BRIDGING THE DIVIDE BETWEEN THE ICC AND UN SECURITY COUNCIL

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ABSTRACT

Since its inception, the International Criminal Court has had a troubled relationship with the UN Security Council, which has only grown more fractious in recent years. The antipathy is serving to undermine and weaken both the power of the Council and the viability of the Court. What are the sources of this friction and what are the possible remedies? This Article seeks to answer these questions by analyzing the instances where the Security Council has cooperated or referred situations to the Court and those instances where at least one Permanent Member has vetoed or threatened to veto a resolution that would refer a situation or provide assistance to the Court. The Article then explores several proposals for surmounting the Council's immobility and improving the relationship between the two organizations to foster increased accountability and international peace and security.

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I. INTRODUCTION

At the conclusion of a diplomatic conference in June 1998, 120 states voted in favor of the Rome Statute creating a permanent International Criminal Court (ICC) to investigate and prosecute war crimes, crimes against humanity, and genocide.[1] The treaty entered into force in 2002 after receiving the requisite sixty ratifications.[2] Since its inception, the ICC has had a troubled relationship with the United Nations Security Council. Indeed, only two of the Security Council's Permanent Five (P5) members – France and the United Kingdom (U.K.) – have ratified the Rome Statute. The United States had participated in the negotiations that led to the

1. *See* Rome Statute of the International Criminal Court, July 17, 1998, UN Doc. A/Conf. 183/9, 2187 U.N.T.S. 9 [hereinafter Rome Statute].

2. *See* Rome Statute, at art. 126(1).

Rome Statute, then voted against it before signing the treaty under the Clinton Administration in 2000 and then un-signing the treaty under the Bush Administration in 2002 amidst the "Global War on Terror" (GWOT).[3] China also voted against the Rome Statute in 1998,[4] and although Russia had signed the treaty in 2000 and initially cooperated with the Court, it never ratified the treaty and withdrew its signature in 2016 after the ICC announced an investigation into Russia's actions in Crimea.[5] Thus, the relationship between the majority of the Council's permanent members and the Court has never been harmonious, but recent crises to international peace and security in Syria, Myanmar, and Yemen have significantly deepened tensions and exposed the costs of dysfunction.

What accounts for the unwillingness among the Security Council's permanent members towards working with the ICC to pursue justice for the world's worst atrocities? And what are the possible antidotes to this dysfunctional relationship? This Article seeks to answer these questions by examining the instances where the Security Council has cooperated or referred situations to the Court and several instances where at least one P5 member has vetoed or threatened to veto a resolution that would refer a situation to the Court or would provide assistance to the Court in the form of enforcing targeted sanctions against countries that refuse to comply with the Court's orders and arrest warrants. This Article begins by exploring the historic relationship between the Security Council and ICC, revealing the deepening tensions between the two institutions since 2012. Next, this Article addresses the problems created for both the Council and the Court due to the growing friction. Finally, the Article provides potential solutions and policy recommendations for improving the relationship to support increased accountability and cooperation to help resolve current challenges to international peace and security.

This Article argues that the Security Council's inability to muster the votes to respond to cases of mass atrocity or enforce the orders of the ICC serves to undermine both the legitimacy of the Council as an arbiter of international peace and security and the viability of the Court in pursuing accountability for atrocity crimes. Responsibility for the dysfunctional

3. *Q&A*: *The International Criminal Court and the United States*, HUM. RTS. WATCH (Sept. 20, 2020, 12:00 AM), https://www.hrw.org/news/2020/09/02/qa-international-criminal-court-and-united-states#.

4. *Id.*

5. Shaun Walker and Owen Bowcott, *Russia withdraws signature from international criminal court statute*, THE GUARDIAN (Nov. 16, 2016, 9:14 AM), https://www.theguardian.com/world/2016/nov/16/russia-withdraws-signature-from-international-criminal-court-statute.

relationship lies in both corners. On the one hand, the P3 (United States, China, and Russia) repeatedly veto or threaten to veto resolutions that would prevent or punish perpetrators for *jus cogens* violations, but on the other hand, the Court does itself no favors in bridging the political divide between the two organizations when the Prosecutor opens investigations *proprio motu* into situations affecting a P5 member, such as the investigation into alleged war crimes and crimes against humanity committed by U.S. service members and civilian operatives in Afghanistan.[6] This is not to suggest that the ICC should not investigate atrocities that implicate a P5 member or their allies, but that the Court should do so extra carefully. Allegations of such crimes committed by members of the P5, combined with the Security Council's recent vetoes of resolutions that would refer situations to the ICC or condemn and impose sanctions for non-compliance with ICC arrest warrants also serve to increase antipathy between the two organizations and further delay or deny accountability for some of the worst atrocity crimes committed in Syria, Yemen, Sudan, Myanmar and elsewhere. This Article examines the politics behind the Security Council-ICC divide and analyzes proposals for overcoming the chasm.

When this Article was about to go to press, the Independent Expert Review created by the ICC Assembly of States Parties issued its report on ways to strengthen the ICC and Rome Statute system.[7] It is notable that the Expert Report does not address ways to improve the ICC's relationship with the UN Security Council, which is the focus of this Article.

II. The Growing Tensions Between The Security Council and ICC

A. *The Golden Age of Accountability 1990s-2000s*

Against the backdrop of the shifting geopolitical global order following the end of the Cold War, intrastate conflicts proliferated in countries destabilized by the Soviet Union's collapse.[8] Armed conflicts between non-state actors and failing governments were a common scene in the 1990s.[9] Two conflicts in particular caught the attention of the Security Council: the breakup of Yugoslavia in 1990-1992 and the genocide in Rwanda in 1994. Coming just after the end of the Cold

6. *See* Situation in the Islamic Republic of Afghanistan, ICC-02/17, Int'l Crim. Ct., https://www.icc-cpi.int/afghanistan.

7. Independent Expert Review of the International Criminal Court and the Rome Statute System Final Report, Int'l Crim. Ct. (Sept. 30, 2020), https://asp.icc-cpi.int/iccdocs/asp_docs/ASP19/IER-Final-Report-ENG.pdf.

8. *See* Andrew Mack, *Human Security Report 2005: War and Peace in the 21st Century*, 80 Die Friedens-Warte 177, 180 (2005).

9. *Id.* at 177–80.

War, the Council's P5 members cooperated in unprecedented ways to stop these conflicts and pursue accountability for the commission of atrocity crimes.[10]

The wars in the former Yugoslavia, and especially the genocide in Srebrenica, led the Security Council to take steps to intervene in the armed conflict. In 1993, the Council created the International Criminal Tribunal for Yugoslavia (ICTY) to address the mass atrocities committed in the region.[11] Despite the antagonistic history between the United States and Soviet Union, the two permanent members cooperated,[12] or at least did not interfere with the investigation and creation of the ad-hoc tribunal.[13]

In order for a resolution to succeed in being adopted by the Security Council, it must receive an affirmative vote from nine out of the fifteen members of the Council and "[T]he concurrent votes of the permanent members"[14] – i.e., the P5 must vote in favor or abstain from voting since the "obvious result of the requirement for a 'concurrent vote' is the conferral of a veto to the P5."[15] As a consequence of the veto power, the preferences of P5 members for or against investigations of atrocities or referrals of situations to the ICC have become a central focus of the Security Council's work.[16] Once the Council adopts a resolution under Chapter VII initiating an atrocities investigation or referring a situation to the ICC or an ad-hoc tribunal, that resolution is legally binding and members must comply with it.[17] Resolution 827 establishing the ICTY was adopted unanimously with fourteen votes in favor and one abstention (China).[18] As noted below, China abstained from casting its vote based on a principled opposition to the creation of the tribunal.[19] The ICTY was the first international tribunal since the Nuremberg Trials that were established after WWII to address Nazi war crimes.[20]

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10. *See* CHRISTODOULOS KAOUTZANIS, THE UN SECURITY COUNCIL AND INTERNATIONAL CRIMINAL TRIBUNALS: PROCEDURE MATTERS 18 (Deen K. Chatterjee ed., 2020).

11. S.C. Res. 827 (May 25, 1993). For the negotiating record of the ICTY, see generally 2 VIRGINIA MORRIS AND MICHAEL SCHARF, AN INSIDER'S GUIDE TO THE INTERNATIONAL CRIMINAL TRIBUNAL FOR THE FORMER YUGOSLAVIA (1995).

12. By that time Russia had succeeded to the Soviet Union's seat on the Security Council.

13. *See* KAOUTZANIS, *supra* note 10.

14. U.N. Charter, art. 27.

15. KAOUTZANIS, *supra* note 10, at 21.

16. *Id.* at 22.

17. Devon Whittle, *The Limits of Legality and the United Nations Security Council: Applying the Extra-Legal Measures Model to Chapter VII Action*, 26 EUR. J. INT'L. L. 671, 671 (2015).

18. S.C. Res. 827 (May 25, 1993).

19. U.N. SCOR, 3217 mtg. at 6, 33, U.N. Doc. S/PV.3217 (May 25, 1993).

20. *See generally* MICHAEL P. SCHARF, BALKAN JUSTICE: THE STORY BEHIND THE FIRST INTERNATIONAL WAR CRIMES TRIAL SINCE NUREMBERG (1997).

Many initially viewed the creation of the ICTY as a propaganda ploy by Security Council members who were pressured by the media to do something about atrocities but were unwilling to take military action to stop them.[21] This critique seemed to be validated in the early years of the ICTY when NATO forces repeatedly declined to arrest indicted war criminals in areas of the former Yugoslavia in which it operated on the ground.[22] But over time, support for the Tribunal grew and ultimately the ICTY obtained custody over 102 of the indictees, including Serb leader Slobodan Milosevic and Bosnian Serb leader Radovan Karadzic.[23]

The creation of the International Criminal Tribunal for Rwanda (ICTR) required more diplomacy than its predecessor.[24] The genocide in Rwanda began less than a year after the creation of the ICTY.[25] Despite the Clinton Administration's hesitance to refer to the mass killings as "genocide," fearing that doing so would require the United States to act under the Genocide Convention,[26] the United States did not stand in the way of an atrocity investigation and creation of the ICTR. Several factors explain how the ICTR came into existence. First, the ICTY had already been established to address atrocity crimes in the former Yugoslavia, and the Security Council did not want to appear to favor justice in Europe over justice in Africa.[27] Second, the ambassadors for New Zealand and the Czech Republic, Colin Keating and Karel Kovanda, were willing to act as patron-diplomats for the cause of justice in Rwanda.[28] As will be argued later, the willingness of an ambassador to act as a patron-diplomat is an important factor in focusing the Security Council's attention on a situation that threatens international peace and security and demonstrating the need for justice. Third, after much debate about whether a Rwanda tribunal should be independent, as advocated by France and Russia, or an extension of the ICTY's mandate, as advocated by the United States, the Security Council finally

21. *Id.* at xv.

22. PAUL R. WILLIAMS AND MICHAEL P. SCHARF, PEACE WITH JUSTICE? WAR CRIMES AND ACCOUNTABILITY IN THE FORMER YUGOSLAVIA 216–22 (2002).

23. MICHAEL P. SCHARF & MELINA STERIO, THE LEGACY OF AD HOC TRIBUNALS IN INTERNATIONAL CRIMINAL LAW 357 (2019).

24. For the negotiating record of the ICTR, see generally 2 VIRGINIA MORRIS & MICHAEL SCHARF, THE INTERNATIONAL CRIMINAL TRIBUNAL FOR RWANDA (1998).

25. KAOUTZANIS, *supra* note 10, at 153.

26. Douglas Jehl, *Officials Told to Avoid Calling Rwanda Killings 'Genocide,'* N.Y. TIMES, A8 (Jun. 10, 1994), https://www.nytimes.com/1994/06/10/world/officials-told-to-avoid-calling-rwanda-killings-genocide.html.

27. *See* KAOUTZANIS, *supra* note 10, at 154.

28. *Id.*

settled on a compromise proposed by Ambassador Keating that the ICTR share a prosecutor and appellate chamber, but otherwise operate independently.[29] Resolution 955 established the International Criminal Tribunal for Rwanda (ICTR) with thirteen votes in favor, one abstention (China), and one opposed (Rwanda).[30] China's abstention stemmed from the position that China was opposed to the principle of the Security Council using its Chapter VII powers to create tribunals, a position it had articulated a year earlier during the creation of the ICTY.[31] Rwanda's vote opposing the creation of the ICTR stemmed from its insistence that the tribunal be permitted to inflict the death penalty.[32]

B. *Tribunal Fatigue and the GWOT*

The ICTY and ICTR set the stage for greater Security Council involvement in exercising its power to pursue justice against perpetrators of atrocity crimes. It was not long, however, before the Security Council members began viewing the creation of tribunals as costly and an impediment to the Council's other work in securing and stabilizing countries involved in armed conflicts and maintaining peace in fragile countries.[33] Two factors appear to have pushed the Security Council members towards the creation of hybrid tribunals. First, due to ongoing intrastate conflicts, there was increasing demand for accountability mechanisms without the time or resources available to establish additional ad-hoc tribunals. Second, the Bush Administration's "Global War on Terror" dampened the United States and its NATO allies' appetite for establishing international tribunals that could sit in judgment of NATO members for their actions in the GWOT.

1. Hybrid Courts

Two courts were established during this period that reflect the hybrid court model: the Extraordinary Chambers in the Courts of Cambodia (ECCC) and the Special Court for Sierra Leone (SCSL).

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29. *Id.* at 155.

30. S.C. Res. 955 ¶ 1 (Nov. 8, 1994).

31. U.N. SCOR, 3453 mtg. at 3, U.N. Doc. S/PV.3453 (Nov. 8, 1994); U.N. SCOR, 3217 mtg. at 33, U.N. Doc. S/PV.3217 (May 25, 1993).

32. KAOUTZANIS, *supra* note 10, at 155. Paradoxically, the absence of a death penalty for the worst crimes imaginable in the ICTR Statute led Rwanda to do away with the death penalty for lesser crimes in its Criminal Code.

33. Richard Dicker & Elise Keppler, *Beyond the Hague: The Challenges of International Justice*, in HUMAN RIGHTS WATCH'S WORLD REPORT 2004 194, 200 (Jan. 26, 2004), https://www.hrw.org/news/2004/01/26/beyond-hague-challenges-international-justice.

In 1999, U.N. Secretary General Kofi Annan submitted to the Security Council a report from the Group of Experts on Cambodia to determine whether and how to address the human rights violations committed by the Khmer Rouge in Cambodia between 1975-1979.[34] After much heated debate, U.S. Senator John Kerry suggested a mixed jurisdiction tribunal be established to address the atrocities committed by the Khmer Rouge in Cambodia.[35] The ECCC was thus established to investigate and prosecute leaders of the Khmer Rouge for committing genocide and crimes against humanity.[36] As a hybrid court, the ECCC was administratively and financially separate from the Security Council.[37]

A similar compromise was reached a year later to address atrocities committed in Sierra Leone. After more than a decade of armed conflict and the failure of the Lomé Peace Accords to restore peace and stability in Sierra Leone, the Security Council adopted Resolution 1315 requesting that the "Secretary-General … negotiate an agreement with the Government of Sierra Leone to create an independent special court . . . ."[38] The SCSL was thus established as a *sui generis* treaty-based court with a hybrid domestic-international jurisdiction.[39] Initially, U.S. Ambassador Richard Holbrooke advocated for an independent ad-hoc tribunal for Sierra Leone, similar to the ICTY/R, but the United Kingdom, France, and Russia opposed this model, preferring instead an internationally-supported domestic court.[40] The United Kingdom had experienced tribunal fatigue from financing and supporting the ICTY/R for the previous six years without any concrete results emerging from either tribunal in that time period, a criticism that Russia had leveled at the courts.[41] After two months of negotiations between the U.S. and U.K. ambassadors, Holbrooke proposed a hybrid court model with mixed international and

34. Ambassador Thomas Hammarberg, *How the Khmer Rouge Tribunal Was Agreed: Discussions Between the Cambodian Government and the UN, Documentation Center of Cambodia*, DC-CAM, http://d.dccam.org/Tribunal/Analysis/How_Khmer_Rouge_Tribunal.htm (last visited Jan. 26, 2022).

35. David J. Scheffer, *A Personal History of the War Crimes Tribunals*, in ALL THE MISSING SOULS 297, 383 (2013).

36. G.A. Res. 57/228 (Dec. 18, 2002).

37. *See generally* Hans Corell, *Agreement Between the United Nations and the Royal Government of Cambodia Concerning the Prosecution Under Cambodian Law of Crimes Committed During the Period of Democratic Kampuchea*, U.N. AUDIOVISUAL LIBR. ON INT'L L. (June 6, 2003), https://legal.un.org/avl/ha/abunac/abunac.html.

