

THE COUNCIL AND THE COURT:

Improving Security Council Support of the
International Criminal Court

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SCHOOL OF LAW
UNIVERSITY of CALIFORNIA • IRVINE
International Justice Clinic

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David Kaye

with

Bryan Hance

Manal Hanna

Sunny Hwang

Elisabeth Levin

Grace Lo

Esther Yoo

Xiangyu Zhang



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University of California, Irvine School of Law

401 E. Peltason Drive, Suite 1000

Irvine, CA 92697-8000

949-824-0066

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EXECUTIVE SUMMARY

The United Nations Security Council has increasingly offered support, if qualified, for the work and purposes of the International Criminal Court. Twice, Darfur in 2005 and Libya in 2011, it has referred situations to the ICC for investigation and possible prosecution. 2012 saw repeated positive references to the Court, including a first-ever public Council discussion focused on building support for the ICC. In March of 2013, the Council authorized the peacekeeping force in the Democratic Republic of the Congo (DRC), MONUSCO, to cooperate with the government on the arrest of individuals subject to ICC arrest warrants. A promising trend that demonstrates clear overlap between Council and Court interests, the Council's support has nonetheless been mainly rhetorical. It has not, for instance, adopted concrete measures in areas such as the cooperation of states, the apprehension of those subject to arrest warrant, and resources to expand the Court's capacity. This report addresses the trend lines in Council support, seeking to answer the following set of questions: How may the Security Council build on and expand the emerging support? What barriers may exist to the adoption of sustainable, concrete measures supporting Court activities, and how may they be overcome?

Two kinds of influences shape the relationship between the Council and the Court. First, the law, norms, rules, and policies of the institutions themselves structure the relationship between the two. Under Chapter VII of the UN Charter, the Security Council bears primary responsibility for the maintenance or restoration of international peace and security. Many Council members, therefore, view the ICC through the lens of this particular authority, asking whether accountability processes can support the Council's Chapter VII responsibilities. The ICC, by contrast, is concerned with implementation of the Rome Statute, which provides for an independent court pursuing accountability for war crimes, crimes against humanity, and genocide. Court officials and supporters may see a strong connection between peace and security, on the one hand, and justice, on the other, but the Court's mandate pertains solely to accountability, as Fatou Bensouda, the ICC prosecutor, recently made clear.¹ That said, both institutions see that the other can advance its own objectives in certain situations. Events force the two institutions to interact, and their interactions are governed in part by the UN Charter, the Rome Statute, and, to a lesser degree, the Relationship Agreement between the UN and the ICC. Yet no permanent structural mechanism is in place to help manage the relationship between the two.

Second, key actors on the Council and within the UN strongly influence day-to-day policies with respect to the Court. The permanent five members of the Security Council, the P-5, serve as the essential actors in this dynamic, with the United Kingdom and France serving a largely supportive role. The United States also has taken on the role as Court supporter, but its freedom of action is

limited by American law, especially the American Servicemembers Protection Act. China and Russia have adopted nuanced positions toward the ICC, often supportive of international accountability in principle and the ICC in particular. But they also jealously guard the prerogatives of the Council with respect to peace and security. Other actors can play influential roles, as well, such as the non-permanent members of the Council, parties and non-parties to the Rome Statute, other active participants in UN politics in New York, the Court itself, and leading non-governmental organizations (NGOs).

This report reviews these two categories of influences – the structural, legal framework and the Council/UN dynamics – before introducing a series of principles that should guide the Council-Court relationship and specific steps the Council and its members could take to advance that relationship.

The principles argue for sustained attention beyond resolutions and statements; mutual respect for the independence and roles of one another; professional, technical engagement as the foundation of the relationship; transparency within the bounds of diplomatic and case- or investigation-specific requirements; and broadening support in the UN General Assembly as a supplement to Council engagement.

The report draws from these principles to recommend a series of specific structural and substantive policy steps. Two structural elements would benefit a sound Council-Court relationship:

1. A Council working group on international justice that integrates ICC matters, either expanding the existing ad hoc Tribunals working group or establishing a new, broader group dedicated to international justice and accountability issues; and
2. A liaison committee consisting of members of the Court Registry and the relevant Council Sanctions Committees. Such a committee would streamline decision-making where Court processes – such as the transfer of an individual to The Hague or the use of funds for defense or reparations purposes – intersect with Council sanctions programs.

