id.* (failing to address Chinese and Russian attitudes to the same extent as European attitudes).

61. The Russian and Chinese statements at an open ICC debate at the Security Council in October 2012 provide evidence of such transactional attitudes. See U.N. SCOR, 67th Sess., 6849th mtg. at 11–12, 19–20, U.N. Doc. S/PV.6849 (Oct. 17, 2012) (showing that China and Russia supported the efforts of the U.N. to create international peace).

62. Cf. Larry D. Johnson, *The Lubanga Case and Cooperation Between the UN and the ICC*, 10 J. INT’L CRIM. JUST. 887, 887 (2012) (“During its first case, the International Criminal Court (ICC) faced several challenges. One of these challenges—which almost derailed the whole trial—was the implementation of the cooperation regime with the United Nations . . .”).

63. See Carsten Stahn et al., *Participation of Victims in Pre-Trial Proceedings of the ICC*, 4 J. INT’L CRIM. JUST. 219, 238 (2006) (explaining that the Pre-Trial Chamber must balance the rules allowing victim participation with the defendant’s right to reasonably speedy proceedings).

witnesses by those associated with Kenyan authorities, and the African Union's political engagement, much more than any action—or inaction—on the part of the Security Council.<sup>64</sup>

Bosco goes beyond the maneuvers of states, however, to show how ICC officials, aiming not to be pawns in a great power game themselves, tried to shape that power dynamic to their own ends. The first prosecutor, Luis Moreno-Ocampo of Argentina, went to European capitals to lobby for his job with an “itinerary [that] reflected an understanding that while more than seventy states had joined the court [at that time, 2003], the European powers were the principal movers behind the new institution.”<sup>65</sup> On balance, however, the Court has seemed to come out on the losing side when it has sought to play the power game.<sup>66</sup> Bosco is sensitive to the challenges faced by Moreno-Ocampo.<sup>67</sup> But despite the prosecutor's vision of engaging and speaking the language of states when necessary, Bosco notes that he sometimes alienated them, triggering numerous crises.<sup>68</sup> Moreno-Ocampo's chief prosecutorial legacy—an understandable focus on African situations that ultimately led to a deeply fraught and problematic relationship with the African Union—reinforces Bosco's presentation of evidence that the ICC has been significantly constrained by major-power interests.<sup>69</sup>

No realist will be surprised that great power politics has constrained the ICC. But what about the flip-side? What has—and what can—the Security Council do to further the ICC's mission of justice? There are several Council powers that can in theory benefit the Court's activity. There is the power, embedded in the Rome Statute, to refer a situation to the Court for investigation and possible prosecution.<sup>70</sup> There is the power to authorize a state to use force that would otherwise be illegal under the UN Charter, such as crossborder force to apprehend an individual fugitive wanted by the ICC.<sup>71</sup> There is the power to obligate all states to cooperate

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64. Alex Whiting, *The ICC in Kenya: Institutional Promises and Limitations*, JUST SECURITY (Sept. 15, 2015, 9:14 AM), <https://www.justsecurity.org/26087/icc-kenya/> [<https://perma.cc/M267-2TK2>].

65. BOSCO, *supra* note 11, at 84.

66. Cf. Alana Tiemessen, *The International Criminal Court and the Politics of Prosecutions*, 18 INT'L J. HUM. RTS. 444, 458 (2014) (concluding that there is a “clear pattern of politicization in the ICC's prosecutions” that indicates the Court is being manipulated by the member states, undermining the Court's “credibility and legitimacy”).

67. See BOSCO, *supra* note 11, at 84–86 (acknowledging that Moreno-Ocampo was a determined investigator but faced a difficult question of how to prosecute the Iraq war).

68. See *id.* at 151–52 (noting that the prosecutor was criticized by certain African leaders and the media).

69. *Id.* at 151, 187.

70. Rome Statute, *supra* note 47, art. 13.

71. See U.N. Charter art. 42, ¶ 1 (stating that in certain circumstances the Security Council “may take such action by air, sea, or land forces as may be necessary to maintain or restore international peace and security”).

with the Court, as the Council did when it directly created war-crimes tribunals for the former Yugoslavia and Rwanda in 1993 and 1994, respectively.<sup>72</sup>

These are meaningful powers. And yet the Council almost never wields them; indeed, it never deployed the last two noted powers in the two cases that the Council itself referred to the ICC. In one case only has the Council authorized UN forces to support the arrest of ICC indictees.<sup>73</sup> It has provided mainly limited political or rhetorical support for the several other situations pending before the Court today.<sup>74</sup> In fact, the Council has more often exercised its power to *limit* the reach of the ICC, using such tools as jurisdictional exemptions and funding limitations in the resolutions referring the Darfur and Libya situations.<sup>75</sup> In short, the Council has shown itself to be more than a match for the forces of international justice and ICC autonomy.

#### IV. Council Cooperation and the Independence of the Court

The heavy shadow cast by the Council has led many partisans of international justice to consider how the ICC might be more independent and less prone to political influence. ICC independence can be thought of in three ways: judicial independence, prosecutorial discretion, and institutional independence. Several years ago, then-professor (now Judge) Theodor Meron laid out the internal and external factors necessary for an independent judiciary in the international context.<sup>76</sup> At its most abstract and general, judicial independence demands that judges be free from influence external to the legal and factual situations they are obligated to adjudicate—

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72. See S.C. Res. 955, ¶ 2 (Nov. 8, 1994) (deciding that “all States shall cooperate fully” with the Rwanda Tribunal); S.C. Res. 827, ¶ 4 (May 25, 1993) (deciding the same for the Yugoslavia Tribunal).

73. See S.C. Res. 2098, ¶ 12(d) (Mar. 28, 2013) (expanding the mandate of the UN peacekeeping operation, MONUSCO, in the Democratic Republic of the Congo).

74. DAVID KAYE ET AL., *THE COUNCIL AND THE COURT: IMPROVING SECURITY COUNCIL SUPPORT OF THE INTERNATIONAL CRIMINAL COURT I* (2013).

75. See S.C. Res. 1970, *supra* note 52, ¶ 6 (deciding “that nationals, current or former officials or personnel from a State outside the Libyan Arab Jamahiriya which is not a party to the Rome Statute of the International Criminal Court shall be subject to the exclusive jurisdiction of that State for all alleged acts or omissions arising out of or related to operations in the Libyan Arab Jamahiriya established or authorized by the Council, unless such exclusive jurisdiction has been expressly waived by the State”); S.C. Res. 1593, *supra* note 52, ¶ 7 (recognizing that expenses from the referral “shall be borne by the parties to the Rome Statute and those States that wish to contribute voluntarily”).