38. S.C. Res. 1315, at ¶ 1 (Aug. 14, 2000).

39. U.N. Secretary General, *Report of the Secretary-General on the Establishment of a Special Court for Sierra Leone*, U.N. Doc. S/2000/915 (Oct. 4, 2000).

40. KAOUTZANIS, *supra* note 10, at 156.

41. David J. Scheffer, A Personal History of the War Crimes Tribunals, in ALL THE MISSING SOULS 297, 327-28 (2013).

domestic jurisdiction as a compromise to bring the British on board.[42] The hybrid model, which remained outside the Council both administratively and financially, satisfied the British, and the SCSL was established.[43]

2. Global War on Terror (GWOT)

The Bush Administration's GWOT also factored into the motivation for shifting away from establishing international tribunals. After Osama Bin Laden and the Taliban claimed responsibility for the terrorist attacks on American soil on 9/11, the Bush Administration moved swiftly to seek out terrorists anywhere in the world.[44] It invaded Afghanistan and later Iraq, created "black sites" across the globe in which the United States could use extraordinary means to interrogate suspects, and began a policy of targeted killing using Predator drones.[45] In doing so, the Bush Administration was setting itself and its allies up for potential criminal liability for war crimes and crimes against humanity committed in Afghanistan, Iraq, and other countries with a nexus to these armed conflicts,[46] as further discussed below.

The GWOT also highlighted a growing tension between the United States and France regarding France's NATO allegiance and disagreement with the Bush Administration's decision to invade Iraq.[47] As permanent members of the Security Council, any tensions between France and the United States could easily be reflected in Council decisions and deal-making. Finally, the GWOT represented an end to America's moral authority as an advocate for human rights and justice globally – an erosion of soft power that the United States has yet to overcome in the two decades since the 9/11 attacks. Undoubtedly, the US's actions

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42. KAOUTZANIS, *supra* note 10, at 158.

43. *Id.*

44. The Global War on Terrorism: The First 100 Days, THE WHITE HOUSE (Dec. 2001), https://georgewbush-whitehouse.archives.gov/news/releases/2001/12/100dayreport.html.

45. Situation in the Islamic Republic of Afghanistan, ICC-02/17, Request for authorisation of an investigation pursuant to article 15, ¶¶ 68, 201, 218 (Nov. 20, 2017), https://www.icc-cpi.int/CourtRecords/CR2017_06891.PDF; Ben Emmerson (Special Rapporteur on the Promotion and Protection of Human Rights and Fundamental Freedoms While Countering Terrorism), Third Rep. on the Promotion and Protection of Human Rights and Fundamental Freedoms While Countering Terrorism, ¶¶ 37, 40–46, U.N. Doc. A/HRC/25/59 (Feb. 28, 2014), http://www.justsecurity.org/wp-content/uploads/2014/02/Special-Rapporteur-Rapporteur-Emmerson-Drones-2014.pdf.

46. *See* Situation in the Islamic Republic of Afghanistan, ICC-02/17, Judgment on the Appeal Against the Decision on the Authorisation of an Investigation Into the Situation in the Islamic Republic of Afghanistan, ¶ 79 (Mar. 5, 2020).

47. *France and Germany Unite Against Iraq War*, THE GUARDIAN (Jan. 22, 2003, 12:45 PM), https://www.theguardian.com/world/2003/jan/22/germany.france.

in the GWOT greatly undermined its position on the Security Council as an arbiter of international peace and accountability.

C. *The Negotiation of the Rome Statute*

At the Rome Diplomatic Conference in 1998, tension erupted between the United States, which sought a Security Council-controlled Court, and most of the other countries of the world which felt no country's citizens who are accused of serious war crimes or genocide should be exempt from the jurisdiction of a permanent international criminal court.[48] The so-called "like-minded countries" were worried that a Security Council-controlled court would shield from criminal liability situations involving the P5 and their allies. These countries were concerned, moreover, about the possibility that the Security Council would once again slide into the state of paralysis that characterized the Cold War years, rendering a Security Council-controlled court a nullity.[49]

Even before the GWOT, the justification for the American position was that, as the world's greatest military and economic power, more than any other country the United States was expected to intervene to halt humanitarian catastrophes around the world.[50] The United States' unique position rendered U.S. personnel uniquely vulnerable to the potential jurisdiction of an international criminal court. In addition, the U.S. Administration feared that an independent ICC Prosecutor would turn out to be, in the words of one U.S. official, an "international Ken Starr" (the name of the Independent Counsel who investigated President Clinton leading to his impeachment) who would bedevil U.S. military personnel and officials and frustrate U.S. foreign policy across the globe.[51]

Many of the countries at Rome were, in fact, sympathetic to the United States' concerns about having adequate checks and balances concerning the power of the ICC prosecutor, and there was a real effort to meet the United States halfway.[52] Thus, what emerged from Rome was a Court with a two-track system of jurisdiction.[53] Track one would constitute situations referred to the Court by the Security Council. This track would create binding obligations on all states to comply with orders

48. Michael P. Scharf, *The Politics Behind U.S. Opposition to the International Criminal Court*, 6 BROWN J. WORLD AFFAIRS 97, 100 (1999).

49. *Id.*

50. *Id.*

51. *Id.*

52. Michael P. Scharf, *The Politics Behind U.S. Opposition to the International Criminal Court*, 6 BROWN J. WORLD AFFAIRS 97, 100 (1999).

53. *Id.*

for evidence or the surrender of indicted persons under Chapter VII of the UN Charter. This track could be enforced by Security Council-imposed embargoes, the freezing of assets of leaders and their supporters, and/or by authorizing the use of force. It is this track that the United States favored and would be likely to utilize in the event of a future Bosnia or Rwanda (as it eventually did in the cases of Libya and Darfur).[54]

The second track would constitute situations referred to the Court by individual countries or the ICC Prosecutor (the latter known as *proprio motu* referrals). This track would only apply to situations in the territory of a state party to the Court's Rome Statute or crimes committed by a national of a state party. This track would have no built-in process for enforcement, but rather would rely on the good-faith cooperation of the parties to the Court's statute. Most of the delegates in Rome recognized that the real power was in the first track, assuming that the Security Council would have the political will to refer situations to the Court and help enforce the Court's orders. But the United States still demanded protection from the second track of the Court's jurisdiction in recognition that even a criminal charge against a U.S. official by the Court could have a damaging effect on U.S. foreign policy. In order to mollify U.S. concerns, several protective mechanisms were incorporated into the Court's statute during the negotiations, as described below.[55]

First, the Court's jurisdiction under the second track would be based on a concept known as "complementarity," which meant that the Court would be a last resort which comes into play only when domestic authorities are unable or unwilling to prosecute.[56] At the insistence of the United States, the delegates at Rome added teeth to the concept of complementarity by providing, in Article 18 of the Court's statute, that the Prosecutor has to notify states with a prosecutive interest in a case of his or her intention to commence an investigation.[57] If, within one month of notification, such a state informs the Court that it is investigating the matter, the Prosecutor must defer to the state's investigation, unless it can convince the Pre-Trial Chamber that the investigation is a sham. The decision of the Pre-Trial Chamber is subject to interlocutory appeal to the Appeals Chamber.[58]

Second, Article 8 of the Court's statute specifies that the Court would have jurisdiction only over "serious" war crimes that represent a "policy or

54. *Id.* at 100–01.

55. *See generally* Rome Statute, *supra* note 1.

56. *See* Rome Statute, *supra* note 1, at Preamble.

57. Rome Statute, *supra* note 1, at art. 18.

58. *Id.*

plan."[59] Thus, random acts of U.S. personnel involved in a foreign peacekeeping operation would not be subject to the Court's jurisdiction. Neither would one-time incidents, such as the July 3, 1988, accidental downing of the Iran airbus by the *USS Vincennes* or the August 20, 1998, U.S. attack on the Al-Shifa suspected chemical weapons facility in Sudan that turned out to be a pharmaceutical plant, be subject to ICC jurisdiction.[60]

Third, Article 15 of the Court's statute guards against spurious complaints by the ICC Prosecutor by requiring the approval of a three-judge Pre-Trial Chamber before the prosecution can launch an investigation. Further, the decision of the Chamber is subject to interlocutory appeal to the Appeals Chamber.[61]

Fourth, Article 16 of the Rome Statute allows the Security Council to postpone an investigation or case for up to twelve months, on a renewable basis.[62] While this does not amount to the individual veto the United States had sought, this does give the United States and the other members of the Security Council the possibility of a collective veto over the Court.

In sum, the United States delegation took an aggressive approach in Rome and obtained a number of protections, substantially weakening the ICC in the process and setting the stage for the dysfunction addressed in this article. As Ambassador David Scheffer, the head of the U.S. delegation to the Rome Diplomatic Conference, reported to the Senate Foreign Relations Committee after the conference: "[T]he U.S. delegation certainly reduced exposure to unwarranted prosecutions by the international court through our successful efforts to build into the treaty a range of safeguards that will benefit not only us but also our friends and allies."[63] These protections proved sufficient for other major powers including the United Kingdom and France that joined 118 other countries in voting in favor of the Rome Statute.[64] But without what would amount to an iron-clad veto of jurisdiction over U.S. personnel and officials, the United States felt compelled to join China,

59. Rome Statute, *supra* note 1, at art. 8.

60. James Pasley, *Inside the US Navy's Mistaken Shooting of Iran Air Flight 655, Which Killed 290 People*, BUS. INSIDER: AUSTL. (Jan. 10, 2020), https://www.businessinsider.com.au/iran-air-flight-655-us-navy-shot-down-1988-photos-2020-1?r=US&IR=T; Seymour M. Hersh, *The Missiles of August*, NEW YORKER (Oct. 4, 1998), https://www.newyorker.com/magazine/1998/10/12/the-missiles-of-august.

61. Rome Statute, *supra* note 1, at art. 18(4).

62. Rome Statute, *supra* note 1, at art. 16.

63. *Is a U.N. International Criminal Court in the U.S. National Interest?: Hearing Before the Subcomm. on Int'l Operations of the S. Foreign Rel. Comm.*, 105th Cong. 9 (1998) (statement of Hon. David Scheffer, Ambassador-at-Large for War Crimes Issues).

64. *Id.*

Libya, Iraq, Israel, Qatar and Yemen as the only seven countries voting in opposition to the Rome Statute.

In the waning days of his presidency, Bill Clinton signed the Rome Statute, setting the stage for its eventual ratification which would require the support of two-thirds of the Senate.[65] The Republican-controlled Congress responded by promulgating the "American Servicemembers' Protection Act," which newly elected President George Bush promptly signed into law. The Act prohibited any U.S. Government cooperation with the ICC, cut off U.S. military assistance to any country that has ratified the ICC Treaty, required that U.S. military personnel must be immunized from ICC jurisdiction before the United States participates in any UN peacekeeping operation, and authorized the president to use all means necessary to release any U.S. or allied personnel detained on behalf of the Court.[66] This was not the start of a productive relationship.

D. *The Early Years of the ICC*

Once the Rome Statute entered into force in 2002, there was no legal need for the Security Council to create more ad-hoc or hybrid tribunals. Even in situations where the ICC otherwise lacks personal jurisdiction over individuals alleged to have committed crimes within the *ratione materiae* jurisdiction of the Court because of non-ratification of the treaty, the ICC can still acquire jurisdiction if the Security Council refers the situation to the Office of the Prosecutor (OTP) in accordance with the Council's powers under Article 13(b) of the Rome Statute.[67] While the majority of situations investigated by the ICC have come from state referrals under the complementarity principle of the Rome Statute,[68] at least four situations have arisen before the Security Council, necessitating a Council referral to the Court for jurisdiction.[69]

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65. Luke A. McLaurin, *Can the President "Unsign" a Treaty? A Constitutional Inquiry*, 84 WASH. U. L. REV. 1941, 1941, 1949 (2006), https://openscholarship.wustl.edu/law_lawreview/vol84/iss7/9.

66. American Service-Members' Protection Act § 2004, 22 U.S.C. § 7423 (2002), https://www.govinfo.gov/content/pkg/STATUTE-116/pdf/STATUTE-116-Pg820.pdf#page=1.

67. Rome Statute, *supra* note 1, at art. 13(b).

68. Rome Statute, *supra* note 1, at art. 17; s*ee also* Xabier Agirre, Antonio Cassese, Rolf Einar Fife, Håkan Friman, Christopher K. Hall, John T. Holmes, Jann Kleffner, Hector Olasolo, Norul H. Rashid, Darryl Robinson, Elizabeth Wilmshurst & Andreas Zimmermann, Informal Expert Paper: *The Principle of Complementarity in Practice*, Int'l Crim. Ct.: Off. of the Prosecutor (2003), https://www.icc-cpi.int/nr/rdonlyres/20bb4494-70f9-4698-8e30-907f631453ed/281984/complementarity.pdf.

69. *See* Jared Genser, The United Nations Security Council's Implementation of the Responsibility to Protect: A Review of Past Interventions and Recommendations for Improvement, 18 Chi. J. Int'l L. 419 (2018); *see also* JENNIFER TRAHAN, EXISTING LEGAL LIMITS TO SECURITY COUNCIL VETO POWER IN THE FACE OF ATROCITY CRIMES 274–82, 337–40 (2020).

These include Darfur and Libya, where the Security Council referred the situations to the OTP, which are addressed in this section, and Syria and Myanmar where members of the P5 vetoed resolutions that would have referred the situations to the OTP, which will be addressed in the next section. These two sections seek to explain some of the reasons why the P5 cooperated on referring the Darfur and Libya situations to the Court, while the veto was used more recently in Syria and Myanmar.

1. The Darfur Situation

In March 2005, the Security Council adopted Resolution 1593, which referred the situation in Darfur to the ICC.[70] The Security Council had received news of atrocities being committed in Darfur and elsewhere in Sudan since 2003,[71] which included the systematic killings of Fur, Masalit, and Zaghawa tribes by the Khartoum-supported Janjaweed. Despite these reports and the recommendations of the independent inquiry to refer the situation to the ICC, the Security Council did not take action until 2005.[72] Part of the reason for the Security Council's inaction on seeking accountability in Darfur stemmed from the United States' opposition to and hesitance to cooperate with the ICC. The Bush Administration, concerned about the prospect of an ICC investigation into the US's wars in Afghanistan and Iraq and counter-terrorism activities in other countries, had entered into bilateral immunity Article 98 agreements (BIAs) with several countries to protect U.S. nationals from coming under the Court's jurisdiction.[73] As mentioned above, the United States had also enacted the American Servicemembers' Protection Act in Congress, prohibiting U.S. funding from going to the ICC and permitting the United States to invade The Hague if a U.S. citizen was brought to the ICC for trial.[74] Without U.S. support, or at least an

70. S.C. Res. 1593 (Mar. 19, 2005).

71. U.N. Secretary-General, Rep. of the Sec'y-Gen. on the Sudan pursuant to para. 6, 13 and 16 of S. C. Res. 1556 (2004), para. 15 of S. C. Res. 1564 (2004) and para. 17 of S. C. Res. 1574 (2004), U.N. Doc, S/2005/68 (Feb. 4, 2005).

72. *See* S.C. Res. 1593 (Mar. 19, 2005).

73. Robert C. Johansen, *The Impact of U.S. Policy toward the International Criminal Court on the Present Genocide, War Crimes, and Crimes against Humanity*, 28 HUM. RTS. Q. 301, 311 (2006); *see* John R. Bolton, American Justice and the International Criminal Court, Remarks at the American Enterprise Institute (Nov. 3, 2003), https://2001-2009.state.gov/t/us/rm/25818.htm (claiming "Our ultimate goal is to conclude Article 98 agreements with every country in the world, regardless of whether they are a signatory or Party to the ICC, or regardless of whether they intend to be in the future."); *see generally* Judith Kelley, *Who Keeps International Commitments and Why? The International Criminal Court and Bilateral Nonsurrender Agreements*, 101 AM. POL. SCI. REV. 573–89 (2003).

74. American Service-Members' Protection Act of 2002, 22 U.S.C. §§ 7421–33 (2006).

agreement not to exercise its veto power, a resolution to refer the situation to the ICC could not succeed.