The structural improvements should be supplemented, over time, with specific policy improvements in the Council resolutions themselves:

1. Extension of the obligations of cooperation with the Court to all states, not just the situation countries themselves, especially in referral situations but also possibly in those circumstances where the Council has expressed support for the work of the Court in non-referral situations;
2. Provision of timely substantive responses to Court findings of non-cooperation that are communicated to the Council, as the Court has done on several occasions;
3. Extension of key Rome Statute protections of privileges and immunities in referral and other situations, thereby allowing Court officials to conduct their work safely and without interference from local actors;
4. Regular and streamlined imposition of financial, travel, and diplomatic sanctions on those accused by the ICC, helping to dry up the accused's resources and highlight the importance of state cooperation in transferring such individuals to ICC custody;

5. Promotion of UN and outside funding in referral situations, eliminating the language from referral resolutions purporting to disallow UN funding;
6. Elimination of jurisdictional restrictions related to non-parties in referral resolutions, enabling the Court to exercise independence in identifying those most responsible for the most serious crimes in situation countries; and
7. Initiation of a transparent conversation about the factors relevant to Council referral of situations to the Court, recognizing that the Council is highly unlikely to identify specific criteria to guide future referrals.

This report also directs three sets of recommendations specifically to the P-5. It recommends that the United Kingdom and France take the lead on both sets of recommendations outlined above, while urging the United States to strengthen its commitment to the Court by expanding presidential waiver authority in ASPA. It concludes with an argument for broadening the support on the Council to include the governments of China and Russia. It thus concludes with a series of recommendations designed to involve the governments of China and Russia in conversations related to the Council-Court relationship. These include conducting diplomacy to encourage support for structural and policy changes on the Council; involving China and Russia in unofficial meetings related to international justice; building and broadening the domestic knowledge base over the long term; helping build the profile of the domestic public international law communities in each country; and identifying areas of collaboration in international justice.

I. INTRODUCTION

The United Nations (UN) Security Council's attention to the International Criminal Court (ICC) has helped catapult the Court into the international limelight. It has become a central actor where there are credible allegations of war crimes, crimes against humanity, or acts of genocide, the subject matter at the heart of the ICC's jurisdiction. The Council inserted the Court into Darfur in 2005 and Libya in 2011. One journalist counted nine references to the ICC in Security Council resolutions in 2012 alone.² The Council held an unprecedented public session on the ICC during the fall of 2012, with all participating governments – including the three permanent members of the Council which are not parties to the Rome Statute: the United States, China, and the Russian Federation – expressing a positive view of the role that can be played by the Court.³ International discussion in a number of recent crises – from Kenya to Mali and Syria to Sri Lanka – has focused attention on accountability and the ways in which the Court may intersect with Council business. A Court whose charter, the Rome Statute, was only adopted in 1998 and entered into force in 2002, now seems anchored to the Security Council in rhetoric and reality.

And yet, the Court's challenges are significant. These challenges include continuing difficult ongoing investigations, conducting complex trials fairly and as expeditiously as possible, funding its operations, protecting witnesses and encouraging their cooperation, building relationships in the communities where it does its work, developing strategies to enforce outstanding arrest warrants, and presenting itself as an independent and effective judicial organization. It also faces challenges brought about by its and the Council's selectivity, frequently criticized as politicized and subject to double-standards. As the Court attempts to meet its challenges, the Security Council could offer critical political, diplomatic, and logistical assistance in ways that advance its own peace and security role, but its peculiar dynamics and broader international role often stand in the way of long-term, sustainable support.

What steps may be taken to convert the rhetorical and political support of the Council to concrete measures supporting Court activities? How may supporters build lasting support for the Court on the Council? How can strong support be developed without compromising the ICC's independence? What kinds of efforts need to be made at UN Headquarters in New York to improve Council support of the Court? What kind of efforts might be helpful to build lasting support in reluctant capitals, especially Beijing and Moscow? This report offers proposals to build a sustainable relationship between the Council and the Court, one that is sensitive to the Court's mandate of accountability and independence and the Council's mandate of maintaining international peace and security.

This report first addresses factors that animate the Council's relationship with the Court, laying out legal, political, and diplomatic dynamics that shape support for the Court on the Security Council. It then turns to the principles that should govern the Council-Court relationship, steps the Council and others may adopt to improve the Council's support of the Court, and the need to ensure that China and Russia are meaningfully engaged in developing a sustainable relationship between the institutions of security and justice.

II. THE CURRENT COUNCIL-COURT RELATIONSHIP

The Security Council has deployed its Chapter VII authority on numerous occasions to facilitate or encourage accountability for serious violations of international human rights and humanitarian law.⁴ The Russian Federation's Permanent Representative to the UN captured the emerging consensus among UN delegations when he stated in 2012 that, "[i]n discharging its mandate for the maintenance of international peace and security[,] the Council must address the fight against impunity."⁵ This section provides an overview of the Council-Court relationship, beginning with a look back at the example of the ad hoc Tribunals for the former Yugoslavia and Rwanda.