76. Theodor Meron, Editorial Comment, *Judicial Independence and Impartiality in International Criminal Tribunals*, 99 AM. J. INT’L L. 359, 360–61 (2005); see also Martin Shapiro, *Judicial Independence: New Challenges in Established Nations*, 20 IND. J. GLOBAL LEGAL STUD. 253, 258–60 (2013) (explaining challenges to judicial independence, such as constitutional review of decisions creating conflict between judges and the government, “judicialization” of politics giving judges potential kickbacks from making specific decisions, and long-arm proliferation expanding a Court’s jurisdiction).

including, and perhaps especially, from their home states. Similarly, others have argued that prosecutors in international tribunals must enjoy the independence to investigate alleged crimes committed by all parties to a conflict, free of political pressure, however well-intentioned.<sup>77</sup> For instance, a Council referral directing the prosecution of specific individuals would clearly interfere with prosecutorial independence. The Rome Statute seeks to protect both judicial and prosecutorial independence, focusing on internal and external factors that could inappropriately influence Court actors—in particular, the prosecutor.<sup>78</sup> As Bosco writes, “[a]t the heart of the court is an independent prosecutor responsible for reviewing complaints and information about possible crimes, conducting investigations, requesting arrest warrants, and prosecuting those on trial.”<sup>79</sup>

Institutional independence differs from judicial and prosecutorial independence, though all three are connected. Judicial and prosecutorial independence speak to the influence exercised by external actors in specific cases before the Court, disadvantaging particular defendants or undermining the credibility of judicial or prosecutorial decisions. Institutional independence addresses more generally the ways in which external actors shape the overall docket of the ICC, as well as its practices and trajectory.<sup>80</sup> Individual states, which may refer situations to the Court for investigation, and the Council itself may both strongly influence the overall focus and direction of the Court. Indeed, the Court’s docket today is not the result of wholly independent decisions on the merits. Instead, Sudan and Libya were both Council referrals, and Uganda, the Democratic Republic of the Congo, the Central African Republic, and Mali were all state self-referrals.<sup>81</sup> An independent judicial institution may not have opened investigations in any one of these six situations.

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77. See WILLIAM A. SCHABAS, *THE INTERNATIONAL CRIMINAL COURT: A COMMENTARY ON THE ROME STATUTE* 47–48 (2010) (discussing the “seductive argument holding that justice should be even-handed, and that atrocities perpetrated on both sides must receive equal attention”).

78. See *id.* at 564–66, 801 (explaining factors that could inappropriately influence judges, such as financial interests in the outcome of the case and the requirement that judges’ and prosecutors’ functions in open Court are impartial).

79. BOSCO, *supra* note 11, at 54.

80. See Laurence R. Helfer & Anne-Marie Slaughter, *Toward a Theory of Effective Supranational Adjudication*, 107 *YALE L.J.* 273, 277 (1997) (stating that the independence of the European Court of Justice and the European Court of Human Rights from the state as part of a supranational jurisdiction has resulted in “a ‘community of law’: a partially insulated sphere in which legal actors interact based on common interests and values, protected from direct political interference”); Eric A. Posner & John C. Yoo, *Judicial Independence in International Tribunals*, 93 *CALIF. L. REV.* 1, 67 (2005) (noting that designers of newer tribunals have tried to provide them with a high level of institutional independence in order to “increase the courts’ legitimacy and ultimately their ability to achieve compliance”); Yuval Shany, *Assessing the Effectiveness of International Courts: A Goal-Based Approach*, 106 *AM. J. INT’L L.* 225, 257 (2012) (describing the link between external actors and judicial independence).

81. *ICC Investigations & Cases*, AM. NON-GOVERNMENTAL ORGANIZATIONS COALITION INT’L CRIM. CT., <http://www.amicc.org/icc/cases> [<http://perma.cc/ZM8Q-VFXZ>].

At Rome and in its lead-up, discussions around jurisdiction and the ability to refer cases were largely framed in terms of the concept of gatekeeping.<sup>82</sup> The case for a more dependent ICC rested on the realities of world politics: when global security is at stake, the pursuit of individual justice can block meaningful peace deals and constrain negotiators' options. Peace, according to this position, must sometimes trump justice. And to do so, the processes of international justice must serve peace, not interfere with it. This conception had and retains many admirers.<sup>83</sup> As a result, some sought to place the Security Council fully in control of the ICC's jurisdiction.<sup>84</sup> This would ensure that politics trumped legalism. Not unrelatedly, it also would give the P5 a special measure of influence.

The Rome negotiators ultimately rejected the idea of the Council as primary gatekeeper. Instead, the Rome Statute rests jurisdiction principally on the traditional pillar of state consent, a deliberate move aimed at bolstering the Court's independence and placing law over politics.<sup>85</sup> The Rome Statute also gave the prosecutor *proprio motu* power—the power to initiate an investigation at the prosecutor's own discretion, though such an investigation has to be approved by a panel of judges.<sup>86</sup> In *Rough Justice*,

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82. See Eric P. Schwartz, *The United States and the International Criminal Court: The Case for "Dexterous Multilateralism,"* 4 CHI. J. INT'L L. 223, 225, 231 (2003) (explaining how the United States supported a "gatekeeper" role for the UN Security Council in order to prohibit countries from being subject to the Court's jurisdiction without consent).

83. Jack Snyder & Leslie Vinjamuri, *Trials and Errors: Principle and Pragmatism in Strategies of International Justice*, INT'L SECURITY, Winter 2003/04, at 5, 6 ("Justice does not lead [peace]; it follows. . . . [N]orm-governed political order must be based on a political bargain among contending groups and on the creation of robust administrative institutions that can predictably enforce the law. Preventing atrocities and enhancing respect for the law will frequently depend on striking politically expedient bargains that create effective political coalitions to contain the power of potential perpetrators of abuses . . ."); cf. Mariano-Florentino Cuéllar, *The Limits of the Limits of Idealism: Rethinking American Refugee Policy in an Insecure World*, 1 HARV. L. & POL'Y REV. 401, 404–05 (2007) (advocating a "pragmatic approach" to refugee problems termed "strategic humanitarianism" that would "develop[] protocols to monitor, restrict, and redirect aid" in order to "lower the risk that aid funneled through the refugee system will subsidize ongoing conflict"); *id.* at 432 ("Idealism without limits is all but impossible, as no American refugee policy can long survive if pivotal constituencies find it irretrievably at odds with American interests. But a policy of limits without idealism in a world capable of engendering such capacious misery and expectations of American leadership poses its own dangers.").