Resolution 1593 only succeeded after significant negotiations between France – a strong supporter of the ICC from the beginning – and the United States, which had originally proposed that the ICTR mandate be expanded to include crimes committed in Darfur.[75] The diplomatic relationship between France and the United States had been strained since 2003 when France opposed the U.S. and NATO invasion of Iraq, leading to institutional paralysis on the Council.[76] But France felt emboldened that it could achieve a deal with the United States not to veto a resolution referring the situation to the ICC, in part because in 2005, the Security Council consisted of nine members that were state parties to the Rome Statute, the so-called "ICC-9,"[77] which formed an unofficial advocacy group on the Darfur referral.[78] Further, France knew that the United States would have difficulty exercising its veto on the matter when it had already labeled the actions in Darfur as genocide.[79] The United States finally agreed to cooperate when France included in the language of the resolution the United States' proposal that borrowed language from Resolution 1497,[80] which had authorized a peacekeeping mission in Liberia, that exempted citizens of non-ICC member states from the Court's jurisdiction.[81]

At 11:55 p.m. on March 31, 2005, Resolution 1593 passed with eleven votes in favor, including eight of the ICC-9, and four abstentions: the United States, Russia, China, and Brazil (which abstained because of its position in the presidency of the Council).[82] Interestingly, despite China's long-held principled opposition to the Security Council referring situations to international courts and its oil relationship with Sudan, China did not exercise its veto over the Darfur referral. This is especially intriguing because China had threatened to veto Resolution 1769, which pertained to UNAMID's peacekeeping mandate, and five other resolutions that would have imposed sanctions on Sudan's

75. *See* KAOUTZANIS, *supra* note 10, at 160.

76. *Id.*

77. The ICC-9 included Argentina, Brazil, Denmark, France, Greece, Benin, Romania, Tanzania, and the United Kingdom.

78. REBECCA HAMILTON, FIGHTING FOR DARFUR 59 (2011).

79. *Id.* at 62.

80. S.C. Res. 1497 (Aug. 1, 2003).

81. *See* KAOUTZANIS, *supra* note 10, at 161.

82. Press Release, Security Council Refers Situation in Darfur, Sudan, to Prosecutor of International Criminal Court, U.N. (Mar. 31, 2005), https://www.un.org/press/en/2005/sc8351.doc.htm.

government in Khartoum.[83] And more recently, China has blocked attempts by the Security Council to follow-up and issue presidential statements about the non-compliance of the arrest warrant of Omar al-Bashir.[84]

2. The Libya Situation

The Security Council's response to Libya's civil war was much quicker than its response to the situation in Darfur. Civil unrest emerged in Benghazi on February 15, 2011, as part of the Arab Spring, and by February 22, a civil war had spread throughout the country.[85] On February 26, the Security Council imposed sanctions and an embargo on Libya and referred the situation for investigation to the ICC in Resolution 1970.[86]

Although the Security Council acted swiftly, the negotiations were not straightforward. France and the United Kingdom were eager to remove Qaddafi even if it required military intervention and approved of ICC intervention, while Russia opposed a NATO-led military intervention and was skeptical of referring the situation to the ICC.[87] Although China remained opposed to the ICC on the principle of sovereignty, it disapproved of Qaddafi's attacks on China's Africa policy, so China did not interfere with the referral.[88] And the United States, under the Obama Administration, was initially ambivalent about referring Libya to the ICC, but eventually changed course when three senior members of the Obama Administration favored the proposal: UN Ambassador Susan Rice, Senior Director for Multicultural Affairs and Human Rights at the National Security Council Samantha Power, and Secretary of State Hillary Clinton.[89] However, the United States' attitude of opposing the ICC had gradually shifted under the Obama Administration, and the United States' consent was easily attained by copying verbatim the language from the Darfur Resolution that prohibited the Court from acquiring jurisdiction over U.S. nationals.[90] The Darfur

83. *See* TRAHAN, *supra* note 69, at 312–30.

84. TRAHAN, *supra* note 69, at 337.

85. *Libya profile - Timeline*, BBC (Mar. 9, 2021), https://www.bbc.com/news/world-africa-13755445; Timeline: Libyan civil war (February 15 – October 20, 2011), Globalnews (Oct. 20, 2011), https://globalnews.ca/news/168180/timeline-libyan-civil-war-february-15-october-20-2011/.

86. S.C. Res. 1970 (Feb. 26, 2011).

87. Luis Moreno-Ocampo, *The Gaddafi Case* (Sept. 2013) (unpublished manuscript) (on file with author).

88. KAOUTZANIS, *supra* note 10, at 164.

89. *See, e.g.*, Bob Dreyfuss, *Obama's Women Advisors Pushed War Against Libya*, THE NATION (Mar. 19, 2011), https://www.thenation.com/article/archive/obamas-women-advisers-pushed-war-against-libya/.

90. KAOUTZANIS, *supra* note 10, at 165.

precedent also satisfied the Russians and Chinese, and Resolution 1970 passed unanimously with all fifteen Security Council members voting in favor of the Resolution.[91] The Libya referral would prove to be the last time the Security Council cooperated in referring a situation to the ICC.

E. *The Ebb Tide of Accountability 2012-2020*

Although Security Council cooperation on decisions to refer atrocity crimes to international tribunals or the ICC has proved challenging as the situations above reveal, the early days of international criminal justice seem sanguine by comparison to the institutional paralysis of the past eight years. Several factors help explain the reasons why the Security Council has ceased cooperating with the ICC on international justice. First, global politics have veered away from diplomacy towards an age of "strongman" politics, particularly in the United States with the election of President Donald Trump in 2016. Second, the ICC has undergone powerful propaganda wars in the past decade that left a lasting impact on the international community's perception of the Court. Two situations in particular have left a stain on the Court's reputation: the Kenya deferral and the OTP's *proprio motu* investigation into the Afghanistan situation. Additionally, several state parties to the Rome Statute have failed to cooperate with the ICC's arrest warrants, undermining the ability of the Court to exercise its jurisdiction over indicted individuals.[92] Finally, recent humanitarian crises in Syria, Myanmar, and Yemen have come up against vetoes or the threat of vetoes at the Security Council, as well as complete disinterest in Security Council action altogether, as is the case in Yemen. This section unpacks each of these challenges to Security Council cooperation.

1. Strongman Politics

A significant rise in nationalism throughout the world may help explain why the Security Council has not been able to cooperate as it has in years past. Former Chief Prosecutor of the Special Court for Sierra Leone, David Crane, suggests that global politics have been taken captive by "strongman" politics.[93] Political strongmen, according to Crane, have belittled the rule of law and called into question the

91. S.C. Res. 1970, *supra* note 86.

92. *75 Trips to 22 Countries in 7 Years: An Indicted War Criminal's Travels*, NUBA REPORTS (Mar. 7, 2016), https://nubareports.org/bashir-travels/.

93. David Crane, *The Third Wave – Accountability for International Crimes in an Age of Extremes*, 52 CASE W. RES. J. INT'L L. 407, 412.

legitimacy of the UN.[94] For example, although the United States has never been a supporter of the ICC, even under the Bush Administration the United States was not as openly hostile towards the ICC as it has been under the Trump Administration.[95] Trump's National Security Advisor, John Bolton, repeatedly criticized the ICC and rejected the ICC's jurisdiction over U.S. nationals in the Afghanistan situation.[96] U.S. Secretary of State Mike Pompeo also rebuked the Court for authorizing the Afghanistan investigation, describing it as a "truly breathtaking action by an unaccountable political institution, masquerading as a legal body."[97] But the United States is not the only member of the Security Council that has been inflicted by strongman politics. Russia's President, Vladimir Putin, continues to pursue a nationalist agenda and ever more flagrantly ignores international law. For example, Russia unlawfully invaded and annexed Crimea in 2016 in violation of the UN Charter and state sovereignty.[98] Russia also meddled in the 2016 U.S. general election to influence its outcome.[99] These shifts towards nationalist politics, and the growing rift between the United States and Russia, help explain why these Security Council members are less likely to cooperate with one another and are less likely to support and more likely to veto any proposal that would give the ICC jurisdiction over a situation that affects their interests.

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94. *Id.*

95. John B. Bellinger, III, *The International Court and the Trump Administration*, LAWFARE BLOG (Mar. 27, 2018, 6:42 PM), https://www.lawfareblog.com/international-criminal-court-and-trump-administration; *75 Trips to 22 Countries in 7 Years: An Indicted War Criminal's Travels*, NUBA REPORTS (Mar. 7, 2016), https://nubareports.org/bashir-travels/; Elizabeth Evenson, *Donald Trump's Attack on the ICC Shows His Contempt for the Global Rule of Law*, HUM. RTS. WATCH (Jul. 6, 2020, 8:04 AM), https://www.hrw.org/news/2020/07/06/donald-trumps-attack-icc-shows-his-contempt-global-rule-law.

96. *See, e.g.*, *Bolton's Remarks on the International Criminal Court*, JUST SECURITY (Sept. 10, 2018), https://www.justsecurity.org/60674/national-security-adviser-john-bolton-remarks-international-criminal-court/.

97. Press Release, Michael R. Pompeo, Secretary of State, ICC Decision on Afghanistan, U.S. MISSION TO INT'L ORG. IN GENEVA (Mar. 5, 2020), https://geneva.usmission.gov/2020/03/05/icc-decision-on-afghanistan/.

98. Thomas Grant, *Russia's Invasion of Ukraine: What does International Law Have to Say?*, LAWFARE BLOG (Aug. 25, 2015, 7:45 AM), https://www.lawfareblog.com/russias-invasion-ukraine-what-does-international-law-have-say.

99. Dustin Volz & Alan Cullison, *'Putin Has Won': Mueller Report Details the Ways Russia Interfered in the 2016 Election*, WALL ST. J. (Apr. 19, 2019, 5:30 AM), https://www.wsj.com/articles/putin-has-won-mueller-report-details-the-ways-russia-interfered-in-the-2016-election-11555666201.

2. Propaganda Wars

In addition to cooling relations on the Security Council, the ICC has been dealing with a crisis of legitimacy of its own in the form of "propaganda wars."[100] The nature of the ICC means that its existence depends upon state support and public legitimacy, without which, it cannot complete its mandate.[101] It is therefore highly susceptible to propaganda attacks.[102] Two recent ICC situations are particularly problematic for the Court: Kenya and Afghanistan.

The Kenya situation was the first ICC investigation to be initiated *proprio motu*,[103] which is part of the reason why it has been so problematic for the Court. Shortly after Prosecutor Luis Moreno Ocampo initiated the investigation under Article 15 of the Rome Statute,[104] Kenya's government challenged the admissibility on the grounds of complementarity.[105] Prosecutor Ocampo charged Kenya's President Uhuru Kenyatta with five counts of crimes against humanity.[106] Ironically, prior to the charges, Kenyatta had been a strong supporter of the Court, but his public support for the Court waned after the indictment.[107] Kenyatta and his co-defendant, Kenya's Deputy President William Ruto, successfully politicized the ICC's charges against them, insisting that the ICC was a "neocolonialist institution biased against Africa and improperly intruding on Kenyan sovereignty," and painting themselves as "victims of Western imperialism."[108] The African-bias claims were widely accepted, and the lack of cooperation from Kenya's government, combined with anti-Court propaganda ultimately led the Security Council to

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100. *See generally* Sara L. Ochs, *Propaganda Warfare on the International Criminal Court*, 42 MICH. J. INT'L L. 581 (2021).

101. *Id.* at 583.

102. *Id.*

103. Simeon P. Sungi, *The Kenyan Cases and the Future of the International Criminal Court's Prosecutorial Policies*, 2 AFR. J. INT'L CRIM. JUST. 153, 153 (2015).

104. Rome Statute, *supra* note 1, at art. 15; Yvonne M. Dutton, *Enforcing the Rome Statute: Evidence of (Non) Compliance from Kenya*, 26 IND. INT'L & COMP. L. REV. 7, 12 (2016).

105. Christopher Totten, Hina Asghar & Ayomipo Ojutalayo, *The ICC Kenya Case: Implications and Impact for Propio Motu and Complementarity*, 13 WASH. U. GLOB. STUD. L. REV. 699, 700 (2014).

106. *Case Information Sheet: The Prosecutor v. Uhuru Muigai Kenyatta*, INT'L CRIM. CT. (Mar. 13, 2015), https://www.icc-cpi.int/CaseInformationSheets/KenyattaEng.pdf.

107. Samuel M. Makinda, *Kenya, Uhuru Kenyatta and Politicising the International Criminal Court*, THE CONVERSATION (May 30, 2013), https://theconversation.com/kenya-uhuru-kenyatta-and-politicising-the-international-criminal-court-14583; James Verini, *The Prosecutor and the President*, N.Y. TIMES (June 22, 2016), https://www.nytimes.com/2016/06/26/magazine/international-criminal-court-moreno-ocampo-the-prosecutor-and-the-president.html?smid=tw-share&_r=2.

108. Yvonne M. Dutton, *Bridging the Legitimacy Divide: The International Criminal Court's Domestic Perception Challenge*, 56 COLUM. J. TRANSNAT'L L. 71, 109–10 (2017).

exercise its power under Article 16 of the Rome Statute to defer the investigation for one year due to a threat to international peace and security.[109] In addition to Kenyatta and Ruto's attacks on the Court, the Kenyan government refused to cooperate with the Court's orders, leading Prosecutor Fatou Bensouda to unsuccessfully petition the Trial Chamber to find that Kenya had violated Article 87 of the Rome Statute.[110] Bensouda also described the Kenyan government's interference with victims and witnesses as "unprecedented."[111] Due to the refusal of two key witnesses to cooperate with the Court in Kenyatta's case, Prosecutor Bensouda requested an indefinite adjournment due to insufficient evidence in October 2014, but the Trial Chamber rejected the request and ordered Bensouda to withdraw the charges against Kenyatta,[112] which she did on December 5, 2014.[113] The dismissal of the charges was a major defeat for the ICC and a reflection of a loss of legitimacy among State Parties, particularly among African States.

Despite the Kenya situation setback, Prosecutor Bensouda pursued another *proprio motu* investigation into war crimes and crimes against humanity committed by all sides during the war in Afghanistan.[114] Unlike Kenya, the United States has never supported the ICC, and has never been a state party to the Rome Statute.[115] Given the at-times hostile relationship between the United States and the Court, it is unsurprising that the official U.S. response to the Court's investigation into the Afghanistan situation described above has been a major source of contention. Though it is too early to know whether the ICC will succeed in bringing U.S. nationals before the Court who may have allegedly committed war crimes or crimes against humanity in Afghanistan or in the territory of state parties with a "nexus" to the armed conflict, the Appeals Chamber has permitted the OTP to

109. *See* Rome Statute, *supra* note 1, at art. 16.

110. Prosecutor v. Kenyatta, ICC-01/09-02/11, Decision on Prosecution's Application for Finding of Non-Compliance under Article 87(7) of the Statute, ¶ 67, (Dec. 3, 2014), https://www.icc-cpi.int/CourtRecords/CR2014_09899.PDF.

111. Press Statement, Fatou Bensouda, Prosecutor of the Int'l Crim. Court, *Statement on the status of the Government of Kenya's cooperation with the Prosecution's investigations in the Kenyatta case*, INT'L CRIM. CT. (Dec. 4, 2014), https://www.icc-cpi.int/Pages/item.aspx?name=otp-stat-04-12-2014.

112. Prosecutor v. Kenyajta, ICC-01/09-02/11, Decision on Prosecution's Application for a Further Adjournment, ¶¶ 17, 62 (Dec. 3, 2014), https://www.icc-cpi.int/CourtRecords/CR2014_09898.PDF.

113. Prosecutor v. Kenyajta, ICC-01/09-02/11, Notice of Withdrawal of the Charges Against Uhuru Muigai Kenyatta (Dec. 5, 2014), https://www.icc-cpi.int/CourtRecords/CR2014_09939.PDF.

114. Situation in the Islamic Republic of Afghanistan, ICC-02/17, Office of the Prosecutor, ¶ 22 (Nov. 20, 2017) [hereinafter Office of the Prosecutor].

115. HUM. RTS. WATCH, *supra* note 3.

continue its investigation for now,[116] and the Security Council has not (yet) invoked an Article 16 deferral under the Rome Statute.

As part of the United States' war in Afghanistan, codenamed "Operation Enduring Freedom," the U.S. military detained Taliban and Al-Qaeda operatives in CIA "black sites" where the detainees were interrogated and submitted to torture in violation of the Geneva Conventions.[117] In 2006, Prosecutor Ocampo had opened a preliminary investigation *proprio motu* into the Afghanistan situation,[118] but it was not until 2017 when Prosecutor Bensouda filed a request to open a formal investigation into the situation that the United States began its propaganda wars against the Court.[119] Bensouda's request stated that there was sufficient evidence to provide "a reasonable basis to find that U.S. armed forces engaged in war crimes of torture and cruel treatment, outrages upon personal dignity, and rape and other forms of sexual violence."[120]

Unsurprisingly, the Trump Administration responded defensively, with John Bolton lambasting the Court for its position on the United States' involvement in Afghanistan, and accusing the ICC of being "ineffective, unaccountable, and indeed outright dangerous."[121] Bolton threatened ICC personnel with sanctions, potential criminal prosecution, and suggested that any states that cooperated with the ICC would be detrimentally affected by U.S. foreign assistance.[122] President Trump, for his part, announced in his speech to the UN General Assembly in September 2018 that the ICC had "no jurisdiction, no legitimacy, and no authority" over the United States.[123] Secretary of State Mike Pompeo followed through with Bolton's threats

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116. Situation in the Islamic Republic of Afghanistan, ICC-02/17, Judgment on the Appeal Against the Decision on the Authorisation of an Investigation Into the Situation in the Islamic Republic of Afghanistan, ¶ 79 (Mar. 5, 2020).