The Examples of the ICTY and ICTR

Twice in its history the Council has created subsidiary institutions devoted to accountability for war crimes, crimes against humanity, and genocide: the ad hoc International Criminal Tribunals for the Former Yugoslavia (ICTY) and Rwanda (ICTR).⁶ The ad hoc Tribunals present a model, if not always perfect, of Council engagement in international justice.

When the Council launched the ICTY with Resolution 827 on May 25, 1993, it held that an accountability mechanism "would contribute to the restoration and maintenance of peace" in the Balkans. It tied its authority under Chapter VII to the prosecution of those responsible for serious violations of international humanitarian law. The Council saw that merely establishing the Tribunal, without granting it the powers to compel compliance with its orders, would create a paper tiger, an institution unable to carry out its work of investigations and prosecutions. Thus, the Council obligated all UN Member States to "cooperate fully" with the Tribunal and to "take any measures necessary" to ensure their domestic authority to implement Tribunal orders or requests for assistance. It urged governments, international organizations, and NGOs to make financial, personnel, or in-kind contributions to enable the Tribunal to do its work. When, the following year, the Council established the ICTR in Resolution 955, it repeated these authorities and obligations.

The Council's determination to establish these new mechanisms of accountability suggested an important role for justice in the implementation of the Council's Chapter VII responsibilities.⁷ It signaled to all UN Member States expectations of compliance and support. By speaking broadly of crimes committed on the territory of the former Yugoslavia and Rwanda, rather than by particular actors or groups, the Council supported accountability for individuals from all parties. By indicating that the "sole purpose" of the Tribunals was to prosecute persons for grave violations

of international law, the Council also signaled that its aim, consistent with the spirit of Nuremberg to which their supporters often referred, was to emphasize individual culpability rather than state or group responsibility. While the Council typically “did not take meaningful action to ensure that the ad hoc tribunals enjoy full cooperation,”⁸ its authority has stood behind the Tribunals as they have sought to complete their mandates.

The Legal Framework for Council-Court Cooperation

No such expectations of support and cooperation are built into the relationship between the Council and the ICC. Unlike the ad hoc tribunals, the ICC owes its existence not to the Council but to the results of a years-long set of negotiations, involving all UN member states and dozens of NGOs. The role of the Council was a central feature of the resistance to the Rome Statute from some permanent Council members, especially the United States.⁹ The Council did not create the Court, but ultimately the governments at the Rome Conference in 1998 provided a roadmap for Council engagement with the Court. At the same time, the Council plays a central role in international peace and security; to the extent the ICC is perceived as seeking to supplement or even share in that role, one can expect key Council states to push back and resist.

The central features of the Council-Court legal relationship may be found in two articles of the Rome Statute, Articles 13 and 16. Article 13(b) enables the Court to exercise jurisdiction if “[a] situation in which one or more [Rome Statute-enumerated] crimes appears to have been committed is referred to the Prosecutor by the Security Council acting under Chapter VII of the Charter of the United Nations.” Article 13 created the pathway for the Council to avoid the potentially costly creation of ad hoc tribunals for each armed conflict, enabling it to externalize the costs of investigation and prosecution in the Court and its Member States.

The Rome Statute also suggests that states parties did not intend to foot the bill for referrals under Article 13(b). Article 115 notes that Court expenses “shall be provided” not only by the states parties but also “by the United Nations, subject to the approval of the General Assembly, *in particular in relation to the expenses incurred due to referrals by the Security Council.*”¹⁰ Article 115 helps explain widespread disappointment in the Council’s failure to authorize UN funding in the Sudan and Libya situations.

Article 16 of the Rome Statute provides the Council with the authority to defer investigations or prosecutions, acting under Chapter VII of the Charter, for periods of up to one year at a time. Article 16 earned a negative reputation when, in 2002, the United States successfully pressed the Council to adopt Resolution 1422 with language promising non-investigation of nationals of non-state parties in the context of peacekeeping, invoking the terms of Article 16.¹¹ Although the U.S. effort on Article 16 foundered by 2004, it became easy to see Article 16 as a political instrument to avoid the Court’s jurisdiction rather than one legitimately tied to the Council’s Chapter VII authorities. African Union and Kenyan efforts to have the Council deploy Article 16 in the context of the Darfur and the Kenya situations, albeit unsuccessful, further gave the impression of a politicized provision of the Statute. That said, Article 16 may also be seen as a potentially useful

tool in those situations where the Court lacks a legal basis to suspend an ongoing investigation that presents peace and security concerns.