84. HEMI MISTRY & DEBORAH RUIZ VERDUZCO, CHATHAM HOUSE, *THE UN SECURITY COUNCIL AND THE INTERNATIONAL CRIMINAL COURT* 3 (2012) ("Article 13(b) was the product of a negotiation that sought to delimit the appropriate relationship between a permanent international criminal court and the UN Security Council, the latter being the primary organ responsible for the maintenance of international peace and security. Article 13(b), in conjunction with Article 16 . . . sought to reconcile the concerns of those who wished to establish a permanent and independent international criminal court, a tribunal independent from the politics of the Security Council, and those on the other hand who sought to establish the court subject to the control of the Security Council.").

85. And, some would argue, justice over peace.

86. Rome Statute, *supra* note 47, art. 15.

Bosco notes that the United States and China in particular opposed this provision, fearing “it would afford the prosecutor too much discretion and insist[ing] that if neither a state party nor the Security Council referred a situation, it likely was not of international concern.”<sup>87</sup>

The flipside was that many other actors feared granting the Security Council too much power to refer situations to the Court.<sup>88</sup> The more the Security Council was linked to the Court, the more it could become a tool of the Council, subject to the political dynamics of the moment. In the end, the Council’s powers were cabined. Referrals may not direct the prosecutor to reach particular outcomes, nor can they pinpoint specific individuals.<sup>89</sup> Yet the Council was given an important power to start and stop Court investigations if, in its view, security concerns necessitated it.<sup>90</sup> Reflective of the power dynamics of world politics, it was the sort of pragmatic decision that, like the insertion of the veto for the P5 in the Charter, could help save idealism from itself.<sup>91</sup>

The compromise struck in Rome between a vision of robust judicial and prosecutorial independence and the reality of power politics left many dissatisfied. The United States, China, and Russia never joined the ICC, in part due to their dissatisfaction with the jurisdictional structure created at Rome.<sup>92</sup> On the other hand, no less a figure than Louise Arbour, former chief prosecutor of the ICTY and ICTR and UN High Commissioner for Human Rights, argued that the Council–Court relationship embedded at Rome created deep threats to the Court’s independence.<sup>93</sup> That the Council can shape the court’s jurisdiction through referrals or suspend proceedings based on security concerns seems to give an overtly political—and unrepresentative—body control over a core judicial function. Yet to work

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87. BOSCO, *supra* note 11, at 55.

88. *See id.* (explaining that although some were disappointed with the compromise on the ICC’s jurisdiction, it was still too extensive for some countries because their citizens could be exposed to prosecution).

89. Rome Statute, *supra* note 45, arts. 14–15.

90. *See id.* art. 16 (“No investigation or prosecution may be commenced or proceeded with under this Statute for a period of 12 months after the Security Council, in a resolution adopted under Chapter VII of the Charter of the United Nations, has requested the Court to that effect . . .”).

91. For an example of this kind of thinking, see generally KENNEDY, *supra* note 20, which traces the evolution of the United Nations, including the balance between pragmatism and idealism.

92. *See* BOSCO, *supra* note 11, at 55 (explaining the fear some countries had that the ICC’s jurisdiction went too far because it allowed for their citizens to be prosecuted).

93. *See* Louise Arbour, *Doctrines Derailed?: Internationalism’s Uncertain Future*, INT’L CRISIS GROUP (Oct. 28, 2013), <http://www.crisisgroup.org/en/publication-type/speeches/2013/arbours-doctrines-derailed-internationalism-s-uncertain-future.aspx> [<http://perma.cc/3LSM-J22T>] (“Council referrals may in fact underscore the Court’s impotence rather than enhance its alleged deterrent effect.”).

well a court needs a cop, and this recognition guided many of the delegates in Rome to seek a balance of sorts between Council control and Court in consequence.

The Court nonetheless struggled to attract a full range of member states. As Bosco writes, the ICC “attracted dozens of new member states and established linkages with key intergovernmental organizations. The process of international acceptance was incomplete however. The Court made only limited progress in attracting major powers that had opted to stay outside the system.”<sup>94</sup> Three of those major powers—China, Russia, and the United States—just happened to be permanent members of the Security Council.<sup>95</sup>

#### V. From Hostility to Engagement

Just eleven days after the Rome Statute entered into force in 2002, the United States successfully demanded the adoption of Security Council Resolution 1422, which sought to protect UN peacekeepers from the ICC’s jurisdiction if they hailed from non-Rome Statute states.<sup>96</sup> Adopted as a measure under Article 16 of the Rome Statute, the provision that enables the Council to suspend proceedings before the Court, the effort had limited support in the law, but the United States was determined to hold peacekeeping—especially in the Balkans—hostage to its demand.<sup>97</sup> However, after two years opposition grew such that the Bush administration abandoned the annual effort.<sup>98</sup>

In 2005, in the wake of the Security Council-mandated Commission of Inquiry’s condemnation of massive atrocities in Darfur, ICC supporters were confident enough to turn to the Court for accountability.<sup>99</sup> On March 31, by referring the situation in Darfur to the Court, the Council took its first, landmark step in acknowledging the ICC’s legitimacy.<sup>100</sup> China and the United States abstained, while Russia, the United Kingdom, and France—the latter two then and still now the only ICC member states on the Council—cast votes in favor.<sup>101</sup> The price for U.S. abstention, as opposed to a veto, was high: the referral resolution barred UN funding of ICC

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94. BOSCO, *supra* note 11, at 131.

95. *Countries Elected Members of the Security Council*, UNITED NATIONS SECURITY COUNCIL, <http://www.un.org/en/sc/members/elected.asp> [<http://perma.cc/6RG9-TA2U>] (listing China, Russia, and the United States as permanent members, never elected to the council).

96. S.C. Res. 1422, ¶ 1 (July 12, 2002).

97. *See generally id.*

98. BOSCO, *supra* note 11, at 103–04.

99. Rep. of the Int’l Comm. of Inquiry on Darfur to the Secretary-General Pursuant to Security Council resolution 1564 (2004), transmitted by Letter Dated 31 January 2005 from the Secretary-General addressed to the President of the Security Council, at 4, U.N. Doc. S/2005/60 (Jan. 31, 2005).

100. S.C. Res. 1593, *supra* note 52, ¶ 1.

101. U.N. SCOR, 60th Sess., 5158th mtg. at 2, 3, 5, U.N. Doc. S/PV.5158 (Mar. 31, 2005).



activities pursuant to the resolution, sought to preclude jurisdiction over Rome Statute nonparties apart from Sudan, and—in contrast to the resolutions establishing the ICTY and ICTR—failed to obligate states outside of Sudan and the Rome Statute to cooperate with the Court.<sup>102</sup> The Council thus expanded the Court’s jurisdiction while limiting its ability to carry out its mandate.