117. *See* Margaret L. Satterthwaite, *De-Torturing the Logic: The Contribution of CAT General Comment 2 to the Debate over Extraordinary Extradition*, 11 N.Y.C.L. REV. 281, 281-82 (2008) (estimating that at least three dozen individuals have been held in secret prisons known as CIA "black sites"); *see also* Peter Jan Honigsberg, *Chasing "Enemy Combatants" and Circumventing International Law: A License for Sanctioned Abuse*, 12 UCLA J. INT'L L. & FOREIGN AFF. 1, 5 (2007). *See generally* Report of the Senate Select Committee on Intelligence Committee Study of the Central Intelligence Agency's Detention and Interrogation Program (Dec. 9, 2014), https://www.intelligence.senate.gov/sites/default/files/publications/CRPT-113srpt288.pdf.

118. Office of the Prosecutor, *supra* note 114, at ¶ 22.

119. *Id.* at ¶ 187.

120. Ochs, *supra* note 100, at 608; *see also* Office of the Prosecutor, *supra* note 114, at ¶ 187.

121. *Full Text of John Bolton's Speech to the Federalist Society*, AL JAZEERA (Sept. 10, 2018), https://www.aljazeera.com/news/2018/09/full-text-john-bolton-speech-federalist-society-180910172828633.html.

122. *Id.*

123. President Donald Trump, Remarks by President Trump to the 73rd Session of the United Nations General Assembly in New York City (Sept. 25, 2018).

against ICC personnel in April 2019 by imposing visa restrictions on Prosecutor Bensouda,[124] and later announcing economic sanctions against Bensouda and other Court officials, and threatening to impose sanctions on anyone assisting the Court in its investigation against the United States.[125]

Despite the United States' efforts to quash the investigation, which nearly succeeded when the Pre-Trial Chamber unanimously rejected Prosecutor Bensouda's request to proceed with the investigation in April 2019,[126] the Appeals Chamber reversed the Pre-Trial Chamber's decision, permitting the OTP to continue its investigation into alleged war crimes and crimes against humanity committed in Afghanistan, and significantly, in the territory of any other state party with a nexus to the armed conflict, implicating the CIA's black sites.[127] The ICC is only just starting to feel the impact of the United States' attack on the Court,[128] and it is too early to tell whether the Afghanistan situation will create a permanent rift between the United States and the Court. Recent decisions by the Biden Administration demonstrate a more welcoming stance towards the Court. For example, in February 2021, a spokesperson for the Biden Administration welcomed the Court's ruling in the Dominic Ongwen case.[129] In April 2021, the Biden Administration lifted the Trump Administration's sanctions on ICC officials.[130] For its part,

124. *Remarks to the Press*, Glob. Pub.Affs., U.S. Dep't of State (Mar. 15, 2019); Marlise Simons & Megan Specia, *U.S. Revokes Visa of I.C.C. Prosecutor Pursuing Afghan War Crimes*, N.Y. TIMES (Apr. 5, 2019), https://www.nytimes.com/2019/04/05/world/europe/us-icc-prosecutor-afghanistan.html.

125. Press Statement, Michael R. Pompeo, Secretary of State, Actions to Protect U.S. Personnel from Illegitimate Investigation by the International Criminal Court (Sept. 2, 2020), https://2017-2021.state.gov/actions-to-protect-u-s-personnel-from-illegitimate-investigation-by-the-international-criminal-court/index.html; s*ee also* Julian Borger, *U.S. imposes sanctions on top international criminal court officials*, THE GUARDIAN (Sept. 2, 2020, 12:08 PM), https://www.theguardian.com/law/2020/sep/02/us-sanctions-international-criminal-court-fatou-bensouda.

126. Situation in the Islamic Republic of Afghanistan, ICC-02/17, Decision Pursuant to Art. 15 of the Statute on the Authorisation of an Investigation into the Situation in the Islamic Republic of Afghanistan, ¶ 94 (Apr. 12, 2019), https://www.icc-cpi.int/CourtRecords/CR2019_02068.PDF.

127. Situation in the Islamic Republic of Afghanistan, ICC-02/17, Judgment on the Appeal Against the Decision on the Authorisation of an Investigation Into the Situation in the Islamic Republic of Afghanistan, ¶ 79 (Mar. 5, 2020).

128. Ochs, *supra* note 100, at 617.

129. Indeed, the US State Department issued a recent statement welcoming the ICC's verdict in the Dominic Ongwen case. *See* Press Statement, Ned Price, Spokesperson, U.S. Dep't of State, Welcoming the Verdict in the Case Against Dominic Ongwen for War Crimes and Crimes Against Humanity (Feb. 4, 2021), https://www.state.gov/welcoming-the-verdict-in-the-case-against-dominic-ongwen-for-war-crimes-and-crimes-against-humanity/ ("While we continue to believe the ICC is in need of significant reform, we are pleased to see Ongwen brought to justice.").

130. Nahal Toosi, *Biden Lifts Sanctions on International Criminal Court Officials*, POLITICO (Apr. 2, 2021), https://www.politico.com/news/2021/04/02/icc-sanctions-reversed-biden-478731.

the new ICC Prosecutor, Karim A.A. Khan, announced in September 2021 that his office would resume its investigation into the Afghanistan situation, focusing only on crimes committed by the Taliban and not on crimes committed by the United States, which he said were of a much lower gravity and scale.[131] But despite these developments, there is no doubt that the Afghanistan situation antagonized the United States such that future cooperation with the Court as a permanent member of the Security Council is not guaranteed, and the relationship is likely to be chilly for some time.

Meanwhile, a third situation has arisen that has a high probability of causing further friction and criticism of the ICC in the United States. On February 5, 2021, the ICC Pre-Trial Chamber ruled that the Court had jurisdiction over war crimes and crimes against humanity committed in Palestinian territories occupied by Israel since 1967, namely Gaza and the West Bank.[132] The decision was decried by Israel's prime minister, who accused the court of "legal persecution,"[133] while the Biden Administration announced that it had "serious concerns about the ICC's attempts to exercise its jurisdiction over Israeli personnel."[134] Nevertheless, the ICC Prosecutor proceeded to formally open the investigation in March 2021.[135]

3. Noncompliance

Another issue that has undermined the effectiveness and viability of the ICC is the noncompliance of states party to the Rome Statute's obligation that they act on arrest warrants. In 2009-2010, the ICC issued arrest warrants for President Omar al-Bashir of Sudan for charges of war crimes, crimes against humanity, and genocide,[136] and against

131. *Statement of the Prosecutor of the International Criminal Court, Karim A. A. Khan QC, following the application for an expedited order under article 18(2) seeking authorisation to resume investigations in the Situation in Afghanistan*, INT'L CRIM. CT. (Sept. 27, 2021), https://www.icc-cpi.int/Pages/item.aspx?name=2021-09-27-otp-statement-afghanistan.

132. Press Release, ICC Pre-Trial Chamber I Issues its Decision on the Prosecutor's Request Related to Territorial Jurisdiction Over Palestine, INT'L CRIM. CT. (Feb. 5, 2021), https://www.icc-cpi.int/Pages/item.aspx?name=pr1566.

133. Josef Federman, *International Criminal Court Clears Way for Crimes Probe of Israeli Actions*, CHICAGO TRIBUNE, (Feb. 5 2021), https://www.chicagotribune.com/nation-world/ct-aud-nw-israel-war-crimes-probe-20210205-vuvsmorzc5dwhov2qb5jlznaly-story.html.

134. Press Statement, Ned Price, Spokesperson, U.S. Dep't of State, Opposing International Criminal Court Attempts to Affirm Jurisdiction Over the Palestinian Situation (Feb. 5, 2021), https://www.state.gov/opposing-international-criminal-court-attempts-to-affirm-territorial-jurisdiction-over-the-palestinian-situation/.

135. *Statement of ICC Prosecutor, Fatou Bensouda, respecting an investigation of the Situation in Palestine*, INT'L CRIM. CT. (Mar. 3, 2021), https://www.icc-cpi.int/Pages/item.aspx?name=210303-prosecutor-statement-investigation-palestine.

136. Prosecutor v. Al Bashir, Case No. ICC-02/05-01/09, https://www.icc-cpi.int/darfur/albashir.

Sudan's National Defense Minister Abdel Raheem Muhammed Hussein.[137] Despite these arrest warrants having been issued more than a decade earlier, neither al-Bashir nor any of the charged Janjaweed fighters have been surrendered to the ICC.[138]

State parties have an obligation to effectuate arrest warrants whenever a charged individual enters their territory.[139] Yet, despite this obligation, al-Bashir was able to travel to 22 countries, including some countries that are state parties to the Rome Statute, such as South Africa and Jordan.[140] Some of these countries argued that al-Bashir had head of state immunity which prevented them from arresting him, but the ICC's Appeals Chamber ultimately ruled that Jordan had failed in its obligations under the Rome Statute to comply with the arrest warrant of al-Bashir and should have arrested and surrendered him to the ICC when al-Bashir entered Jordan's territory to attend the League of Arab States' Summit on March 29, 2017.[141]

Ultimately, al-Bashir was toppled from power and the new government has promised to surrender him to the ICC.[142] But the case still demonstrates that without Security Council action to support the Court in enforcing arrest warrants, Council referrals are ineffectual. As previously noted, China threatened to veto a presidential statement that would have called for state parties to comply with al-Bashir's arrest warrant.[143] Such actions not only interfere with the Court's ability to exercise its jurisdiction over the worst war criminals, but these actions also make a mockery of the Security Council as an arbiter of international peace and security. As will be argued later, the Council must do better to enforce the Court's arrest warrants because the consequence of its inaction is impunity for the worst crimes.

4. Vetoes, Threats of Vetoes, and Inaction

Perhaps the greatest impediment to cooperation between the Security Council and the ICC is the permanent members' ability to exercise their

137. Prosecutor v. Hussein, Case No, ICC-02/05-01/12, https://www.icc-cpi.int/darfur/hussein (seven counts of crimes against humanity, six counts of war crimes).

138. Trahan, *supra* note 69, at 309.

139. Rome Statute, *supra* note 1, at art. 88 et seq.

140. *75 Trips to 22 Countries in 7 Years: An Indicted War Criminal's Travels*, NUBA REPORTS (Mar. 7, 2016), https://nubareports.org/bashir-travels/.

141. Press Release, *Al Bashir Case: ICC Appeals Chamber confirms Jordan's non-cooperation but reverses the decision referring it to the ASP and UNSC*, INT'L CRIM. CT. (May 6, 2019), https://www.icc-cpi.int/Pages/item.aspx?name=pr1452.

142. Omar Bashir, *ICC Delegation Begins Talks in Sudan Over Former Leader*, BBC NEWS (Oct. 17, 2020), https://www.bbc.com/news/world-africa-54548629.

143. Trahan, *supra* note 69, at 337.

veto, or threaten to exercise their veto, over investigations and referrals of atrocity crimes. Professor Jennifer Trahan emphasizes the significant power that the P5 have in deciding whether and which situations the Security Council will open an investigation into or refer to the ICC, arguing that the use of the veto over situations that constitute *jus cogens* violations is unlawful under the UN Charter and customary international law.[144] Scholar Christodoulos Kaoutzanis identifies four reasons why a Security Council permanent member might veto a resolution to open an atrocities investigation: (1) where the member is complicit in the commission of atrocities; (2) where the member was involved in a military intervention in the situation country, though not involved in the atrocities, such as when the United States conducted airstrikes in Syria to stop the Assad regime from using chemical weapons against Syrians;[145] (3) where the subject of an atrocities investigation is an ally to a Security Council member, such as the Israel-U.S. alliance or China-Sudan alliance; and (4) where a Security Council member is ideologically opposed to an atrocities investigation on principle, as China and Russia have been.[146] This section will examine three situations –Syria, Myanmar, and Yemen– where at least one P5 member has exercised a veto or has turned a blind eye to humanitarian disasters resulting from armed conflicts.

a. Syria Situation

Syria's decade-long civil war remains a primary catalyst of deadlock in the Security Council. Since the conflict began in 2011, France has been a strong advocate for atrocities investigation and referral to the ICC.[147] Switzerland, France, the United Kingdom, and 55 other states submitted a letter to the Security Council on January 13, 2013, calling upon the Council to refer the situation to the ICC.[148] But the Swiss proposal lacked support to make an impact because some states, and even the former Chief Prosecutor of the ICC, Luis Moreno-Ocampo, believed

144. *See generally* Trahan, *supra* note 69.

145. *See generally* Michael P. Scharf, *How the War Against ISIS Changed International Law*, 48 CASE W. R. J. INT'L L. 1 (2016).

146. *See* KAOUTZANIS, *supra* note 10, at 33-37. Kaoutzanis prepared this book as a Harlan Fisk Stone Scholar at Columbia Law School. He holds a Ph.D. from Columbia, an LL.M from University of Amsterdam in International Criminal Law, a J.D. from Columbia, and a B.A. from Georgetown School of Foreign Service.

147. *Id.* at 166.

148. Permanent Rep. of Switzerland to the U.N., Letter dated 19 May 2014 from the Permanent Representative of Switzerland to the United Nations addressed to the Secretary-General, U.N. Doc. S/2014/361 (May 19, 2014).

that an ICC referral would lead to more violence in Syria.[149] Two reasons for the lack of support among traditional ICC advocates like Guatemala include the fact that a referral would require the Council to fund the investigation indefinitely and the fact that earlier referrals – namely, Darfur and Libya – had not produced the desired results.[150]

But there was also the problem of the P3. While the United States favored a justice mechanism for Syria, it did not think it should be the ICC because an ICC referral might implicate Israel's actions in the Golan Heights (Syrian territory that it occupies).[151] The Syria situation thus implicated the Israel-U.S. alliance and was against the United States' interests. However, the United States' position on Syria changed after months of negotiations ended without success in February 2014.[152] The United States was placated by the proposal's adoption of the same language in the Darfur and Libya Resolutions that would exempt U.S. personnel from investigation.[153]

Meanwhile, Russia and China had set up several roadblocks for the Security Council in dealing with the situation in Syria. In total, Russia exercised fourteen vetoes over proposals related to the Syrian civil war, while China used its veto eight times.[154] On October 4, 2011, the Security Council considered a proposal to demand an end to violence by Assad's regime and a call to hold accountable perpetrators of human rights violations.[155] The proposal was vetoed by Russia and China.[156] A second veto was cast again by Russia and China in February 2012 when the Security Council considered a proposal to condemn the use of

149. Luis Moreno-Ocampo, *The ICC as the Sword of Damocles*, JUST SECURITY (Sept. 23, 2013), https://www.justsecurity.org/914/icc-sword-damocles/; s*ee also* KAOUTZANIS, *supra* note 10, at 166.

150. KAOUTZANIS, *supra* note 10, at 167.

151. *Id.*

152. *Id.*

153. *Id.* at 168; s*ee also* Somini Sengupta, *U.N. Will Weigh Asking Court to Investigate War Crimes in Syria*, N.Y TIMES (May 21, 2014), https://www.nytimes.com/2014/05/22/world/middleeast/un-will-weigh-asking-court-to-investigate-war-crimes-in-syria.html.

154. Ved P. Nanda, *The Security Council Veto in the Context of Atrocity Crimes, Uniting for Peace, and the Responsibility to Protect*, 52 CASE W. R. J. INT'L L. 119, 119 (2020);The Veto, Security Council Report: UN Security Council Working Methods (Dec. 16, 2020), https://www.securitycouncilreport.org/un-security-council-working-methods/the-veto.php; *see also* Michelle Nichols, *Russia casts 13th veto of U.N. Security Council Action During Syrian War*, REUTERS (Sept. 19, 2019), https://ca.reuters.com/article/topNews/idCAKBN1W42CJ-OCATP.

155. Trahan, *supra* note 69, at 269.

156. U.N Security Council, France, Germany, Portugal and United Kingdom of Great Britain and Northern Ireland: draft resolution, U.N. Doc. S/2011/612 (Oct. 4, 2011) (vetoed by the Russian Federation and China- *see Security Council - Veto List*, U.N., https://research.un.org/en/docs/sc/quick (last visited Feb. 3, 2022)).

arbitrary detention, enforced disappearances, and torture by the Assad regime.[157] On July 19, 2012, Russia and China exercised their vetoes again on a proposal condemning the shelling of population centers and government detentions, renewed the peacekeeping mandate for UNSMIS, and permitted Article 41 sanctions for non-compliance.[158] So it is unsurprising that when a proposal to refer the situation in Syria to the ICC came before the Security Council, Russia and China swiftly vetoed the resolution.[159] Through their vetoes, Russia and China blocked the ICC from the possibility of prosecuting government and opposition forces, as well as ISIS.[160]

The primary rationale behind Russia's veto was Putin's alliance with the Assad regime, which permitted Russia to maintain a strategic naval port on Syria's coast.[161] The primary rationale behind China's veto was its ideological stance against the Security Council referring situations to the ICC and interfering with state sovereignty.[162] But this explanation, with respect to China, is not satisfying given that China had not vetoed the Darfur referral, despite China's oil relationship with Sudan.