Following adoption of the Rome Statute, the UN and the Court concluded a Relationship Agreement that loosely frames the interactions between the two institutions, respecting the mandate of each and enabling the two to “cooperate closely, whenever appropriate.”¹² Other UN bodies have provided the Court with on-the-ground cooperation. The Office of the Prosecutor has benefited, for instance, from logistical cooperation with the Council-mandated UN Operation in Cote d’Ivoire (UNOCI) and UN Organization Stabilization Mission in the DRC (MONUSCO).¹³ The ICC’s New York liaison officers, along with Court officials from The Hague, participate in or observe ICC-related discussions within the Council, the General Assembly, the Secretariat, the Office of Legal Affairs, special representatives of the Secretary General and among the various governmental missions to the UN.

Despite the legal framework, the Council-Court relationship seems nascent today. No formal structure provides for consistent, professional interaction between the two bodies. The Council’s expressions of support belie the reality that, apart from a rare exception or two, it does not offer concrete assistance to the Court, even (or especially) in the context of referred situations. Further, it is distressing to some that the Council has not articulated criteria by which it considers whether threats to peace and security warrant referral to the Court, but the Council is a political body unlikely to adopt legal rules to guide its decisions. Unfortunately, when political rather than humanitarian considerations are seen to drive referral decisions, both the Council and the Court come under criticism: the Council for protecting its members’ allies, the Court for being unavailable in those situations that most warrant investigation and prosecution.

The Referral Resolutions: Darfur and Libya

Multiple motivations stand behind Council member support for referrals. Council members that are parties to the Rome Statute, for instance, may be motivated to refer a situation because of substantive commitments to accountability and the building of an ICC docket of serious situations. Council members that are not party to the Rome Statute may share the substantive commitment to accountability, but they may also be motivated by other factors – such as the support of national and regional actors, as clearly was the case in Libya, or simply the desire not to be the sole delegation to cast a negative vote. Some members may support referrals not to bolster accountability but to shore up a particular diplomatic and political case against actors that might undermine international peace and security. Some UN delegations in New York see the Libya resolution in this light, inasmuch as the referral was just one among many tools, including sanctions and arms embargoes, adopted to pressure Muammar Qaddafi and protect civilians. Even if the motivations are not focused solely on accountability, however, the act of involving the Court strengthens the perception that the Court has a proper role to play in peace and security.

Regardless of motivations behind them, the Darfur and Libya resolutions share key elements but also differ in certain respects. Resolution 1593 focused exclusively on referring the situation in

Darfur to the ICC, a response to the International Commission of Inquiry on Darfur that reported to the Secretary General earlier in 2005.¹⁴ Each of the resolution's preambular and operative paragraphs deals with a particular question of the referral, but it does not condemn or draw attention to the violence in Darfur; it merely takes note of the Commission report. By contrast, Resolution 1970, adopted in 2011, offers a brief against the Qaddafi regime, expressing "grave concern" about the situation for civilians in Libya, deploring the regime's violations, demanding "an immediate end to the violence" and calling "for steps to fulfil the legitimate demands of the population." Resolution 1970 not only referred the situation in Libya to the ICC; it also imposed an arms embargo, a travel ban, and an asset freeze.

Despite their differences, Resolutions 1593 and 1970 share a basic outline and some common principles. Under both, the Security Council acted under Chapter VII to refer the situations in each country to the ICC prosecutor, thereby connecting justice to the Council's peace and security authorities. The resolutions also delimit the jurisdiction of the Court, from the entry into force of the Rome Statute for Darfur to the date when unrest erupted in Libya in February 2011. Both resolutions invite the prosecutor to address the Council on a half-yearly basis on "actions taken pursuant to" them. The resolutions of referral share similar language in three other ways, each of which raises concerns among Court supporters and continues to figure in the discussions over the Council-Court relationship:¹⁵

Cooperation: In Resolution 1593, the Council obligated the Sudanese Government "and all other parties to the conflict in Darfur" to "cooperate fully with and provide any necessary assistance to the Court and the Prosecutor." Resolution 1970 obligated "the Libyan authorities" to undertake the same kind of cooperation but did not include the language about "other parties to the conflict." Both resolutions provide that "States not party to the Rome Statute have no obligation under the Statute," merely "urg[ing] all States and concerned regional and other international organizations to cooperate fully." Pursuant to the Rome Statute, the Court has reported instances of non-cooperation to the Council in the case of Sudan, but the Council has not taken up the reports.¹⁶