This state of affairs frustrated many ICC supporters, and not least the then-prosecutor himself, Moreno-Ocampo. As Bosco recounts,

Frustrated by the fickle commitment of states, the prosecutor delivered a scathing speech at a Nuremberg conference on international justice in May 2007. He complained that the court faced incessant—and, to his mind, unfair—calls to accommodate itself to political realities. “We also hear officials of States Parties calling for amnesties, the granting of immunities and other ways to avoid prosecutions, supposedly in the name of peace.” The prosecutor insisted that “there can be *no* political compromise on legality and accountability” and he laid down a daunting challenge for states: “Dealing with the new legal reality is not easy. It needs political commitment; it needs hard and costly operational decisions: arresting criminals in the context of ongoing conflicts is a difficult endeavor. . . . *If the States Parties do not actively support the Court, in this area as in others, then they are actively undermining it.*”<sup>103</sup>

This somewhat curious echo of the Bush Doctrine<sup>104</sup> makes plain how much frustration was felt in The Hague over the inability, or more to the point, the unwillingness of powerful states to help the ICC work. The locus of that frustration was the Security Council.

For its part, the Council did not deign to answer the prosecutor nor to pay much, if any, attention to the Court—even to provide support for efforts on Darfur, which it had referred.<sup>105</sup> From the adoption of the Darfur referral in 2005 to the adoption of the Libya referral on February 23, 2011, not a single Security Council resolution offered support for the work of the ICC, even though the Court’s work in Africa overlapped neatly with situations that seized the Council.<sup>106</sup>

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102. S.C. Res. 1593, *supra* note 52, ¶¶ 6, 7.

103. BOSCO, *supra* note 11, at 131 (omission in original).

104. There are various things so labeled but, recall President Bush’s famed post-9/11 statement to a joint session of Congress: “Every nation in every region now has a decision to make: Either you are with us or you are with the terrorists.” President George W. Bush, Address Before a Joint Session of the Congress on the United States Response to the Terrorist Attacks of September 11 (Sept. 20, 2001), <http://edition.cnn.com/2001/US/09/20/gen.bush.transcript> [<http://perma.cc/7NFG-B4D5>].

105. S.C. Res. 1593, *supra* note 52, ¶ 7.

106. See *Security Council*, COALITION FOR INT’L CRIM. CT., <http://www.iccnw.org/?mod=sc> [<https://perma.cc/T38R-ZHC7>] (documenting Security Council discussions pertaining to the ICC and showing no resolutions regarding the ICC between Darfur and Libya).

Then, something changed. Beginning in early 2011, the Council expressed new interest in the Court, repeatedly (and approvingly) noting it in its resolutions and debates. Yet a close inspection reveals a pattern of mixed signals and uneven (and usually hollow) support. On the one hand, the Council referred the situation in Libya to the ICC for investigation and prosecution in February 2011 in what was widely seen as a supportive symbol of the role the ICC might play in preventing mass atrocity.<sup>107</sup> Over the course of the next three years, the Council repeatedly welcomed the role of the ICC in a variety of contexts, regularly citing its work with support, especially outside of the referral-situation countries.<sup>108</sup> Council members—including the United States, China, and Russia—held an open meeting in 2012 that left an impression of widespread support for the Court and its work.<sup>109</sup>

The Council crossed the Rubicon from rhetorical to logistical and military support for the ICC in the context of the long-standing and extensive conflict in the Democratic Republic of the Congo (DRC). In 2013, the Council authorized the establishment of an “Intervention Brigade” as part of the UN’s peacekeeping force in the DRC.<sup>110</sup> The authorization, remarkable for its provision of an offensive capability to a peacekeeping force,<sup>111</sup> was also notable for the support it offered the ICC. The Intervention Brigade, the resolution provided, would be expected to work with the Court and the Government of the DRC “to arrest and bring to justice those responsible for war crimes and crimes against humanity in the country.”<sup>112</sup>

The Intervention Brigade, however, represents a rare form of concrete support for the work of the ICC. Overall, despite these recent steps the Council has shown a marked reluctance to flex its muscle to generate broader cooperation by other states. That reluctance continues to this day.

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107. S.C. Res. 1970, *supra* note 52, ¶4. See, for example, the statement from Mr. Hardeep Singh Puri (India), as well as statements from France and Germany. U.N. SCOR, 66th Sess., 6491st mtg. at 2, 5–6, U.N. Doc. S/PV.6491 (Feb. 26, 2011) (“[W]e note that several members of the Council . . . believe that referral to the Court would have the effect of an immediate cessation of violence and the restoration of calm and stability.”).

108. See Colum Lynch, *The World’s Court vs. the American Right*, FOREIGN POL’Y: TURTLE BAY (Feb. 11, 2013), [http://turtlebay.foreignpolicy.com/posts/2013/02/11/the\\_icc\\_vs\\_american\\_conservatives](http://turtlebay.foreignpolicy.com/posts/2013/02/11/the_icc_vs_american_conservatives) [<http://perma.cc/N42K-EBG8>] (quoting the French UN envoy as recognizing the key role that the ICC plays in preventing atrocities).

109. See generally U.N. SCOR, 67th Sess., 6849th mtg., *supra* note 61.

110. Bruce ‘Ossie’ Oswald, *The Security Council and the Intervention Brigade: Some Legal Issues*, ASIL INSIGHTS (June 6, 2013), <http://www.asil.org/insights/volume/17/issue/15/security-council-and-intervention-brigade-some-legal-issues> [<http://perma.cc/VU8V-P7EP>].

111. *Id.* The Security Council first sent such a peacekeeping force to the Congo in 1960. S.C. Res. 143 (July 14, 1960).

112. S.C. Res. 2098, *supra* note 73, ¶ 12(d). The Brigade saw some success when it helped bring about the end of M23. Press Release, Sec. Council, Security Council Issues Statement Welcoming End of Hostilities by ‘M23’ in Democratic Republic of Congo, U.N. Press Release SC/11174 (Nov. 14, 2013).