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157. U.N. Security Council, Bahrain, Colombia, Egypt, France, Germany, Jordan, Kuwait, Libya, Morocco, Oman, Portugal, Qatar, Saudi Arabia, Togo, Tunisia, Turkey, United Arab Emirates, United Kingdom of Great Britain and Northern Ireland and United States of America: draft resolution, U.N. Doc. S/2012/77 (Feb. 4, 2012) (vetoed by the Russian Federation and China - *see Security Council - Veto List*, U.N., https://research.un.org/en/docs/sc/quick (last visited Feb. 3, 2022)); Trahan, *supra* note 69, at 271; *see also* Human Rights Council, *Report of the Independent International Commission of Inquiry on the Syrian Arab Republic*, UN Doc. A/HRC/19/69 (Feb. 22, 2012), https://www.ohchr.org/Documents/HRBodies/HRCouncil/RegularSession/Session19/A-HRC-19-69_en.pdf.

158. U.N. Security Council, France, Germany, Portugal, United Kingdom of Great Britain and Northern Ireland and United States of America: draft resolution, U.N. Doc. S/2012/538 (July 19, 2012) (vetoed by the Russian Federation and China); Trahan, *supra* note 69, at 273.

159. U.N. Security Council, Albania, Andorra, Australia, Austria, Belgium, Botswana, Bulgaria, Canada, Central African Republic, Chile, Côte d'Ivoire, Croatia, Cyprus, Czech Republic, Democratic Republic of the Congo, Denmark, Estonia, Finland, France, Georgia, Germany, Greece, Hungary, Iceland, Ireland, Italy, Japan, Jordan, Latvia, Libya, Liechtenstein, Lithuania, Luxembourg, Malta, Marshall Islands, Mexico, Monaco, Montenegro, Netherlands, New Zealand, Norway, Panama, Poland, Portugal, Qatar, Republic of Korea, Republic of Moldova, Romania, Samoa, San Marino, Saudi Arabia, Senegal, Serbia, Seychelles, Slovakia, Slovenia, Spain, Sweden, Switzerland, The former Yugoslav Republic of Macedonia, Turkey, Ukraine, United Arab Emirates, United Kingdom of Great Britain and Northern Ireland and United States of America: draft resolution, U.N. Doc. S/2014/348 (May 22, 2014) (draft Resolution referring the situation in the Syrian Arab Republic to the International Criminal Court, vetoed by the Russian Federation and China).

160. Trahan, *supra* note 69, at 274.

161. *See id.* at 264–65.

162. *Id.* at 268–69.

b. Myanmar

In September 2018, the Independent International Fact-Finding Mission on Myanmar (IIMM), established by the UN Human Rights Council, found that credible evidence existed that genocide, war crimes, and crimes against humanity had been committed in Myanmar, in particular against the Rohingya ethnic group.[163] The IIMM suggested that the most senior officials of Myanmar's military should be investigated and prosecuted by an international criminal tribunal for the above crimes.[164] This led China to try to stop a Security Council briefing on Myanmar by the IIMM's Chair.[165]

Although no recent Security Council proposals have considered referring the situation in Myanmar to the ICC, China and Russia have blocked previous resolutions that would have condemned state-sanctioned violence against civilians and ethnic minorities.[166] Given that the Burmese military's "Rohingya extermination plan" was known to Security Council members,[167] Russia and China's vetoes may constitute a violation of their obligations under the Genocide Convention.[168] Even if Russia and China have not violated the Genocide Convention's obligations to "prevent or punish" genocide, the Security Council's "capacity to influence the government of Myanmar" is sufficient reason for Russia and China not to cast their vetoes in the face of ongoing genocide.[169]

The threat of the use of the veto by China or Russia regarding any proposal for accountability in Myanmar is thus a significant impediment to the Security Council even being able to propose a solution that

163. Human Rights Council, *Report of the Detailed Findings of the Independent International Fact-Finding Mission on Myanmar*, U.N. Doc. A/HRC/39/CRP.2 1, 110 (Sept. 17, 2018); *see also* Human Rights Council, *Report of the Independent International Fact-Finding Mission on Myanmar*, U.N. Doc. A/HRC/42/50 (Aug. 8, 2019), https://documents-dds-ny.un.org/doc/UNDOC/GEN/G19/236/74/PDF/G1923674.pdf?OpenElement.

164. Human Rights Council (2018), *supra* note 163, at 1.

165. Michelle Nichols, *China Fails to Stop U.N. Security Council Myanmar Briefing*, REUTERS (Oct. 24, 2018), www.reuters.com/article/us-myanmar-rohingya-un/china-fails-to-stop-unsecurity-council-myanmar-briefing-idUSKCN1MY2QU.

166. U.N. Security Council, United Kingdom of Great Britain and Northern Ireland and United States of America: draft resolution, U.N. Doc. S/2007/14 (vetoed by China and the Russian Federation).

167. Doug Bock Clark, *Inside the Rohingya Refugee Camps, Traumatised Exiles Ask Why the World Won't Call the Humanitarian Crisis 'Genocide'*, S. CHINA MORNING POST (Jan. 16, 2018), https://www.scmp.com/magazines/post-magazine/long-reads/article/2128432/inside-rohingya-refugee-camps-traumatised-exiles (discussing an "11-point scheme detailed in a government report . . . titled 'Rohingya Extermination Plan'").

168. Trahan, *supra* note 69, at 233.

169. *Id.* at 233-34.

would bring accountability to the genocidaires and perpetrators of war crimes and crimes against humanity.[170] Moreover, although the ICC has jurisdiction over the crimes of ethnic cleansing of the Rohingya that occurred in Bangladesh,[171] and the International Court of Justice (ICJ) is considering Myanmar's responsibility for genocide in *The Gambia v. Myanmar*,[172] these legal remedies only cover a fraction of the crimes committed in Myanmar and will not create widespread accountability.

c. Yemen

Yemen has been described by the UN as the "world's worst humanitarian crisis."[173] More than 13 million Yemenis are at risk of death from starvation and starvation-related illnesses.[174] Despite the mounting atrocities in Yemen's civil war, committed by government forces, the Saudi Arabia-led Coalition (SLC), and Iran-backed Houthi rebels, the Security Council has taken almost no concrete action in the past seven years to prevent atrocities or bring perpetrators of war crimes and crimes against humanity to account.[175] The most significant decision of the Security Council in Yemen was Resolution 2417, which condemned the use of starvation as a method of warfare in Yemen.[176] But that resolution has not been enforced, and the SLC continues to starve civilians by targeting destruction of objects indispensable to survival and by imposing blockades that restrict humanitarian aid from reaching

170. *Id.* at 237-38.

171. *See* Decision on the 'Prosecution's Request for a Ruling on Jurisdiction under Article 19 (3) of the Statute,' ICC-RoC46(3)-01/18, ¶ 73 (Sept. 6, 2018).

172. *See Application of the Convention on the Prevention and Punishment of the Crime of Genocide (The Gambia v. Myanmar), Order of 23 January 2020*, I.C.J. REPORTS 2020 69 (Jan. 23, 2020), https://www.icj-cij.org/public/files/case-related/178/178-20200123-ORD-02-00-EN.pdf.

173. Remarks by the Secretary-General to the Pledging Conference on Yemen (Apr. 1, 2018), https://www.un.org/sg/en/content/sg/statement/2019-02-26/secretary-generals-remarks-the-pledging-conference-for-yemen-delivered-%C2%A0; *see also* U.N. Office for the Coordination of Humanitarian Affairs, Under-Secretary-General for Humanitarian Affairs and Emergency Relief Coordinator Stephen O'Brien, Statement to the Security Council on Missions to Yemen, South Sudan, Somalia, and Kenya and an Update on the Oslo Conference on Nigeria and the Lake Chad Region (Mar. 10, 2017), https://docs.unocha.org/sites/dms/Documents/ERC_USG_Stephen_OBrien_Statement_to_the_SecCo_on_Missions_to_Yemen_South_Sudan_Somalia_and_Kenya_and_update_on_Oslo.pdf (O'Brien telling the Security Council, "We stand at a critical point in history. Already at the beginning of the year we are facing the largest humanitarian crisis since the creation of the United Nations.").

174. *Yemen could be 'worst famine in 100 years'*, BBC NEWS (Oct. 15, 2018), https://www.bbc.com/news/av/world-middle-east-45857729/yemen-could-be-worst-famine-in-100-years.

175. *See generally* Laura Graham, *Pathways to Accountability for Starvation Crimes in Yemen*, 53 CASE W. RSRV. J. INT'L L. 401 (2021).

176. *See* S.C. Res. 2417, ¶ 5 (May 24, 2018).

civilians.[177] Moreover, in 2018 Russia vetoed a draft resolution that would have imposed sanctions on Iran for non-compliance with an arms embargo,[178] and the United States, United Kingdom, and France allegedly threatened to veto any resolutions that would have restrained the SLC or implicated the SLC in war crimes.[179]

Much like Syria and Myanmar, Yemen is not a state party to the Rome Statute, which means that the ICC does not have jurisdiction over crimes committed in Yemen's armed conflict without Security Council referral. However, unlike Syria and Myanmar where the Security Council has considered at least some accountability measures, Yemen lacks a patron-diplomat advocating for an atrocities investigation or referral to the Court.[180] That may change, as the newly elected Biden Administration has signaled fundamental changes to U.S. policies regarding Yemen.[181] The Security Council has considered no draft proposals regarding accountability for Yemen despite the Human Rights Council's Group of Eminent Experts' September 2020 Report calling on the Security Council to refer the situation in Yemen to the ICC due to the Commission's findings that war crimes and crimes against humanity have occurred.[182]

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177. *See* Graham, *supra* note 175, at 426–30.

178. The resolution later passed as S.C. Res. 2451 (Dec. 21, 2018), without language on an independent investigation for breaches of international humanitarian law, and with more limited language regarding humanitarian deliveries. Julian Borger, *UN Agrees Yemen Ceasefire Resolution After Fraught Talks and US Veto Threat*, THE GUARDIAN (Dec. 21, 2018, 11:51 AM), https://www.theguardian.com/world/2018/dec/21/un-yemen-ceasfire-stockholm-resolution-us.

179. *See A Year of Hunger and Blood: Yemen at the UN / Special Issue—2017 in Review*, Yemen Rev. 4 (Jan. 22, 2018), https://sanaacenter.org/files/Yemen-at-the-UN-Special-Issue-2017-en.pdf ("The United States (US), United Kingdom (UK) and France – all veto-wielding permanent UNSC members, as well as the Saudi-led military coalition's primary arms suppliers – have also quashed attempts at the UNSC to restrain the coalition or to implicate its members in war crimes. Representatives from other UNSC member states told the Sana'a Center in 2017 that the council had thus exhausted all plausible options for action regarding Yemen and had essentially been reduced to an observer of the crisis.").

180. *See* KAOUTZANIS, *supra* note 10, at 15.

181. Steven Nelson, *Biden Pulls Out of Yemen War in First Foreign Policy Speech*, N.Y. POST (Feb. 4, 2021, 1:42 PM), https://nypost.com/2021/02/04/biden-will-end-us-support-for-saudi-led-intervention-in-yemen/.

182. Situation of Human Rights in Yemen, Including Violations and Abuses Since September 2014, Rep. of the Grp. of Eminent Int'l and Reg'l Experts on Yemen, Human Rights Council, Forty-Fifth Session, Sept. 14–Oct. 2, 2020, ¶ ¶ 99, 103-05, 109, U.N. Doc. A/HRC/45/6 (Sept. 28, 2020), https://www.ohchr.org/Documents/HRBodies/HRCouncil/GEE-Yemen/2020-09-09-report.pdf.

While it may be too early to predict that the Security Council will take no action to refer the situation to the ICC, there are at least two reasons why the Security Council would likely veto or threaten to veto a referral. First, as demonstrated by the Syria and Myanmar situations, the Security Council is experiencing complete institutional paralysis at the moment, and recent events do not appear to indicate a shift in that dynamic. Second, even if Russia and China were to cooperate with a proposal to refer the situation the ICC, the United States may veto the proposal because of its stance towards forfeiting its sovereignty to international organizations, including the ICC.[183] Further, until the Afghanistan situation is resolved, the United States is likely to remain uncooperative towards any efforts to refer situations to the ICC. This does not mean that the United States would not support an accountability mechanism for Yemen. The United States might support an ad-hoc or hybrid tribunal as it has done in the past, but the road to repairing the U.S.-ICC relationship will be a long one.

III. Problems Created by the Security Council-ICC Divide

Four problems are apparent from the current chasm between the Security Council and the ICC. These problems include (1) a loss of legitimacy for both organizations, (2) a lack of accountability for the world's worst atrocity crimes, (3) a potential stalemate on the Security Council between ICC-supporters and ICC-opponents, and (4) a shift in power away from the Security Council to unilateral actions and other institutions. This section examines each of these problems, setting the stage for the proposed solutions in section four.

A. *Loss of Legitimacy for Both Organizations*

The growing divisions between the Security Council and ICC serve to undermine the legitimacy of both organizations. The primary purpose of the Security Council is to maintain international peace and security in accordance with the "principles and purposes" of the UN Charter.[184] Whenever a threat to international peace and security occurs, the Security

183. *See, e.g.*, Press Statement, Ned Price, Spokesperson, Welcoming the Verdict in the Case Against Dominic Ongwen for War Crimes and Crimes Against Humanity, U.S. Dept. of State, (Feb. 4, 2021), https://www.state.gov/welcoming-the-verdict-in-the-case-against-dominic-ongwen-for-war-crimes-and-crimes-against-humanity/; *see also* Press Statement, Ned Price, Spokesperson, Opposing International Criminal Court Attempts to Affirm Jurisdiction Over the Palestinian Situation, U.S. Dep't of State (Feb. 5, 2021), https://www.state.gov/opposing-international-criminal-court-attempts-to-affirm-territorial-jurisdiction-over-the-palestinian-situation/.

184. U.N. Charter art. 24, ¶¶ 1–2.

Council is responsible for taking actions and decisions to restore peace and stability, and wherever appropriate, assisting in providing accountability for crimes to peace and humanity.[185] If the Security Council cannot or will not take such actions or make these decisions, then it is not fit for this purpose. More specifically, if the Security Council is unwilling or unable to use its extensive powers to pursue accountability for atrocity crimes, then the Council is violating the very "principles and purposes" that it was created to uphold. To that end, the recent crises in Syria, Myanmar, and Yemen demonstrate that the Security Council is either unwilling – because of vetoes or threats to veto accountability resolutions – or unable – because of institutional paralysis – to fulfill its obligations under the UN Charter and obligations to maintain international peace and security, prevent atrocities, and pursue justice for atrocities violations. As a result, the Security Council's role as arbiter of international peace and security is undermined, resulting in a loss of legitimacy in the eyes of the international community.

By the same token, the growing hostilities between the ICC and P3 members of the Security Council serve to undermine the legitimacy of the Court. As already noted, the *proprio motu* investigation into the Afghanistan situation has severely weakened the Court's favor with the United States. The Court cannot hope to advance its agenda in pursuit of international justice in the years ahead without the support – or at least acquiescence – of the United States. By making enemies of the United States, the Court has substantially undermined its lifeblood because the Court is partially dependent upon funding from the Assembly of States Parties, voluntary contributions, and the UN when the Security Council refers situations to the ICC.[186] As the United States has demonstrated repeatedly in the past decade, it has not shied away from unilaterally imposing secondary sanctions on targets that it opposes,[187] and the ICC could easily become such a target if it continues to antagonize U.S. interests. The Trump Administration made this point abundantly clear when it imposed sanctions on top ICC officials in 2020.[188]

185. U.N. Charter art. 33, ¶¶ 1–2.

186. Stephen J. Rapp, *Overcoming Obstacles to Funding ICC Investigations in UN Security Council Referred Cases*, INT'L CRIM. JUST. TODAY (Dec. 10, 2015), https://www.international-criminal-justice-today.org/arguendo/overcoming-obstacles-to-funding-icc-investigations-in-un-security-council-referred-cases/.

187. *See, e.g.*, Jeffrey A. Meyer, *Second Thoughts on Secondary Sanctions*, 30 U. PA. J. INT'L L. 905, 927–29 (2009). For further discussion of secondary sanctions, see *infra* note 283.