Exemptions of non-state party nationals: In Resolution 1593, the Council decided that nationals of "a contributing State outside Sudan which is not a party to the Rome Statute . . . shall be subject to the exclusive jurisdiction" of that state in the case of any "acts or omissions arising out of or related to operations in Sudan established or authorized by the Council or the African Union," unless that state waives such jurisdiction. In other words, the Council sought to narrow the scope of the ICC's investigative and prosecutorial reach to Sudanese nationals and nationals of Rome Statute states parties. Resolution 1970 likewise excludes non-state party nationals for the Libya situation. Some observers believe that, if such a situation were presented to a chamber of the Court, the judges may ignore the exemption and apply the Rome Statute, assuming jurisdiction and admissibility requirements are met.

Funding: The resolutions share identical language in which the Council "recognizes" that the United Nations shall not bear the expenses of the referrals or investigations and prosecutions in connection with them. The Council expressly notes that "such costs shall be borne by the parties to

the Rome Statute and those States that wish to contribute voluntarily.” Some argue that the Council acted beyond its authority, since the Charter allocates budgeting responsibility to the General Assembly. In 2012, ICC President Judge Sang-Hyun Song expressed the frustration of Rome Statute states parties from a functional perspective, when he said, “Clearly, it will be difficult to sustain a system under which a referral is made . . . but the costs of any investigation and trial proceedings are met exclusively by the parties to the Rome Statute.”¹⁷

In the eight years since adoption of Resolution 1593 and two years since Resolution 1970, the Council has not provided significant political, logistical, or legal support for either set of investigations.

Non-Referral Situations

Until recently, the Council has not regularly engaged with the Court on investigations or prosecutions related to situations that it did not refer (which currently include Uganda, Democratic Republic of the Congo (DRC), Central African Republic, Kenya, Cote d’Ivoire, and Mali). During much of the first decade of the Court’s existence, the Council has not acknowledged, let alone supported, Court actions in particular situations. But that attitude has changed in recent years, in the context of general statements supporting the Court and specific efforts to encourage cooperation with it. Consider the following examples:

- On June 29, 2010, following a meeting on the rule of law in the context of peace and security, the Security Council adopted a Presidential Statement noting “that the fight against impunity for the most serious crimes of international concern has been strengthened through the work of the International Criminal Court.”¹⁸
- In April 2011, when the Kenyan government sought deferral of the proceedings against senior Kenyan officials at the ICC under Article 16, the Council firmly rejected the proposal, noting that such issues deserved to be decided by the Court itself.¹⁹
- The Security Council’s Sanctions Committee for Resolution 1533 explicitly targets individuals alleged to be responsible for serious violations of international humanitarian law in the Democratic Republic of the Congo (DRC).²⁰ In June 2012, the Council adopted Resolution 2053, stressing the importance of accountability and the need for the government to cooperate with the ICC and calling upon MONUSCO, the UN peacekeeping force, to cooperate with the government toward this end.²¹ In March 2013, the Council went even further, authorizing the new Intervention Brigade of MONUSCO to work with the government to arrest those wanted by the ICC.²²
- Twice in 2012, the Council urged the government of Cote d’Ivoire to cooperate with ICC investigations.²³ In 2011, it expeditiously lifted a travel ban on former president Laurent Gbagbo to enable his smooth transfer to The Hague for trial.
- In December 2012, the Council called upon states to cooperate with the government of Uganda and the ICC to bring to justice the leaders of the Lord’s Resistance Army.²⁴

- At the time of the Council’s authorization of an African Union peacekeeping force in Mali late in 2012, it called upon that force to cooperate with the ICC on matters of accountability.²⁵

Despite the support expressed in these and other resolutions and statements, the overall picture of the Council interaction with the Court is not one of significant *concrete* support. Instead, as Security Council Report put it, the picture is one of the Council missing “the opportunity to visibly strengthen individual accountability as a guiding principle within its work.”²⁶

III. KEY ACTORS IN THE COUNCIL-COURT RELATIONSHIP

The actors on the Council are those five governments with a permanent seat and a veto – the so-called P-5 – and the ten non-permanent elected members serving two-year terms. All play a role in shaping Council attitudes toward the Court, with the P-5 and a changing assortment of active non-permanent members leading the way. This section devotes some space to key actors, governmental and non-governmental. It devotes the most space to China and the Russian Federation, two critical players whose ICC policies have been the subject of comparatively little in-depth analysis in recent years.