On Libya, the Council's follow-through has been tepid at best. As soon as the Qaddafi regime began to crumble, leading Council members' support for the ICC's role faded away.<sup>113</sup> On Sudan, the Council has barely addressed the lack of state cooperation, despite repeated requests for engagement by the ICC.<sup>114</sup> This led Prosecutor Fatou Bensouda, who succeeded Moreno-Ocampo in 2012, to deliver an impassioned plea to the Council during her semiannual report on the situation in Darfur in 2013, using powerful language rarely heard in the Council chamber. Emphasizing her "frustration and despair at the Council's inaction and paralysis regarding the situation in Darfur," the prosecutor detailed how the lack of Council support has undermined her work.<sup>115</sup>

## VI. Looking Forward

In his conclusion to *Rough Justice*, Bosco writes:

It will not be surprising if the world is willing to tolerate an international justice system constrained by major-power interests. . . . [O]ther significant international justice initiatives have been influenced and constrained by political considerations. Instead of being denounced for their defects and limitations, these instruments were mostly celebrated and, in fact, served as the inspiration for the ICC. Double standards are deeply rooted in existing global governance structures, and the new court appears more likely to reflect those than to alter them.<sup>116</sup>

It is undeniable that Council support is a necessary, if insufficient, component of any long-run success for the ICC. For the Court, the question is how to engage the Council in a way that does not fundamentally compromise its essential independence—or perhaps, how to do so in a way that *acceptably* compromises the Court's independence while enhancing its effectiveness. For the Council, the question is how to partner with the ICC to ensure that its primary responsibility—the maintenance of international peace and security—can be more effectively achieved. In what follows, we offer some reflections as well as some concrete suggestions about the way forward.

A number of international workshops and conferences in recent years have brought experts and observers together to evaluate and understand the Council's behavior.<sup>117</sup> All of these efforts aim toward identifying an

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113. Mark Kersten, *Used and Abandoned: Libya, the UN Security Council and the ICC*, JUST. CONFLICT (Aug. 31, 2011), <http://justiceinconflict.org/2011/08/31/used-and-abandoned-libya-the-un-security-council-and-the-icc> [http://perma.cc/VV5W-FDLH].

114. U.N. SCOR, 68th Sess., 7080th mtg. at 2–4, U.N. Doc. S/PV.7080 (Dec. 11, 2013).

115. *Id.* at 2.

116. BOSCO, *supra* note 11, at 189.

117. See, e.g., INT'L PEACE INST., *supra* note 50, at 2 (noting a meeting's conclusion that improvements in the relationship between the Security Council and the ICC are needed; KAYE ET

optimal level of support by the Council for the Court.<sup>118</sup> What kind of support could the ICC expect, and how could that support be generated? What types of situations would be appropriate for the Council to refer? When might the Council use its Rome Statute authority to defer an ongoing investigation? The prescriptions tend to fall into categories of structure and substance, wishlist and realpolitik, short-term and long-term. In principle, they do not question the premises underlying a strong Council–Court relationship. But the results of these meetings—the formal papers and reports—tend to hide a vigorous discussion over the nature and value of the relationship.

First, while there are obvious advantages to a relationship with the Security Council, what risks does such a relationship pose for the Court? The Council is an unabashedly political institution. While procedural rules may govern its working calendar and diplomatic and military realities may constrain its actions, few substantive rules constrain its decisions.<sup>119</sup> The Council does not need to distinguish and explain one situation from the next. Its decisions often appear unprincipled, driven by the political, economic, or military equities of the P5 rather than a reasoned accounting of when it should invoke Chapter VII of the Charter.<sup>120</sup> While a lack of principle well serves an institution that must balance competing interests from crisis to crisis, it nonetheless undermines its claim to be acting in the interests of the international community as a whole. Indeed, such political motives call attention not merely to the Council’s inconsistencies but also to its claim of representativeness and ability to speak to the security concerns of all UN members.<sup>121</sup> None of this is new. The Council cannot be judged according to the same standards as a court of law. But its political nature sits uneasily alongside notions of individual culpability for atrocities.

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AL., *supra* note 74, at 17–23 (reporting the findings of a workshop held to discuss improving support for the ICC); MISTRY & VERDUZCO, *supra* note 84, at 2 (summarizing the conference held to discuss the development of the relationship between the Security Council and the ICC).

118. *See, e.g.*, INT’L PEACE INST., *supra* note 50, at 5 (discussing a strategy for improving Security Council support of the ICC through arrest warrants); KAYE ET AL., *supra* note 74, at v (stating that the goal of the workshop was to foster optimal support of the ICC by the Security Council); MISTRY & VERDUZCO, *supra* note 84, at 9–10 (suggesting that the Security Council could properly support the ICC through coordination of approach and procedure).

119. UNITED NATIONS, PROVISIONAL RULES OF PROCEDURE OF THE SECURITY COUNCIL (1983).

120. *See* David D. Caron, *The Legitimacy of the Collective Authority of the Security Council*, 87 AM. J. INT’L L. 552, 562–65 (1993) (noting that a “major charge against the Security Council[’s legitimacy] is that it is dominated by several of the permanent members” and describing how the P5 members are able to exert dominance over the Council’s decisions).

121. *See id.* at 558 (providing examples of how the perceptions of illegitimacy may work against the effectiveness of the Security Council, such as a state having difficulty convincing its citizenry that the Council’s action, which is UN authorized, is supportive of community concerns rather than the “thinly veiled imperialism of the Council’s permanent members”).

This then is a key risk of the Court's relationship with the Council: unless it protects itself, the Court increasingly will become entangled in the politics and credibility gap of the Council, tarred by its association with a body that has significant power to shape its docket. The Council refers Libya but not Syria, Sudan but not Sri Lanka.<sup>122</sup> It expands the ICC's jurisdiction while purporting to limit the reach of its cases so as to protect nonstate parties.<sup>123</sup> This kind of selectivity will continue, as selectivity is simply an everyday feature of Council behavior across the vast range of issue areas it addresses. But this selectivity, coupled with the seeming inability of the ICC to expand its own reach to state parties beyond Africa, highlights that the ICC has limited capacity to achieve its purpose, as emphasized in the Rome Statute's Preamble, "to guarantee lasting respect for and the enforcement of international justice."<sup>124</sup>

This risk of entanglement may be a feature of the Rome Statute inasmuch as it enables the ICC to exercise jurisdiction over situations referred by the Council. As the work of both institutions continues to overlap, the ICC may find it difficult to protect itself from such politicization, but it is not without tools. Most importantly, it needs a strategy for dealing with Council referrals—not only the fact of referral but also the politicized elements of referrals that seek to limit the ICC's jurisdiction and funding and fail to promote state cooperation.

Conversely, a strong relationship with the Council may be desirable from the ICC's perspective, but is it desirable for the Council? What does the Council gain from the Court? The Council is an institution with extraordinary lawmaking powers, uniquely able to compel action by or against any UN member state.<sup>125</sup> It can even, as it did in the 1990s with the ICTY and ICTR, create ad hoc courts to address the aftermath of atrocities.<sup>126</sup> All this suggests that the Council actually needs little from the ICC, and indeed the balance of power is undeniably in the Council's favor. Yet the ICC, deliberately designed not to be under the direct supervision of the Council, is a reality—and as such is both a new tool and partner to the Council as well as a possible rival and competitor. The Court can

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122. *Situations and Cases*, *supra* note 16.