188. *US Sanctions on the International Criminal Court*, HUM. RTS. WATCH (Dec. 14, 2020, 12:00 AM), https://www.hrw.org/news/2020/12/14/us-sanctions-international-criminal-court.

But the antagonistic relationship between the United States and ICC is not the only problem the Court faces. As discussed above, the ICC's "propaganda wars" are a significant problem for the Court's legitimacy in the international community because the treaty-based nature of the Court's existence requires state support, without which, it cannot exist.[189] The Kenya debacle and the Appeals Chamber's decision requiring the OTP to withdraw the charges against Uhuru Kenyatta underscore a significant weakness in the Court's viability and the politics at play in maintaining the Court's existence. The political nature of the Court's viability significantly impedes the Prosecutor's ability to pursue accountability unless the state where the alleged crimes have occurred refers the situation to the ICC and there is sufficient support within the state for the lengthy investigative process and legal proceedings. If the Court makes too many political missteps, it risks losing support and having state parties withdraw from the Rome Statute, as Burundi did in 2017 after the ICC opened an investigation into crimes committed in Burundi.[190] In 2017, the African Union adopted a nonbinding resolution calling upon its members to withdraw from the ICC,[191] and in 2018, the organization adopted a resolution requesting an advisory opinion from the International Court of Justice on whether the ICC could bring cases against sitting heads of state.[192] These actions make clear that the Court's continued existence depends upon state support and the cooperation of the Security Council, and without both, it cannot hope to survive.

B. *Lack of Accountability for Perpetrators of the Worst Atrocities*

A second problem that arises from the growing divide between the Security Council and ICC is diminished accountability for perpetrators of the worst atrocity crimes. The clearest example of a lack of accountability caused by the ICC-Security Council divide is in Syria. China and Russia's vetoes over the proposed referral demonstrate the Security

189. *See generally* Ochs, *supra* note 100.

190. *Burundi and the ICC*, COALITION FOR THE INTERNATIONAL CRIMINAL COURT, https://www.coalitionfortheicc.org/latest/resources/burundi-and-icc (last visited Nov. 4, 2021).

191. African Union [AU] Assembly, Twenty-Eighth Ordinary Session, *Decision on the International Criminal Court*, Doc. EX.CL/1006(XXX), Assembly/AU/Dec.622(XXVIII), ¶ 8 (Jan. 30–31, 2017), https://au.int/sites/default/files/decisions/32520-sc19553_e_original_-_assembly_decisions_621-641_-_xxviii.pdf.

192. AU Assembly, Thirtieth Ordinary Session, Decision on the International Criminal Court, Doc. EX.CL/1068(XXXII), Assembly/AU/Dec.672(XXX), ¶ 5(i) (Jan. 28–29, 2018), https://au.int/sites/default/files/decisions/33908-assembly_decisions_665_-_689_e.pdf.

Council's inability or unwillingness to pursue justice for the world's worst atrocities. Jennifer Trahan argues that Russia and China's vetoes over the proposal referring the Syria situation to the ICC "jettisoned any kind of consistent message that perpetrators could face accountability, which could have been sent in an attempt to deter further crimes, and [m]ade attempts to prosecute the crimes significantly more difficult, if not impossible . . . while the Syrian Government remains in power."[193] Not only did the Security Council's decision on the Syria referral significantly undermine the possibility of accountability in Syria, it sent a message to the Assad regime and war criminals throughout the world that they could continue to commit the most heinous crimes with impunity due to the Security Council's institutional paralysis.

Nowhere is that message clearer than in Myanmar, where the IIMM reported credible evidence of genocide had been committed against the Rohingya.[194] With Myanmar being a country of strategic alliance for China, the prospect of a Security Council referral to the ICC is unrealistic because China would most likely veto the proposal. As a consequence of institutional paralysis in the Security Council and declining public support for the ICC, investigative mechanisms such as the IIIM and IIMM are the current political reality for countries torn apart by armed conflict. Yet there are many countries, such as Yemen, where protracted armed conflict continues without even the slightest chance of ending impunity absent Security Council action. Consequently, not only is the world less safe because of the growing ICC-Security Council divide, but it is also less just.

C. *Stalemate on the Council: A New Cold War?*

A third problem created by the growing division between the ICC and Security Council is a potential stalemate on the Security Council between ICC-supporters and ICC-opponents. Although the P5 have historically had differences in opinion on the value of the ICC as an international accountability mechanism, those differences have grown starker in recent years. While the United Kingdom and France continue to support the ICC and are likely to advocate for continued referrals of situations to the ICC, the United States, Russia, and China are just as likely to exercise their vetoes over any referrals. To that end, as

193. Trahan, *supra* note 69, at 282.

194. Human Rights Council (2018) *supra* note 163, at 364; s*ee also* Human Rights Council (2019) *supra* note 163, at 6.

situations continue to arise where an ICC-referral is an appropriate solution to end impunity, as it would be in Yemen, the most likely outcome is that at least one of the P3 will veto or threaten to veto a referral, thus ending the prospect of pursuing accountability for atrocity crimes. An indirect consequence of this division between ICC-supporters and ICC-opponents is that disagreements over Court referrals is likely to play out in other negotiations and decisions taken by the Council relating to Lebanon, Sudan, Venezuela, and North Korea.[195] Thus, the divisions between members of the P5 in relation to the ICC serve to undermine other aspects of the Council's work in maintaining international peace and security.

D. *Power Shift*

Finally, as one of the authors details in a recent book,[196] the Security Council's inability to refer the atrocities in Syria to the ICC has provoked state and international institutional responses that have shifted power away from the Security Council, with potentially broad and long-term implications. *The Guardian* newspaper reported in 2015 that "[t]he United States has warned that Russia's continued blanket use of its UN veto will jeopardize the [S]ecurity [C]ouncil's long-term legitimacy and could lead the U.S. and like-minded countries to bypass it as a decision-making body."[197] As the U.S. Permanent Representative to the UN told *The Guardian*: "It's a Darwinian universe here. If a particular body reveals itself to be dysfunctional, then people are going to go elsewhere."[198] That warning became reality in the two situations discussed below.

1. The General Assembly's Creation of the IIIM

Despite significant evidence of atrocity crimes being committed by all sides to the conflict in Syria — particularly by government forces — the UN Security Council has been paralyzed by the Russian veto, unable to take any steps towards accountability. As mentioned above, in May 2014, Russia vetoed a Security Council resolution that would have

195. *Council of Despair? The Fragmentation of UN Diplomacy*, INTERNATIONAL CRISIS GROUP (Apr. 30, 2019), https://www.crisisgroup.org/global/b001-council-despair-fragmentation-un-diplomacy.

196. MICHAEL P. SCHARF, MILENA STERIO & PAUL R. WILLIAMS, THE SYRIAN CONFLICT'S IMPACT ON INTERNATIONAL LAW 90-109 (2020).

197. Julian Borger & Bastien Inzaurralde, *Russian Vetoes are Putting UN Security Council's Legitimacy at Risk, Says US*, THE GUARDIAN (Sept. 23, 2015, 6:15 AM), https://www.theguardian.com/world/2015/sep/23/russian-vetoes-putting-un-security-council-legitimacy-at-risk-says-us.

198. *Id.*

referred the situation in Syria to the International Criminal Court.[199] Later, Russia vetoed a Security Council resolution that would have established an investigative mechanism to document Syrian use of chemical weapons and other atrocities.[200] In all, Russia has vetoed 13 resolutions to prevent accountability of the Syrian government since the outbreak of the Syrian civil war.[201]

In contrast, in the 1990s, the Security Council first condemned atrocities in the former Yugoslavia and Rwanda, then established an investigative commission to document them, and finally created ad hoc tribunals to prosecute the perpetrators.[202] Also, ten years later, the Security Council referred the situations in Sudan and Libya to the ICC for prosecution.[203] But in Syria, the Security Council could do nothing.

Enter Liechtenstein's UN Ambassador Christian Wenaweser, who had formerly served as President of the ICC Assembly of State Parties. In the fall of 2016, Ambassador Wenaweser hatched a bold plan for an end-run around the Security Council.[204] Wenaweser figured if the Security Council will not act, why not try the UN General Assembly. For months, Wenaweser canvassed UN Delegates, arguing: "We have postponed any meaningful action on accountability too often and for too long."[205] Commenting on the outsized role Wenaweser played, Harvard Law Professor Alex Whiting writes, "the short history of international criminal justice, from Nuremberg to the present, is full of heroic individuals and their improbable and creative ideas that have pushed the project forward."[206] This is the very essence of a custom pioneer.

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199. Ian Black, *Russia and China Veto UN Move to Refer Syria to International Criminal Court*, THE GUARDIAN (May 22, 2014, 11:07 AM), https://www.theguardian.com/world/2014/may/22/russia-china-veto-un-draft-resolution-refer-syria-international-criminal-court.

200. Permanent Mission of the Russian Fed'n to the U.N., Note verbale dated 8 February 2017 from the Permanent Mission of the Russian Federation to the United Nations addressed to the Secretary-General, U.N. Doc. A/71/793 (Feb. 14, 2017).

201. *Russia casts 13th veto of U.N. Security Council action during Syrian war*, Reuters (Sept. 19, 2019), https://www.reuters.com/article/us-syria-security-un/russia-casts-13th-veto-of-u-n-security-council-action-during-syrian-war-idUSKBN1W42CJ.

202. *See generally* MILENA STERIO & MICHAEL SCHARF, THE LEGACY OF AD HOC INTERNATIONAL TRIBUNALS IN INTERNATIONAL CRIMINAL LAW (2019).

203. Press Release, Security Council, Security Council Refers Situation in Darfur, Sudan, to Prosecutor of International Criminal Court, U.N. Press Release SC/8351 (Mar. 31, 2005), https://www.un.org/press/en/2005/sc8351.doc.htm; Situation in Libya, ICC-01/11, https://www.icc-cpi.int/libya (last visited Oct. 31, 2021, 11:55 AM).

204. Michelle Nichols, *UN Creates Team to Prepare Cases on Syria War Crimes*, REUTERS (Dec. 21, 2016), https://www.reuters.com/article/us-mideast-crisis-syria-warcrimes-idUSKBN14A2H7?il=0.

205. *Id.*

206. Alex Whiting, *An Investigation Mechanism for Syria: The General Assembly Steps Into the Breach*, 15 J. INT'L' CRIM. JUST. 231, 236 (2017).

Galvanized by Ambassador Wenaweser's efforts, on December 21, 2016, the United Nations General Assembly took a historic step in establishing a mechanism to investigate and preserve evidence of international crimes in Syria, the first time the Assembly has established such a body.[207] Despite objection by Russia, the General Assembly adopted Resolution 71/248 by a vote of 105 to 15 with 52 abstentions, creating the International, Impartial and Independent Mechanism to Assist in the Investigation and Prosecution of Those Responsible for the Most Serious Crimes under International Law Committed in the Syrian Arab Republic since March 2011, known in shorthand as the IIIM.[208]

The IIIM is empowered to collect evidence from other bodies including the Independent International Commission of Inquiry established by the Human Rights Council, and to conduct its own investigations "including interviews, witness testimony, documentation and forensic material."[209] The General Assembly resolution directs the IIIM to analyze the collected evidence and prepare files of evidence that could be provided to "national, regional or international courts or tribunals that have or may in the future have jurisdiction over these crimes, in accordance with international law."[210]

This was the first time in history that the General Assembly established an investigative body to assemble and analyze evidence of international crimes for the purpose of preserving evidence for future international or domestic trials. But its authority to do so was questioned by Russia. During the debate on the resolution and subsequently in a *note-verbale* dated February 8, 2017, the Russian Government complained that "the General Assembly acted *ultra vires* — going beyond its powers as specified" in the UN Charter.[211] Specifically, Russia argued that

> A number of powers vested in the mechanism under [R]esolution 71/248, including those of "analyz[ing] evidence" and "prepar[ing] files," are prosecutorial in nature. However,

207. *Id.*

208. U.N. GAOR, International, Impartial and Independent Mechanism to Assist in the Investigation and Prosecution of Those Responsible for the Most Serious Crimes under International Law Committed in the Syrian Arab Republic since March 2011, ¶ 4, U.N. Doc. A/71/L.48 (Dec. 19, 2016).

209. U.N. Secretary-General, *Implementation of the resolution establishing the International, Impartial and Independent Mechanism to Assist in the Investigation and Prosecution of Persons Responsible for the Most Serious Crimes under International Law Committed in the Syrian Arab Republic since March 2011*, ¶ 12, U.N. Doc. A/71/755 (Jan. 19, 2017).

210. U.N. GAOR, *supra* note 208, ¶ 4.

211. UN Doc. A/71/793, *supra* note 200.

> prosecutions, criminal investigations and support of criminal investigations are not among the functions of the General Assembly. It cannot create an organ that has more powers than the General Assembly itself.[212]

There was a time when it was not settled whether the Security Council, itself, had the power to establish a prosecutorial institution, let alone whether the General Assembly could do so.[213] But that question was answered in the affirmative by the Appeals Chamber of the Yugoslavia Tribunal in 1995 based on the extraordinary powers vested in the Security Council under Chapter VII of the UN Charter to maintain international peace and security.[214] The General Assembly has no such powers. Yet, it is not clear that the powers of the IIIM are "prosecutorial in nature" in the sense that they entail the prosecution of individuals, a power that could only be conferred by the Security Council. Rather, the resolution and Secretary General's report describe a "prosecutorial" body only in respect to the standards that will be adopted by the IIIM when collecting and analyzing evidence. If one views the IIIM not as a sort of investigative judge or prosecutor but simply as a fact-finding body that will adhere to a criminal law standard in performing its functions, its creation would seem to be within the powers of the General Assembly.

Article 10 of the UN Charter gives the General Assembly the power to "discuss" and make "recommendations" concerning "any questions or matters within the scope of the present Charter or relating to the powers and functions of any organs provided for in the present Charter."[215] A limitation on this power is set forth in Article 12 of the Charter which stipulates that the General Assembly cannot make recommendations when the Security Council is exercising its functions with respect to a particular dispute or situation, unless the Council requests the General Assembly do so.[216] But this limitation has been honored increasingly in the breach and was not seen as limiting the General Assembly's involvement in major crises including the former Yugoslavia, Rwanda,

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212. *Id.*

213. *See generally* Trahan, *supra* note 69.

214. Prosecutor v. Tadić, Case No. IT-94-1-T, Decision on the Defense Motion: Jurisdiction of the Tribunal (Int'l Crim. Trib. for the Former Yugoslavia Aug. 10 1995) (affirmed); Prosecutor v. Tadić, Case No. IT-94-1-AR72, Decision on the Defense Motion for Interlocutory Appeal on Jurisdiction (Int'l Crim. Trib. for the Former Yugoslavia Oct. 2, 1995); 1 VIRGINIA MORRIS & MICHAEL P. SCHARF, THE INTERNATIONAL CRIMINAL TRIBUNAL FOR RWANDA 95–97 (1998).

215. U.N. Charter art. 10.

216. U.N. Charter art. 12.

Libya, and Syria over the past 30 years.[217] As such, it is within the mandate of the General Assembly to consider questions of threats to peace and security in Syria and whether a referral to the ICC or the establishment of an ad hoc tribunal is warranted. Further, Article 22 of the Charter empowers the General Assembly to "establish such subsidiary organs as it deems necessary for the performance of its functions."[218] Therefore, the General Assembly has the authority to establish a "subsidiary organ" to collect and assess the available evidence of international crimes in Syria in order to inform the General Assembly's discussion and recommendations on these matters. On the other hand, the evidence collected by the IIIM would undeniably not be used solely (or even primarily) for the purpose of the General Assembly's discussion and recommendations, but it is not clear that additional uses of the information would render the creation of the IIIM beyond the power of the General Assembly.

Whatever the merits of Russia's legal argument, the establishment of this novel institution by the General Assembly clearly evinces a fundamental power shift away from the Security Council and to the General Assembly caused by the international community's frustration with the abuse of the veto to prevent action to deal with international atrocities. In providing a legal justification for this power shift, Professor Jennifer Trahan of New York University argues

> [T]he veto power is being abused in a way never anticipated when the Charter was drafted, and in a way that is at odds with other bodies of international law (such as the highest level *jus cogens* norms) and the "purposes and principles" of the UN Charter, with which the Security Council (including its permanent members) are bound, under article 24.2 of the Charter, to act in accordance.[219]

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217. VIRGINIA MORRIS & MICHAEL P. SCHARF, 1 THE INTERNATIONAL CRIMINAL TRIBUNAL FOR RWANDA 81 (1998).