The P-3

The P-5 are the essential actors on the Council; although their affirmative support is not necessary for every decision taken, their opposition must be overcome in order to achieve the adoption of a resolution. Though few issues rise to the level of the veto, the P-5 role means that drafting of resolutions demands the engagement of the P-5 in New York, with one of the P-3 – the UK, France, or United States – often holding the pen in the drafting exercise. P-3 influence is at its strongest, therefore, in the context of referrals and other resolutions providing a role for the ICC.

The governments of **France** and the **United Kingdom**, as parties to the Rome Statute, initiate favorable ICC statements and regularly speak in support of the Court in Council discussions. Their UN delegations are active and widely seen as expert in ICC issues (particularly the French delegation, whose current legal adviser served for several years as a senior official with the Office of the Prosecutor). While both governments have pressed for a stronger relationship between the Council and the Court, some observers believe that they could do more, especially in urging Council follow-up from the referrals and Court reports of non-cooperation.²⁷ While neither can be expected to serve as the Court's mouthpiece, France and the UK are widely seen as the lead ICC actors on the Council.

The **United States** has come a long way from the days of its early hostility to the Court. Many mark the policy change to the American abstention from (and thus tacit support of) the Council referral of the Darfur situation. Yet while the second term of the administration of President George W. Bush did involve a mutual introduction and warming-up between the Court and Washington, President Barack Obama's administration has offered a close working relationship.

The United States now participates as an observer state at meetings of the Assembly of States Parties to the Rome Statute and participated actively in the Rome Statute Review Conference in 2010. The administration's deployment of military advisers to Uganda to help with the search for leaders of the Lord's Resistance Army highlighted that commitment, even though it derives from domestic concerns as much as ones related to the ICC.²⁸ The eagerness (not mere willingness) to transfer ICC indictee Bosco Ntaganda, who surrendered himself to the U.S. Embassy in Kigali, Rwanda, to The Hague elevated that support another notch.²⁹

Nonetheless, American commitment to the Court is constrained – or *perceived* by many to be constrained – by several factors, some legal and some political, that frame U.S. behavior on the Council. The legal constraints include the American Servicemembers Protection Act (ASPA), which aims to bar American funding of and cooperation with the ICC while also protecting American nationals from the jurisdiction of the Court.³⁰ ASPA constraints have motivated the U.S. position with respect to the cooperation, exemption, and funding provisions of the Sudan and Libya referrals. Not all these positions are legally mandated, and where they are, the administration will need to seek modification of ASPA in order to deepen cooperation with the Court. The ICC remains a potentially fraught issue in Congress, requiring the administration to tread carefully in developing ICC positions. ICC engagement in a situation such as Israel and Palestine, for instance, would almost certainly undermine U.S. moves toward greater support of the Court.

China and Russia

Chinese and Russian policies are not as well-understood as those of the P-3 and merit more discussion than they usually receive. Officials of both governments express concerns about the Court. In private interviews, Chinese officials and analysts, for instance, expressed dismay that the Court issued arrest warrants against a sitting head of state, President Bashir of Sudan.³¹ China went so far as to welcome Bashir on an official visit to Beijing in 2011.³² Officials of both countries are said to harbor concerns about a possible ICC focus on their own domestic conflicts, even though such concerns arise realistically only upon ratification of the Rome Statute, a remote possibility for each. Both are skeptical about ICC jurisdiction over the crime of aggression, but their skepticism may not vary significantly from the other P-5 governments. One of the overriding features of both countries' attitudes, however, is that very few individuals in the policymaking and academic communities in Beijing and Moscow pay attention to or have substantial knowledge about the Court.

On the positive side of the ledger, China and Russia have regularly participated as observers in ICC meetings. Russia voted for referrals of both Sudan and Libya, while China abstained on the first and voted in favor of the second. They have joined Council resolutions and statements expressing support for the Court's work. Russian Foreign Ministry lawyers and some diplomatic officials are extremely well-informed and sophisticated about the Court and its jurisprudence, while Chinese Foreign Ministry lawyers enjoy excellent general knowledge of the Court and deep interest in its work. While both have stood adamantly against Council engagement in Syria, their

positions appear driven by Syria-specific attitudes, not animus toward the Court. In short, China and Russia should not be treated as inevitable barriers to a solid Council-Court relationship. Their positions on specific situations are driven more by considerations of how the Court fits into other national objectives than by principled stands against the Court.