123. *See supra* text accompanying notes 98–105 (illustrating how the Council "expanded the Court's jurisdiction while limiting its ability to carry out its mandate" in part because of non-state-parties' actions that sought to preclude the Court's jurisdiction over them).

124. Rome Statute, *supra* note 47, pmbl.

125. U.N. Charter art. 25.

126. *See About the ICTY*, UNITED NATIONS INT'L CRIM. TRIBUNAL FOR FORMER YUGOSLAVIA, <http://www.icty.org/en/about> [<http://perma.cc/762S-VE7C>] (reporting that the Council established the ICTY as an ad hoc court in 1993 to address war crimes committed during the Balkan conflicts in the 1990s); *The ICTR in Brief*, UNITED NATIONS INT'L CRIM. TRIBUNAL FOR RWANDA, <http://www.unictr.org/en/tribunal> [<http://perma.cc/GGV2-P4SD>] (reporting that the Council established the ICTR in 1995 to prosecute human rights violators during the Rwandan genocide).

legitimate Council actions and share in the burden of addressing pressing international problems. The Court can take action when the Council does not want to. But the Court can also complicate and even disrupt the work of the Council, particularly in situations where a majority of the Council seeks a resolution to a crisis that may involve an actor accused or indicted of grave crimes. A full inquiry into these conflicting interests and incentives cannot be carried out here, but we can at least survey the waterfront.

Consider first the challenges posed to the Council by the Court. That the ICC can initiate investigations without a green light from the Council was a hard-won victory for those who sought meaningful judicial independence. The original vision of the Council as a decisive body required that it be empowered to act with dispatch against threats to the peace. That the great powers (at least as of 1945) had a permanent place and veto was designed to allow that decisive action to take place only when no vital interest of a permanent member was threatened. This structure—inevitably frustrating to justice and fairness—was deemed essential lest the world once again risk devolving into an unimaginably horrific global conflagration.

The ICC's ability to initiate prosecutions does not alter this structure. But it permits a new and notable international organization to address core questions of international security in ways that can impinge on the traditional prerogatives of the Council and, perhaps, to interfere with the delicate politicking necessary to achieve peace. And it inevitably creates a new star in the international galaxy, one that has the potential to command both popular and diplomatic attention. While the Council can defer an ICC prosecution that it does not want, that decision must be renewed every twelve months (and, like any other substantive decision of the Council, must secure nine votes and no vetoes).<sup>127</sup> In short, the ICC can inject itself into areas of concern to the Council and, as long as one permanent member is supportive of the Court, the Council can do nothing about it.

This redistribution of power among international actors may seem abstract. Yet given the often close connection between breakdowns in state authority and grave crimes and the often vigorous disputes, both academic and political, over how (if at all) to balance peace and justice,<sup>128</sup> the ICC's

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127. Rome Statute, *supra* note 47, art. 16.

128. See, e.g., Eric Blumenson, *The Challenge of A Global Standard of Justice: Peace, Pluralism, and Punishment at the International Criminal Court*, 44 COLUM. J. TRANSNAT'L L. 801, 804 (2006) (discussing the role of the Office of the Prosecutor and the proper weight it should give potentially conflicting claims of peace, pluralism, punishment, and justice); Linda M. Keller, *Achieving Peace with Justice: The International Criminal Court and Ugandan Alternative Justice Mechanisms*, 23 CONN. J. INT'L L. 209, 210 (2008) (noting that international courts may negotiate peace in international conflict at the expense of justice but considering how courts can sometimes achieve both); Linda M. Keller, *The False Dichotomy of Peace Versus Justice and the International Criminal Court*, 3 HAGUE JUST. J. 12, 13 (2008) (explaining how the conflict in Uganda supports the argument that the international community can sometimes accept a peace

powers in this regard are hardly insignificant. Recall how stability was the core concern of the framers of the UN Charter and how the Council's powers and rules were explicitly crafted to ensure stability, both among and between the great powers and their informal empires.<sup>129</sup> In such a context, the ability of the Court to enter a conflict with an indictment becomes more than simply a matter of justice. It has the potential to upend carefully crafted compromises and strategies and insert considerations of law into what were, traditionally, largely political deliberations.

Yet the Court also offers real advantages to the Council. Because its work sounds in the language of justice, the Court can, when working alongside or in ways consistent with those of the Council, add an element of legitimacy to the sometimes craven and cynical deliberations of the Council. By appearing to "do something," even if ineffectually, the ICC can take some heat off the Council in situations that the Council would rather not delve into. The ICC is also consistent with some important goals of the Council. To the degree the ICC is successful as a deterrent to atrocities, it furthers the overarching aim and *raison d'être* of the Council to preserve and secure global peace and security. And to the degree the ICC, through the doctrine of complementarity, builds judicial capacity in member states, it furthers the Council's interest in promoting the rule of law locally.

Given these differing interests, what kind of approaches, if any, would overcome the barriers to a sound relationship between the two institutions?

Structurally, the most important measure would involve the establishment of a regular channel of communication between the two institutions. The Council now has an informal Tribunals Working Group, devoted to issues related to the ICTY, ICTR, and Special Tribunal for Lebanon.<sup>130</sup> The members of the working group streamline Council decision-making in the area.<sup>131</sup> An expanded working group should enable discussions of the ICC as well; it would not commit any Council member to any particular course of action with regard to the ICC's work, as the group operates on the basis of consensus, but would provide a forum for technical and relatively quiet

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deal for impunity while promoting justice); Snyder & Vinjamuri, *supra* note 81, at 5 (arguing that the prosecution of perpetrators of atrocities according to universal standards risks causing more atrocities than it would prevent); Noah Weisbord, *Judging Aggression*, 50 COLUM. J. TRANSNAT'L L. 82, 88 (2011) (suggesting that the ICC should promote peace as it does justice by assessing contextual factors in its interpretation of the law).

129. See U.N. Charter art. 1, ¶ 1 (declaring that the purpose of the United Nations is to maintain international peace and security).

130. *Working Groups*, UNITED NATIONS, [http://www.un.org/en/sc/repertoire/subsidiary\\_organ/working\\_groups.shtml#cat6](http://www.un.org/en/sc/repertoire/subsidiary_organ/working_groups.shtml#cat6) [<http://perma.cc/86CJ-HYBS>].

131. *Id.*

discussions on a range of areas of common concern. A working group need not focus solely on Council-referred cases, especially given the engagement of the Council in areas such as the Cote d'Ivoire, Central African Republic, DRC, Kenya, Mali, and Uganda. The Court's annual report to the UN<sup>132</sup> could serve as the basis for identification of Court needs.