218. U.N. Charter art. 22.

219. Jennifer Trahan, *The Narrow Case for the Legality of Strikes in Syria and Russia's Illegitimate Veto*, OPINIO JURIS (Apr. 23, 2018), https://opiniojuris.org/2018/04/23/the-narrow-case-for-the-legality-of-strikes-in-syria-and-russias-illegitimate-veto/. Trahan argues that there are three ways in which the Russian veto of the proposal to refer the matter of Syria to the International Criminal Court, or to at least establish an international investigative mechanism for Syria was incompatible with the UN Charter. First, the veto power derives from the UN Charter, which is subsidiary to *jus cogens* norms. Thus, a veto that violates *jus cogens* norms, or permits the continued violation of *jus cogens* norms, would be illegal. The Charter (and veto power) must be read in a way that is consistent with *jus cogens*. Second, the veto power derives from the UN Charter, which states in Article 24(2) that the Security Council "[in] discharging [its] duties . . . shall act in accordance

2. Humanitarian Intervention

On April 14, 2018, the United States, United Kingdom, and France conducted airstrikes against three Syrian chemical weapons facilities.[220] They justified their use of force as necessary to prevent the Assad regime from continuing to use chemical weapons against the Syrian population in the context of Security Council paralysis to establish accountability for this international crime.[221] Before the Syrian airstrikes, most countries and experts had taken the position that there was no international law right of humanitarian intervention under customary international law or the UN Charter except when authorized by the UN Security Council.[222]

This was confirmed in 1999, when Russia blocked the Security Council from authorizing force against Serbia to safeguard Kosovar Albanians in the Serb province of Kosovo from ethnic cleansing, and NATO launched a 78-day bombing campaign against Serbia without Security Council authorization.[223] The United States and United Kingdom justified the action as a *sui generis* act to save hundreds of thousands of lives.[224] The UN described it as "unlawful but legitimate." In the years since 1999 NATO action, countries have used force for

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with the Purposes and Principles of the United Nations." A veto in the face of a credible draft resolution aimed at curtailing or alleviating the commission of genocide, crimes against humanity or war crimes does not accord with the Charter's purposes and principles. And finally, a permanent member of the Security Council that utilizes the veto power also has other treaty obligations, such as those under the Genocide Convention, which contains an obligation to "prevent" genocide. A Permanent Member's use of the veto that would enable genocide, or allow its continued commission, would violate that state's legal obligation to "prevent" genocide. A similar argument can be made as to allowing the perpetration of at least certain war crimes, such as "grave breaches" and violations of Common Article 3 of the 1949 Geneva Conventions.

For a contrary view, see Mohamed Helal, *On the Legality of the Russian Vetoes in the UN Security Council and the Harsh Realities of International Law, A Rejoinder to Professor Jennifer Trahan*, OPINIO JURIS (May 4, 2018), http://opiniojuris.org/2018/05/04/on-the-legality-of-the-russian-vetoes-in-the-un-security-council-and-the-harsh-reality-of-international-law-a-rejoinder-to-professor-jennifer-trahan/.

220. Parts of this chapter previously appeared as Michael P. Scharf, *Striking a Grotian Moment: How the Syria Airstrikes Changed International Law Related to Humanitarian Intervention*, 19 CHI. J. INT'L L. 586, 586-614 (2019).

221. MICHAEL P. SCHARF, MILENA STERIO & PAUL R. WILLIAMS, THE SYRIAN CONFLICT'S IMPACT ON INTERNATIONAL LAW 62, 80-83 (2020).

222. *See generally* Michael P. Scharf, *How the War on ISIS Changed International Law*, 48 CASE W. R. J. INT'L L. 1 (2016).

223. SCHARF, *supra* note 221, at 65-69.

224. U.S. Secretary of State Madeleine Albright, Press Conference with Russian Foreign Minister Igor Ivanov, Singapore, U.S. DEPT OF STATE (July 26, 1999), https://1997-2001.state.gov/statements/1999/990726b.html; HC Deb (26 Apr. 1999) (330) cols. 30.

humanitarian purposes without Security Council authorization on several other occasions, including the U.S.-U.K. imposition of a no-fly zone over Iraq to protect the Marsh Arabs from Saddam Hussein's reprisals,[225] the Russian invasion of South Ossetia, Georgia ostensibly to protect ethnic Russians living there from attack,[226] and the U.S. airstrikes against the ISIS terrorist group to save the besieged Yazidis on Mount Sinjar, Iraq.[227] But never before the April 14, 2018 airstrikes against Syria had humanitarian use of force been accompanied by a clear legal justification based on a right of humanitarian intervention.

In contrast to the prior cases, the countries participating in the April 2018 airstrikes on Syria embraced a common legal justification – humanitarian intervention – rather than cite only factual considerations that render use of force morally defensible as they had in the past.[228] The United Kingdom was the most explicit of the three, telling the Security Council that its actions were legally justified on the basis of "humanitarian intervention" in the context of preventing use of chemical weapons when the Security Council had been paralyzed by a Permanent Member's veto.[229] It stated that "[a]ny State is permitted under international law, on an exceptional basis, to take measures in order to alleviate overwhelming humanitarian suffering."[230]

The United Kingdom's position was that humanitarian intervention in such cases without Security Council authorization would not be in violation of Article 2(4) of the UN Charter because that provision only prohibits the use of force that is "against the territorial integrity or political independence of any state" and "inconsistent with the Purposes

225. HC Deb 26 February 2001 vol 363 cols. 620-34.

226. Brian Barbour & Brian Gorlick, *Embracing the Responsibility to Protect: A Repertoire of Measures Including Asylum for Potential Victims,* 20 IN'L J. REFUGEE L.533, 559 (2008).

227. Helene Cooper & Michael D. Schear, *Militants Seize of Mountain in Iraq is Over, Pentagon Says*, N.Y. TIMES (Aug. 13, 2014), http://www.nytimes.com/2014/08/14/world/middleeast/iraq-yazidi-refugees.html?_r=0; Helene Cooper, Mark Landler & Alissa J. Rubin, *Obama Allows Limited Airstrikes on ISIS,* N.Y.TIMES (Aug. 7, 2014), https://www.nytimes.com/2014/08/08/world/middleeast/obama-weighs-military-strikes-to-aid-trapped-iraqis-officials-say.html?smid=url-share.

228. SCHARF, STERIO & WILLIAMS, *supra* note 221 at 74, 80-83.

229. A policy paper issued by the UK Prime Minister's Office stated: "The UK is permitted under international law, on an exceptional basis, to take measures in order to alleviate overwhelming humanitarian suffering. The legal basis for the use of force is humanitarian intervention …." Alonso Gurmendi Dunkelberg, Rebecca Ingber, Priya Pillai & Elvina Pothelet, *Mapping States Reactions to the Syria Strikes of April 2018*, JUST SECURITY (Apr. 22, 2018), https://www.justsecurity.org/55157/mapping-states-reactions-syria-strikes-april-2018/.

230. U.N. SCOR, 8233d mtg., at 6-7, U.N. Doc. S/PV.8233 (Apr. 14, 2018).

of the United Nations."[231] Humanitarian intervention, the United Kingdom argued, is consistent with the Charter's Purposes and Principles, which include "maintaining international peace and security," "promoting and encouraging respect for human rights," and "sav [ing] succeeding generations from the scourge of war."[232] According to the United Kingdom, humanitarian intervention in response to use of chemical weapons is not seeking to threaten the integrity of a state or bring about political change, but only to save lives and enforce the global ban on chemical weapons.[233]

For its part, the United States told the Security Council that "[t]he United States is deeply grateful to the United Kingdom and France for their part in the coalition to defend the prohibition of chemical weapons. We worked in lock step: *we were in complete agreement*" (emphasis added).[234] As such, the United States can be held to have implicitly adopted the rationale of the United Kingdom.[235] This is particularly significant because the United States has never before recognized a right of humanitarian intervention under international law.

Out of a total of seventy states that publicly commented on the airstrikes at the United Nations or elsewhere, only a small handful of countries questioned their legality.[236] The implications of the April 2018 airstrikes are far-reaching. Like the creation of the IIIM, the assertion of a right of humanitarian intervention without Security Council authorization represents a fundamental power shift from the Security Council – which had historically been viewed as holding the keys to use of force – to coalitions of states who assert a right to act to save lives when the Council is paralyzed.

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231. Richard Ware, *Briefing Paper: The Legal Basis for Air Strikes Against Syrian Government Targets*, HOUSE OF COMMONS LIBRARY (Apr. 16, 2018), https://researchbriefings.parliament.uk/ResearchBriefing/Summary/CBP-8287.

232. *Id.*

233. *Id.*

234. U.N. SCOR, *supra* note 230, at 6.

235. Draft articles on Responsibility of States for Internationally Wrongful Acts, with commentaries, U.N. (2001), http://legal.un.org/ilc/texts/instruments/english/commentaries/9_6_2001.pdf (citing international cases where a state's unequivocal acknowledgment and adoption of another's position will render the state retroactively responsible for it).

236. Fifty-six separate states and NATO (consisting of 28 member States) – for a total of over seventy countries – publicly expressed opinions about the April 14, 2018 airstrikes. Dunkelberg, Ingber, Pillai & Pothelet, *supra* note 229.

IV. Solutions and Policy Proposals

The problems outlined above serve to threaten the legitimacy of and weaken both the Security Council and the ICC. But for each of these problems there is a plausible solution. In this section, three potential solutions are proposed: (1) changes to the Security Council's veto power, (2) creation of an ICC diplomatic mission to the UN, and (3) calls for a new sanctions' paradigm for non-compliance.

A. *Changes to the Veto Power*

As discussed above, Article 27(3) of the UN Charter confers a veto power upon the permanent members of the Security Council over substantive resolutions.[237] The origins of the veto power stem from the UN Charter negotiations at the 1945 San Francisco Conference where the unanimity clause passed with thirty-three votes in favor, fifteen abstentions, and two opposed (Columbia and Cuba).[238] The patriarchal design of the Security Council as the global enforcer of international peace and security has long been criticized, particularly by small and medium sized states, and many ideas have been proposed to reform the Security Council and the veto powers of the permanent members. This section examines a few of those proposals and assesses the viability of each proposal.

1. Uniting for Peace Resolution

The Cold War began at about the same time the Security Council was formed.[239] Along with the shift in geopolitics created by the Cold War came disagreements among Security Council members regarding the handling of threats to international peace and security. After the Soviet Union twice vetoed resolutions proposed by the United States related to North Korea's aggression in the Korean War in 1950,[240] U.S.

237. U.N. Charter art. 27, ¶ 3.

238. Verbatim Minutes of the Fifth Meeting of Commission III, *in* United Nations Archives, Documents of the United Nations Conference of International Organization San Francisco, 1945, Vol. XI, 163, 165; Jean Krasno & Mitushi Das, *The Uniting for Peace Resolution and Other Ways of Circumventing the Authority of the Security Counci*l, *in* The UN Security Council and the Politics of International Authority 176 (Bruce Cronin & Ian Hurd eds., 2008). In 1945, there were only fifty-one states in the world. *See United Nations Security Council*, Encyc. Britannica (Jul. 20, 1998), https://www.britannica.com/topic/United-Nations-Security- Council.

239. Philip Jenkins, A Global History of the Cold War 1945–1991 (2021).

240. The result of the vote was nine in favor, the U.S.S.R. against, and Yugoslavia abstaining. *See generally* U.N. SCOR, 5th Sess., 496th mtg. U.N. Doc. S/PV.496 (Sept. 5, 1950) (containing the draft U.S. Resolution S/1653). The result of the vote was nine in favor, the U.S.S.R. against, and Yugoslavia abstaining; s*ee* U.N. SCOR, 5th Sess., 501st mtg. U.N. Doc. S/PV.501 (Sept. 12, 1950)

Secretary of State Dean Acheson proposed a plan to permit the General Assembly to make recommendations regarding breaches of international peace and security if the Security Council was unable to do so because of a lack of unanimity among the P5.[241] The United for Peace Resolution passed in the General Assembly by fifty votes in favor, two opposed (India and Argentina), and five abstentions from Soviet bloc countries.[242] The purpose of the Uniting for Peace Resolution was to restrain permanent members from exercising their veto power and to create a failsafe mechanism for the General Assembly to override Security Council deadlock.[243]

The United for Peace Resolution has been used many times over the past seventy years. Some examples include the creation of a peacekeeping mission during the 1956 Suez Crisis; to condemn armed conflicts in Hungary, Suez, Lebanon, Jordan, Afghanistan, Panama, and Israel, among others; to strengthen or confirm UN mission mandates in Korea and Congo; and to call for ceasefires in India-Pakistan.[244] The General Assembly has used the United for Peace Resolution in many situations to challenge Security Council inaction and to raise its members' collective voices on matters of international peace and security that are deadlocked in the Security Council.[245] In 2001, the International Commission on Intervention and State Sovereignty

(containing the draft U.S. Resolution S/1745/Rev.1). The vote was seven votes to one with two abstentions, India and Yugoslavia, and one member, China not participating in the vote.

241. Keith S. Petersen, *The Uses of the Uniting for Peace Resolution since 1950*, 13 INT'L ORG. 219, 219 (1959); Krasno & Das, *supra* note 238.

242. Krasno & Das, *supra* note 238, at 181.

243. G.A. Res. A/RES/377 A, U.N. GAOR, 5th Sess., Supp. (No. 20) 10–12, U.N. Doc. A/1775 (1950) ("*Reaffirming* the importance of the exercise by the Security Council of its primary responsibility for the maintenance of international peace and security, and the duty of the permanent members to seek unanimity and to exercise restraint in the use of the veto . . . . *Conscious* that failure of the Security Council to discharge its responsibility on behalf of all the Member States . . . does not relieve Member States of their obligations or the United Nations of its responsibility under the Charter to maintain international peace and security, *Resolves* that if the Security Council, because of lack of unanimity of the permanent members, fails to exercise its primary responsibility for the maintenance of international peace and security in any case where there appears to be a threat to the peace, breach of the peace, or act of aggression, the General Assembly shall consider the matter immediately with a view to making appropriate recommendations to Members for collective measures, including in the case of a breach of the peace or act of aggression the use of armed for when necessary, to maintain or restore international peace and security.") (emphasis in original).

244. Dominik Zaum, *The Security Council, The General Assembly, and War: The Uniting for Peace Resolution*, *in* THE UNITED NATIONS SECURITY COUNCIL AND WAR: THE EVOLUTION OF THOUGHT AND PRACTICE SINCE 1945, 163 (Vaughan Lowe, Adam Roberts, Jennifer Welsh & Dominik Zaum eds., 2008).

245. *Id.* at 166, 174.

(ICISS) suggested that the United for Peace Resolution was "one possible important instrument if the Council fails to act to address major human rights violations of humanitarian emergencies."[246] Indeed, the United for Peace Resolution and the General Assembly's willingness to take up an issue when the Security Council is paralyzed by deadlock provides alternative routes to addressing crises that threaten international peace and security.[247] Although the United for Peace Resolution was not used to override the Security Council during the nearly decade-long deadlock over Syria,[248] the General Assembly did manage to address the need through the creation of the IIIM.[249] Indeed, Article 11 of the UN Charter permits the General Assembly to discuss questions of power and functions of its organs, including the Security Council.[250]

Thus, the United for Peace Resolution provides one limited approach to overcome Security Council vetoes. But it is doubtful that the General Assembly could, under the "recommendations [for] collective measures,"[251] override a Security Council veto in referring a situation to the ICC since the Rome Statute clearly reserves the referral role for the Security Council, not the General Assembly.[252] If the General Assembly had such power, it probably would have referred the Syria situation to the ICC rather than creating the IIIM for Syria. An alternative solution for bypassing Security Council deadlock on matters related to referring atrocities situations to the ICC would be for the Assembly of State Parties to amend the Rome Statute to permit the General Assembly to refer situations to the ICC, perhaps with the caveat that such referrals must pass by a two-thirds majority in the Assembly. Given that the Syria referral was supported by sixty-five member states,[253] including three permanent members of the Security Council – France, the United Kingdom, and the United States – the prospect of a General Assembly power to refer situations to the ICC would likely only be invoked in the gravest of situations, such as Syria, Myanmar, or Yemen.

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246. INT'L COMM'N ON INTERVENTION & STATE SOVEREIGNTY, THE RESPONSIBILITY TO PROTECT 53 (Int'l Dev. Rsch. Ctr., 2001).

247. Trahan, *supra* note 69, at 28.

248. Nanda, *supra* note 155, at 141.

249. Trahan, *supra* note 69, at 28.

250. U.N. Charter art. 11.

251. G.A. Res. A/RES/377 A, 5 U.N. GAOR, Supp. (No. 20) 10–12, U.N. Doc. A/1775 (1950).

252. *See* Rome Statute, supra note 1, at art. 13(b).