China's permanent representative to the UN has referred to the ICC as "an integral part of the international system of the rule of law," but he also expressed concern about the Court "impeding the work of the Security Council."³³ Likewise, its expressions of support and votes in favor of the Libya referral and other ICC-supportive resolutions are balanced by the welcoming to Beijing of Bashir. Chinese analysts suggest the government is especially influenced by the attitudes of developing countries, regional organizations, and other P-5, as well as concerns over the Court's precedent-setting impact on China in the future. According to academics and officials in Beijing, interest in the ICC exists, but knowledge of the Court does not extend much beyond a community of legal scholars and departments of the Ministry of Foreign Affairs.

At the same time, Chinese thinking about global issues is undergoing change. For instance, non-interference and sovereignty concerns may be less salient than they once were, giving way to the competing factors of nationalism on one hand and pragmatism on the other. Sovereignty may be a background concern but Chinese interests will also reflect others, especially regional stability. Public opinion has a growing influence on policy, and its many manifestations – the widely-read *Global Times*, the growing role of Weibo (China's powerful twitter-like microblogging site), and so forth – weigh on analysts and policymakers. Particularly at a moment when Chinese foreign policy institutions have new leadership, there may be some opportunities for reexamination of the ICC over the coming year.

The long-term stability of the Council-Court relationship will require that China become a party to the conversations about international justice. Court supporters seeking China's involvement should take into account four elements of Chinese policy:

First, supporters should recognize that Chinese resistance to the ICC, to the extent it exists, is rooted in traditional but evolving thinking about multilateral institutions, non-interference, and sovereignty. Official Chinese statements will continue to emphasize the principle of non-interference, but, to some extent, these principles seem to be placeholders, points that resonate with policymakers but do not explain fully Chinese behavior in specific situations.³⁴ Non-interference may remain relevant; Chinese officials resist outsiders' complaints about, for example, Tibet and freedom of expression and information. Human rights remain difficult to engage in Beijing. In discussing ICC issues in Beijing, particularly outside of the MFA and legal academic circles, emphasis should be placed on the ICC's overlap with international peace and security – Security Council equities – rather than general human rights issues beyond the scope of the Rome Statute.

Second, Court supporters should acknowledge the stated Chinese preference for national and regional solutions to problems of peace and security. The Chinese look to regional and national actors as they develop their ICC thinking in specific situations, a point raised repeatedly

in conversations about Chinese support for Resolution 1970. Focusing on the African Union and Arab League will continue to be important to generate support from China.

Third, Chinese analysts become more comfortable with the idea of the ICC when it acts on a state's self-referral or in the territory or against a national of a Rome Statute state party. These situations share a common thread: the presence of state consent. Discussions with Chinese policymakers should highlight that these kinds of cases – all of the non-referral cases at the moment, that is – should not implicate any latent concerns of sovereignty and non-interference.

Fourth, those who engage with Beijing should understand that the Chinese foreign policy apparatus extends across government and party structures. As with any government, Beijing has its own particular way of organizing its policymaking community, which, for many outsiders, is quite opaque depending on the issue.³⁵ Traditional Chinese actors with interest in ICC-related issues are in the Party apparatus, the government (such as the Ministry of Foreign Affairs), and the military, but where they stand on any particular issue or how they are integrated into decision-making is difficult to discern. Outside actors should make a particular effort to understand policymaking in Beijing and to engage with those in key universities and research institutes to involve Chinese thinkers in efforts to broaden participation in ICC discussions.

Russian thinking about the ICC was expressed during the October 17th Security Council debate, when Russia's Permanent Representative, Ambassador Vitaly Churkin, provided an overview of the official Russian attitude toward the Court.³⁶ While Russia has not ratified the Rome Statute, one can read in Ambassador Churkin's statement some fundamental agreements with the purposes of the Court and international justice more generally. "It is clear," he said, "that persons guilty of particularly serious crimes under international law must be brought before the Court." The Council "has a serious new tool with which to achieve that goal" of fighting impunity, and the two entities "must interact within the framework of their respective mandates and with mutual respect."

However, Ambassador Churkin also spoke of Russian concerns about the Court and the Council-Court relationship. First, Ambassador Churkin highlighted the balance between peace and justice. He recognized the importance of the Court's judicial independence, yet he suggested that its "activities must be carried out in the light of common efforts to settle crisis situations." The referral experience, he argued, shows that "serious political and legal consequences" sometimes follow Court engagement. He seemed concerned that referrals made "either too fast or too slowly" can undermine stability and the search for peace. Churkin's closing remark questioning "[t]he extent to which [the Court] can work in a mature and balanced way and find its own place in the international system" suggests a concern that the Court not interfere with the peace-and-security mandate of the Council.