In addition to structural innovations, a number of substantive changes, some more politically realistic, some less, would serve to protect the Court and advance state cooperation with it. We briefly describe several here:

*1. Obligate States to Cooperate with the Court.*—Referral resolutions have imposed obligations on the target states, Sudan and Libya, and other parties to the conflict, and they have encouraged cooperation by other states and regional and international organizations.<sup>133</sup> This is helpful, but falls short of the more concrete and sweeping obligations imposed under the resolutions establishing the ICTY and ICTR. Article 29(2) of the ICTY Statute, which obligates states to comply with trial chamber orders, should be a model for such obligations.<sup>134</sup> Council referrals involve the same kind of policy motivations that led to the ICTY and ICTR; likewise, the Council should impose similar kinds of obligations. Again, they need not be limited to referral situations, since the Council's engagement in other areas—such as the DRC—clearly indicates the Council's expectations of support as well.

*2. Extend Key Rome Statute Protections in Referral Situations.*—Privileges and immunities of international civil servants advance cooperation and indeed are central and long-standing features of international law precisely because they enable international relations. The work of any international institution will be undermined if governments do not respect the individuals conducting work on its behalf. Libya highlighted this problem in June 2012 when registry and defense-counsel officials were detained for a month, triggering a rare press statement on the ICC from the

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132. Int'l Criminal Court, Rep. of the Int'l Criminal Court on its Activities in 2013/14, U.N. Doc. A/69/321 (Sept. 18, 2014); Negotiated Relationship Agreement Between the International Criminal Court and the United Nations, *supra* note 48, art. 6.

133. S.C. Res. 1970, *supra* note 52, ¶¶ 4–6, 9–21 (deciding that the government of Libya shall cooperate with the ICC and provide assistance to the Court and prosecutor and proclaiming an arms embargo, asset freeze, and travel restrictions to Libya for member states of the Rome statute); S.C. Res. 1593, *supra* note 52, ¶ 2 (deciding that the government of Sudan shall cooperate with the ICC and provide assistance to the Court and prosecutor and encouraging the ICC to support international cooperation with domestic efforts to promote the rule of law and protect human rights).

134. U.N. Secretary-General, Rep. of the Secretary-General Pursuant to Paragraph 2 of S.C. Res. 808, art. 29, U.N. Doc. S/25704 (May 3, 1993).



Council.<sup>135</sup> All states, especially those subject to investigation, should accord Court officials all necessary privileges and immunities so they may carry out their work efficiently and without external intervention. Under Article 48 of the Rome Statute, Office of the Prosecutor and Registry staff “shall enjoy the privileges and immunities and facilities necessary for the performance of their functions, in accordance with the agreement on the privileges and immunities of the Court.”<sup>136</sup> This provision should be extended in application to all states at the time of referral, and the Council may consider extending it in specific nonreferral cases.

*3. Promote Funding in Referral Situations.*—The funding restriction appears inequitable to many, as it enables the Council to use the ICC as a Chapter VII tool without providing even a portion of the resources for the ICC to carry out its functions.

It is also argued that, as a matter of law under the UN Charter, the Council cannot “preclude the Assembly from budgeting for ICC situations.”<sup>137</sup> By contrast, among P-5 governments there is an argument that ICC member states must have understood at the time of Rome Statute adoption that Council referrals could not *obligate* the Council to fund those cases.<sup>138</sup>

Ultimately, the realities of funding within the UN system take precedence over theory, and as seems always to be the case, the Court’s capacity to pursue investigations and prosecutions is stretched by a full docket involving investigations, hearings, motion practice, administration, and so forth. Every annual budget adopted by the Assembly of States Parties seems unlikely to support further serious referral cases. As argued elsewhere, “[f]uture referrals should seek to eliminate the offending funding paragraph and replace it either with nothing or with a more encouraging commitment of the Council to assist the Court in financing referral-related work.”<sup>139</sup>

*4. Eliminate Jurisdictional Restrictions.*—Limitations on jurisdiction undermine the reputation and credibility of the Court and are widely seen as political concessions to nonparties—in particular, Russia, China, and the United States—that do not recognize the ICC’s jurisdiction over their

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135. Press Release, Security Council, Security Council Press Statement on International Criminal Court Staff Detained in Libya, U.N. Press Release SC/10674-AFR/2405-L/3196 (June 15, 2012).

136. Rome Statute, *supra* note 47, art. 48, ¶ 3.

137. KAYE ET AL., *supra* note 74, at 21.

138. *Id.*

139. *Id.*

nationals.<sup>140</sup> These provisions respond to an unlikely hypothetical situation, and yet they generate considerable frustration among supporters of the Court.<sup>141</sup> The symbolic importance was captured by the South African Deputy Permanent Representative to the UN when he asked, “How can the Council begin to trust the Court and, consequently, expect others to trust it, when it is unwilling to subject nationals of its member countries to the scrutiny of the ICC?”<sup>142</sup>

5. *Work with Regional Bodies, Especially the African Union.*—The ICC’s ability to generate Council support will depend on the support of critical regional organizations as well. Much has been written about the African Union and the general problem, or phenomenon, of African focus by the ICC,<sup>143</sup> and we only pause here to note that a more positive approach by the African Union could be helpful in generating the support of other actors, especially China. Unfortunately, developments in 2016 seem to be militating against African Union support, as Kenya’s President Kenyatta, a former indictee of the Court, has been vigorously advocating for African Union member states to consider withdrawing from the Rome Statute.<sup>144</sup>

6. *Conduct Diplomacy in New York to Encourage Support for Council Improvements Related to the ICC.*—Early indications suggest that China and Russia may be reluctant to move forward on some of the more promising efforts to build the Council–Court relationship, even in the technical sphere of the Council’s informal Tribunal Working Group.<sup>145</sup> ICC supporters, especially the United Kingdom, France, and the United States, should work closely with the Chinese and Russian delegations to identify the concerns and develop ways to overcome them. This could mean a limited mandate for the working group at the outset, focused on technical

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140. See INT’L PEACE INST., *supra* note 50, at 3 (discussing the relationship between the UN Security Council and the ICC and the limitations of jurisdiction of the ICC).

141. See U.N. SCOR, 67th Session, 6849th mtg., *supra* note 61, at 9, 11–12, 16 (showing supporters of the ICC noting preferences for expansive jurisdiction which would include nationals and others (notably China, the United States, and Pakistan) arguing that some cases should be left to national jurisdiction).

142. *Id.* at 16–17.