253. U.N. Security Council, *supra* note 159.

2. The Accountability, Transparency, and Coherence Group Code of Conduct

In 2015, the Accountability, Transparency, and Coherence (ACT) Group, which consists of thirty-five small and medium sized states, proposed an initiative to prevent Security Council inaction on atrocities.[254] The ACT Code of Conduct for Security Council Action Against Genocide, Crimes Against Humanity or War Crimes (ACT Code of Conduct) is a voluntary commitment of UN member states to support "timely and decisive action to prevent or end crimes against humanity, war crimes, and genocide" when acting as members of the Security Council.[255] The ACT Code of Conduct has the support of 121 States, including ten current Security Council members.[256] The purpose of the ACT Code of Conduct is to prevent atrocity crimes through veto restraint.[257] It is therefore similar to Ambassador Hans Correll's proposal that Security Council members "lead by example," and refrain from using their veto power when mass atrocities are implicated.[258]

While such efforts are laudable, there are two reasons why more concrete action is needed to constrain Security Council veto power. First, the ACT Code of Conduct, and similar lead-by-example initiatives, rely on Council members' cooperation and a "scout's honor," so to speak, not to use their veto even when a member's interests are at stake. While this proposal might work in a world with greater cooperation among states, it is unlikely to have a substantial impact on the P5 who have not shown a willingness to cooperate on matters of international peace and security at least since 2011. Second, without a more concrete solution to the Security Council veto, it is unlikely that permanent members will refrain from exercising their veto power when their interests are implicated – whether directly or indirectly – e.g., complicity, military involvement,

254. Ambassador Wenaweser, Letter dated Dec. 14, 2015 from the Permanent Representative of Liechtenstein to the United Nations addressed to the Secretary General, Annex 1, U.N. Doc. A/70/621-S/2015/978 (Dec. 14, 2015) [hereinafter ACT Code of Conduct].

255. *Id.* at 1.

256. *List of Signatories to the ACT Code of Conduct*, GLOB. CENT. FOR THE RESPON. TO PROTECT (June 20, 2019), https://www.globalr2p.org/resources/list-of-signatories-to-the-act-code-of-conduct/.

257. ACT Code of Conduct, supra note 255, at 1, 3.

258. Hans Correl, *UN Security Council Reform – The Council Must Lead by Example*, *in* 22 MAX PLANCK YEARBOOK OF UNITED NATIONS LAW 5 (Frauke Lachenmann & Rüdiger Wolfrum, eds. 2018).

alliance, or ideology.[259] This is precisely why Russia has continued to veto Security Council efforts in Syria. Thus, a stronger proposal is needed to remedy Security Council inaction over mass atrocity situations.

3. Recognize Unlawful Nature of Vetoing *Jus Cogens* Violations

Jennifer Trahan's recent book on Security Council veto reform advances three arguments under existing international law that recognize the legal limits of the veto use: (1) the UN Charter, and therefore the Security Council's authority, must be consistent with *jus cogens* norms, which carry greater legal authority than the Charter; (2) the veto power must be consistent with the UN's "purposes and principles" under Article 24(2) of the Charter; and (3) permanent members must comply with foundational treaty obligations, such as the Geneva Conventions and Genocide Convention that create non-derogable and binding obligations upon member states.[260] In essence, Trahan's work recognizes the unlawful nature of vetoing resolutions to address *jus cogens* violations and the need for concrete reforms to the Security Council veto. Trahan suggests two approaches to recognizing the legal limits of the veto power: (1) the General Assembly could request that the ICJ render an advisory opinion on the question, "does existing international law contain limitations on the use of the veto power by permanent members of the UN Security Council in situations where there is ongoing genocide, crimes against humanity, and/or war crimes?" or (2) the General Assembly could adopt a resolution recognizing the legal limits of the veto power when *jus cogens* norms are implicated.[261] These approaches, Trahan argues, are the only viable pathways to constraining permanent members from vetoing proposals that would address mass atrocities because "[w]aiting for the recalcitrant members of the Council to join the Code of Conduct or French/Mexican initiative will, quite simply, come at the cost of too many victims' lives."[262] Indeed, any reform proposals that require a Charter amendment will undoubtedly be vetoed by at least one permanent member, and proposals calling for voluntary restraint will fail whenever one of the P5 refuses to commit, as noted above.[263] The answer, according to Trahan, lies in the understanding that

259. *See* KAOUTZANIS, *supra* note 10, at 33-37.
260. *See generally* Trahan, *supra* note 69.
261. *Id.* at 51-52.
262. *Id.* at 52.
263. *Id.*

the veto power is not a source of authority above all other sources of international law, but is constrained by existing international law.[264]

To that end, whenever actors violate a *jus cogens* norm by committing war crimes, crimes against humanity, or genocide, the Security Council and its members individually are thus constrained from vetoing a proposal that would address these violations.[265] "A veto made where there is a serious breach of a peremptory norm should be seen as void or *ultra vires* of the proper exercise of Security Council power."[266] One way of demonstrating that a veto is *ultra vires* is for the General Assembly and individual member states to continue to speak out against unrestrained veto use whenever a permanent member acts *ultra vires* with the UN Charter, *jus cogens* norms, or foundational treaty obligations.[267] While this naming-and-shaming approach will not have an immediate effect on permanent members, it will strengthen international support for veto reform and/or place pressure on permanent members to bring their actions into compliance with the existing legal limits of the veto. Ultimately, the P5 may be willing to sacrifice a small slice of their veto power through reform rather than see further erosion of legitimacy and shifts in power as described above.

B. *A Missionary Function for the ICC's Registry*

Currently, the Security Council only periodically hears reports from the Prosecutor of the International Criminal Court. A second proposal to improve the relationship between the Security Council and the ICC is for the ICC to create a diplomatic mission to the UN, with a specific office dedicated to liaising with the Security Council that would replace the New York Liaison Office, which was recently deemed to be ineffective by an Independent Expert Review of the ICC.[268] The Registry, which is responsible for the Court's external

264. *Id.*

265. By analogy to the Uniting for Peace process described above, the General Assembly could determine that there is a prima facie case that violations of *jus cogens* norms have occurred, thereby triggering the Security Council's obligation not to veto.

266. Trahan, *supra* note 69, at 170.

267. *Id.* at 52.

268. *See* Independent Expert Review of the International Criminal Court and the Rome Statute System, *supra* note 7 ("The Experts find that the role of the NYLO should be reviewed and updated.").

affairs, is ideally situated to take on this role.[269] This is an appropriate exercise of the Registry's functions because one facet of the Registry's work is public outreach– i.e. to build support for the Court through outreach to State Parties and international organizations.[270]

The envisaged "diplomatic" function of the Registry's mission to the UN would be to establish working relationships with diplomats serving the Security Council, engage in discussions and negotiations with members concerning the Court's priorities and the importance of pursuing accountability for atrocity crimes, and provide expertise and information-sharing about situation countries where atrocities have been or are presently taking place in order to improve Security Council knowledge and assist in decision-making.[271] The diplomatic mission would also bridge the literal divide between the UN in New York and the ICC in The Hague, enabling diplomats and ICC officials to build better working relationships and pursue common goals.

Over time, the goal of an ICC mission to the UN would also be to call upon member states to ratify the Rome Statute – a request recently made by Prosecutor Bensouda at the Arria-formula meeting held in 2018 on the achievements, challenges, and synergies in the relationship between the Council and the ICC.[272] Another goal would be for the Security Council to call upon States to arrest and surrender charged individuals to the Court or to impose Article 41 measures on states that refuse to comply with the Court's orders.[273]

Finally, although the Security Council should have no bearing on who the Assembly of States Parties elects as the next Chief Prosecutor of the ICC, a missionary office could seek the advice of Security Council members on their preferences for who they think should hold that office. Indeed, so much damage has been done to the United States' support for the Court through the *propio motu* investigation into Afghanistan that the United States is likely to remain hostile towards non-Western prosecutors, a problem that could potentially be alleviated by

269. Registry, INT'L CRIM. CT., https://www.icc-cpi.int/about/registry.

270. *See id.*

271. The author's idea for a diplomatic mission for the ICC came from discussions with former ICC Registrar Herman von Hebel during an interview (Nov. 13, 2020) (on file with the authors).

272. Permanent Rep. of the Netherlands, Letter dated Aug. 31, 2018 from the Permanent Representative of the Netherlands to the United Nations addressed to the President of the Security Council, U.N. Doc. S/2018/810, at 4 (Sept. 4, 2018).

273. *Id.* at 3.

Council members providing input on shortlisted candidates under consideration by the Assembly of States Parties.

C. *New Sanctions Paradigms*

A third proposed solution to the problems that plague the Security Council and ICC relates to the use of Article 41 measures. It is widely understood now that targeted sanctions imposed by the Security Council on member states have limited efficacy. Indeed, the Targeted Sanctions Consortium found in its comprehensive assessment of UN sanctions that they "are only effective in coercing, constraining, or signaling a target on average about 22% of the time."[274] Targeted sanctions were only effective at changing a target's behavior 10% of the time.[275] Even where targeted sanctions are imposed on member states, they are rarely enforced by the Security Council.[276] And permanent members are likely to use their veto power over sanctions imposed on their allies, as China did or threatened to do when the Security Council tried to enforce sanctions against Sudan.[277] To that end, China threatened to veto sanctions against Sudan on five separate occasions.[278]

There are thus four ways in which a new sanctions regime can be used to bring member states into compliance with measures aimed at pursuing accountability for atrocity crimes and ensuring that State Parties to the Rome Statute comply with arrest warrants. These include (1) regional organizations, such as the African Union (AU) or Economic Community of West African States (ECOWAS), imposing sanctions on non-compliant members; (2) international organizations conditioning loans on compliance with Security Council Resolutions or ICC arrest warrants; (3) the General Assembly invoking the Uniting for Peace Resolution to recommend that member states impose sanctions on non-compliant states; and the most controversial proposal, (4) calling upon the Security Council to impose secondary sanctions upon non-compliant member states. Each is discussed below.

To support the Security Council's sanctions regimes, as well as bolster support for the ICC's arrest warrants, regional organizations can impose sanctions on non-compliant members. For example, the AU or

274. THOMAS J. BIERSTEKER, MARCOS TOURINHO & SUE E. ECKERT, *Thinking about United Nations Targeted Sanctions*, *in* TARGETED SANCTIONS 31 (Thomas J. Biersteker, Sue E. Eckert & Marcos Tourinho, eds. 2016).

275. *Id.* at 32.

276. Meyer, *supra* note 187, at 923–24.

277. Trahan, *supra* note 69, at 330.

278. *Id.*

ECOWAS could act as regional enforcers of sanctions regimes, ensuring that state parties to these regional organizations comply with the measures. Buy-in and enforcement from regional actors are especially important in overcoming regional distrust of the Security Council and ICC, as evidenced by the African-bias critique of the Court.[279] Moreover, regional bodies like ECOWAS are important economic and political gatekeepers for their regions. By requiring members of the organization to comply with, for example, arrest warrants issued by the ICC, ECOWAS can play an important role in ensuring that perpetrators are brought to justice and strengthening the legitimacy of the Court.

International organizations are also gatekeepers on global issues such as trade. For example, the World Trade Organization (WTO) regulates trade relations between its 164 members, ensuring fair and safe trade practices.[280] Additionally, the International Monetary Fund (IMF) is another international organization that provides loans to countries to develop capacities, particularly in developing countries.[281] The IMF could condition loans on compliance with Security Council Resolutions or ICC arrest warrants, ensuring that perpetrators are brought to justice. And the WTO could impose trade restrictions on countries that refuse to comply with arrest warrants or Article 41 sanctions. In this way, international organizations can exert greater pressure on countries to comply with sanctions regimes. Precedent for the success of this approach exists in the conditionality of economic assistance the United States, European Union, and IMF imposed on Serbia, leading to the surrender of major indicted war criminals to the ICTY.[282]

The General Assembly may also invoke the Uniting for Peace Resolution to recommend that member states impose sanctions on non-compliant states. As noted above, the United for Peace Resolution allows the General Assembly to bypass Security Council deadlock to make recommendations on issues related to threats to international peace and security.[283] Moreover, under Article 11(2) of the UN Charter, the General Assembly has the power to make recommendations to states or the Security Council

279. *See generally* Ochs, *supra* note 100.

280. *What is WTO?*, WORLD TRADE ORG., https://www.wto.org/english/thewto_e/whatis_e/whatis_e.htm (last visited Nov. 2, 2021).

281. *About The IMF*, INT'L MONETARY FUND, https://www.imf.org/en/About (last visited Nov. 2, 2021).

282. Steven Woehrel, *Conditions on U.S. Aid to Serbia*, CRS REPORT 1, 2 (Jan. 7, 2008), https://apps.dtic.mil/dtic/tr/fulltext/u2/a486626.pdf.

283. Krasno & Das, *supra* note 238, at 181.

over a question of international peace and security.[284] Therefore, the General Assembly has significant power to apply diplomatic pressure on the Security Council or UN member states to comply with Article 41 measures or to suggest additional measures be imposed by the Security Council.

Finally, and most controversially, the Security Council could threaten and, if necessary, impose secondary sanctions upon non-compliant member states. Secondary sanctions are economic restrictions "imposed by a sanctioning or sending state (e.g. the United States) that is intended to deter a third-party country or its citizens and companies (e.g. France, the French people and French companies) from transacting with a sanctions target."[285] Thus secondary sanctions aim to apply pressure on targets by preventing third-party states, individuals, or businesses from doing business with the targeted state. Such sanctions are unpopular,[286] and they have been considered unlawful when states unilaterally employ them against nationals of other states.[287] But they are more effective than targeted sanctions on the primary offenders, and for this reason they may apply the right kind of pressure on individuals, businesses, or states to comply with existing Article 41 measures or Court orders.

V. Conclusion

This article has argued that the Security Council's inaction and lack of support for the ICC serves to undermine both the legitimacy of the Council as an arbiter of international peace and security and the viability of the Court in pursuing accountability for atrocity crimes. The article began by exploring the historical relationship between the Security Council and ICC, revealing the growing tensions between the two organizations since 2012.

In particular, the article examined how the Crimea investigation and attempts to refer the Syria case fed Russia's animosity toward the ICC and how the Afghanistan investigation transformed neglect into ill will toward the ICC on the part of the United States. Despite the change in the U.S. presidential administration in 2021, and the Prosecutor's decision to focus only on alleged Taliban crimes in Afghanistan, the ICC's recent decision potentially leading to charges against Israelis for

284. U.N. Charter art. 11, ¶ 2.

285. Meyer, *supra* note 187, at 926.

286. Interview with Christian Mahr, Director, Int'l Crim. Ct. (Nov. 15, 2020) (on file with the authors).

287. Meyer, *supra* note 187, at 932-33.

alleged war crimes and crimes against humanity in the Gaza Strip and West Bank will make it difficult for President Biden to alter course. However, a recent development in international affairs may induce a tipping point. The war in Ukraine and Russian President Vladimir Putin's alleged war crimes may provide the spark that ignites U.S. interest in rekindling its relationship with the ICC in an effort to pursue criminal accountability for Russian violations in Ukraine.

The article also addressed the problems created for both the Council and the Court due to the growing friction. Owing to Security Council paralysis, the ICC has been unable to engage constructively in the three greatest humanitarian crises of the past decade: Syria, Myanmar, and Yemen. This inability has created a loss of legitimacy for both organizations, a lack of accountability for the world's worst atrocity crimes, and perhaps most significantly a shift in power away from the Security Council to unilateral actions and other institutions. As the U.S. Permanent Representative to the UN explained, "[i]t's a Darwinian universe here."[288] If the Security Council continues to prove incapable of responding to atrocities, then power will shift elsewhere.[289]

Finally, this article explored potential solutions and policy recommendations for improving the relationship between the Security Council and ICC to help resolve current challenges to international peace and security. First, it analyzed options to circumvent the persistent vetoes of the P5, including the General Assembly's use of the Uniting for Peace Resolution, advocating for voluntary restraint under a Code of Conduct, and encouraging the ICJ or General Assembly to pressure the P5 not to veto cases involving response to *jus cogens* violations. Second, it explored the proposed creation of an ICC diplomatic mission to the UN as a way of improving communication with both the Security Council and members of the General Assembly. And finally, it examined calls for a new sanctions paradigm which would include resort to regional organizations to impose sanctions on non-compliant members, utilizing international financial institutions to condition loans on compliance with Security Council Resolutions or ICC arrest warrants, and requesting that the General Assembly invoke the Uniting for Peace Resolution to recommend that member states impose sanctions on non-compliant States.

288. Borger & Inzaurralde, *supra* note 197.

289. *Id.*

Together, the International Criminal Court and Security Council are currently foundering on rocky shoals. While cognizant of the political obstacles, pursuit of proposals to fix the dysfunctional relationship may become increasingly palatable as the costs of inaction – a broken court, a weakened Security Council, and ultimately a new age of impunity – continue to mount.