143. See, e.g., Tendayi Achiume, *The African Union, the International Criminal Court, and the United Nations Security Council* 6–7 (Nov. 2012) (unpublished manuscript) (discussing the tensions between the African Union and the ICC and the perception the ICC is an “African Criminal Court” rather than an international court). See generally Charles C. Jalloh, Dapo Akande & Max du Plessis, *Assessing the African Union Concerns About Article 16 of the Rome Statute of the International Criminal Court*, 4 AFR. J. LEGAL STUD. 5 (2011) (assessing the African Union’s concerns regarding Article 16 of the Rome Statute).

144. Isaac Mugabi, *ICC: What Next for Africa and the Tribunal in Quest for Justice?*, DW (Feb. 2, 2016), <http://www.dw.com/en/icc-what-next-for-africa-and-the-tribunal-in-quest-for-justice/a-19020659> [https://perma.cc/F6NL-NBEA].

145. See KAYE ET AL., *supra* note 74, at 10–13 (chronicling China and Russia’s policies and reactions towards Council–Court relations).

exchange of information, and deferral of some of the recommended policy changes.

7. *Involve China and Russia in Unofficial Meetings Related to International Justice.*—The United Kingdom, France, and the United States have expressed relatively consistent support for the ICC in recent years and have engaged with the community of governments, NGOs, and scholars thinking through how to improve the institution and cooperation with it.<sup>146</sup> Chinese and Russian delegations have participated less regularly in discussions outside the Council or Assembly of States Parties.<sup>147</sup> ICC supporters should seek to involve Chinese and Russian counterparts in the efforts to build a constructive Council–Court relationship by including them in unofficial discussions. Neither government is a confirmed spoiler of the Court; each has accepted the referrals of situations to the ICC and joined in the Council resolutions expressing support for ICC activity in nonreferral situations.<sup>148</sup> Each said supportive things about the ICC’s work during the October 2012 open debate on the Court.<sup>149</sup> But, they have not sufficiently participated in the range of conversations about the relationship otherwise. An active approach to bring them into those discussions could go a long way.

8. *Build a Knowledge Base over the Long Term.*—Knowledgeable actors at the domestic and international levels should begin a long-term process of engaging foreign policy analysts on ICC issues. Sustainable Chinese and Russian support for a cooperative Council–Court relationship will require exchanges that go beyond legal scholars and involve security

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146. See *id.* at 9–10, 16 (discussing France and the United Kingdom’s support for the ICC and the United States’ better relationship with the ICC in recent years, as well as the important role NGOs play in the development of the ICC).

147. See UNIV. OF CAL. IRVINE SCH. OF LAW, THE BEIJING WORKSHOP ON THE UNITED NATIONS SECURITY COUNCIL AND THE INTERNATIONAL CRIMINAL COURT: SUMMARY OF DISCUSSIONS 2 (2014) (“Yet while the governments of Russia and China have remained non-party observers . . . of the activities of the ICC, until recently neither they nor Russian and Chinese academics and analysts have been actively engaged in international discussions about the Court and its relationship with the Council.”), <http://councilandcourt.org/files/2014/06/Beijing-Workshop-Proceedings.pdf> [<https://perma.cc/YY6L-ED6B>].

148. See, e.g., Joel Wuthnow, *China and the ICC*, DIPLOMAT (Dec. 7, 2012), <http://thediplomat.com/2012/12/china-and-the-icc/> [[perma.cc/56GR-TLD7](https://perma.cc/56GR-TLD7)] (noting, for example, China’s agreement to launch ICC tribunals for Rwanda and the former Yugoslavia in the 1990s, its acquiescence to a referral of Darfur in 2005, and its vote in 2011 to refer Libya’s Muammar Qaddafi); *The International Criminal Court Bares its Teeth*, ECONOMIST (May 12, 2011), <http://www.economist.com/node/18682044> [<https://perma.cc/9JHH-D3G2>] (noting, among other things, Russia’s acquiescence to various referrals).

149. See, e.g., U.N. SCOR, 67th Sess., 6849th mtg., *supra* note 61, at 12 (stating the ICC is “an integral part of the international system of the rule of law”); *id.* at 19–20 (calling for broader support for the ICC and expressing hope the ICC would become a “truly universal organ of international criminal justice”).

and policy analysts in government and academia. International criminal law experts in China and Russia, natural constituencies to support national engagement with the ICC, would benefit from a higher profile in policy-making circles. Court supporters could encourage this in a number of ways: engage them in building educational programs for nonlaw analysts in government (and, for China, Party) institutions; establish collaborations that involve domestic thinkers in addressing international justice issues; help academics and analysts take research trips to The Hague and to institutions in the United States and Europe; and fund internship opportunities for promising students.

9. *Identify Areas of Collaboration in International Justice.*—Chinese and Russian officials have expressed commitment to the principles of accountability and justice, and their delegations have repeatedly voted in favor of ICC-supportive resolutions at the Council.<sup>150</sup> These demonstrations of support should be advanced and nourished. Beyond the ICC, there are areas where Chinese engagement in particular could be especially useful, such as helping to build national jurisdictions (perhaps by involving Chinese help in infrastructure building).<sup>151</sup>

#### Conclusion

The International Criminal Court “represents one of the world’s most elaborate experiments in enforcing legal restrictions on violence.”<sup>152</sup> Although it suffers from many grave infirmities that have severely limited its reach and power, the ICC is nonetheless a major step forward in the long and arduous quest for justice at the international level. David Bosco’s *Rough Justice* ably documents the most recent twists and turns in that quest and details how, in his words, “powerful states and a potentially revolutionary court learned to get along.”<sup>153</sup>

For all its power and promise, the ICC functions in a larger framework of global governance. At the core of this framework rests the great powers. Without the strong support of those powers, the ICC will remain a niche player with much of its docket driven by external actors and factors and little ability to make a difference in the hardest cases. The Security Council is both the primary institutionalized forum for great power politics and the key interlocutor for the Court. Building deep support within the Security

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150. See KAYE ET AL., *supra* note 74, at 10 (stating that China and Russia have participated as observers in ICC meetings and have joined Council resolutions and statements supporting the ICC).

151. See DAVID A. KAYE, COUNCIL ON FOREIGN RELATIONS, JUSTICE BEYOND THE HAGUE: SUPPORTING THE PROSECUTION OF INTERNATIONAL CRIMES IN NATIONAL COURTS 28 (2011) (highlighting the importance of building infrastructure in developing the rule of law).

152. BOSCO, *supra* note 11, at 177.

153. *Id.* at 2.

Council will be essential to the Court's future. This will not be easy, especially since China, Russia, and the United States remain nonparties to the Court, with little prospect of change. Yet the Court has great potential as a tool to help the Council achieve its mandate "to promote the establishment and maintenance of international peace and security."<sup>154</sup> In the long run, a strong Council–Court relationship may prove impossible. But it is in the interest of both institutions to try very hard to achieve it.

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154. U.N. Charter art. 26.