Second, Ambassador Churkin argued that referral resolutions "do not abrogate the norms of general international law on the immunity of heads of State in office." His suggestion that only "a direct instruction" from the Council may abrogate immunity provides a hint of displeasure that the Court seeks the arrest of those for whom immunity customarily would attach.

The Russian position, as expressed by Ambassador Churkin, strongly suggests concern that the Court risks undermining what is seen as the established roles of the Council. Churkin's emphasis on how the Court must carry out its activities highlights a case-by-case approach in which Russian policymakers will focus on Council equities and security, stability, and peacemaking as much as, if not more than, principles of accountability and justice.

In some respects, the Russian attitude matches the view from Beijing. However, as a matter of policymaking, while Beijing academics and analysts, in and out of government and party structures, express interest but not necessarily deep familiarity with the Court, it is difficult to identify many Russians who focus on or express interest in the ICC. The community of Russian scholars who make study of international justice a principal item on the research agenda is limited in size. Think tank experts on the ICC seem nonexistent. Whereas official discussion of the ICC in the West extends to policy and legal entities, informed discussion in the Russian government appears limited to a very small number of experts in the Ministry of Foreign Affairs. Many local observers believe that Russian ICC policymaking is concentrated in the Kremlin and thus highly opaque. Even some activists in Moscow express the view that the ICC is not high among their priorities; but they also tended to express disappointment that early interest in the Court among officials, parliamentarians, academics, and activists dissipated over the course of the first decade of the Court's existence.

In this light, it is important for ICC supporters to begin to lay the groundwork for long-term Russian engagement with the Court. Given the concerns and the Syria experience, in which Russia has opposed Council engagement repeatedly, some Russian academics argued in interviews in favor of laying the groundwork for long-term Russian engagement with the Court and support of the Court through the Council. They suggested the need for university and law school programming that educates students about international courts and tribunals, including through the use of conferences and academic exchanges. They also suggested a need for policy-oriented education today, emphasizing that a shorter-term target audience would not be lawyers or students but policymakers, think-tank experts, and others who focus on Russian security and foreign policy.

Other Key UN Member State Influences

Even with the privileged place of the P-5, other states and organizations influence Council outcomes and can help shape the relationship between the Council and the Court.³⁷ Among the key non-P-5 actors are those Council members, elected on a two-year basis, that play an important and influential role either on the Council itself or throughout the UN in New York. Currently, for instance, the delegation of Guatemala plays a strong role on the Council. During its tenure as President of the Council, Guatemala spearheaded the effort to hold the open Council meeting in October 2012, producing a concept paper highlighting key cooperation issues and generating the most substantial and supportive statements for the Court on the Council since the Rome Statute's entry into force.³⁸ Other current Council members playing an

important role are Argentina, Australia, Korea, Luxembourg, and non-party Togo. Morocco, an ICC-friendly Council member that has not ratified the Rome Statute, may play a particularly useful role with ICC members Jordan and Tunisia (not on the Council presently) in building support within the Middle East/North Africa region. By contrast, Rwanda, which joined the Council in 2013, has expressed hostility toward the ICC that resulted in the omission of a reference to the Court in an April 2013 Council Presidential Statement.³⁹ During 2011 and 2012, three non-permanent but influential members that are no longer on the Council – India, Brazil, and South Africa – sought to shape Council discussions touching on justice and accountability. This so-called IBSA grouping can, when united, present a strong position favoring or opposing particular action in the Council, weighing especially on Chinese considerations.⁴⁰

Others on and off the Council can be critical in building support for the Court. Three member states in particular have played roles that go beyond their economic or military power: Jordan, Costa Rica, and Liechtenstein, whose permanent representatives have also served as presidents of the Rome Statute’s Assembly of States Parties and remain active opinion leaders in New York. To give one example, when Costa Rica held a seat on the Council in 2008, its delegation successfully pressed the Council to adopt a Presidential Statement noting the work of the ICC in Sudan and urging all parties to the conflict to cooperate with the Court “to put an end to impunity for the crimes committed in Darfur.”⁴¹ Until this point, and for some time afterward, the Council did not express any measure of support for the Court’s efforts under Resolution 1593. Together with Singapore and Switzerland, the delegations created the so-called S-5 states to press for changes in the Council, including how it treats ICC-related issues.⁴² The examples set by these delegations highlight not only the way in which small states may influence policy debates on the Council and more broadly at the UN. They also demonstrate that individuals, those who take a particular interest in the Court, may have substantial room to influence thinking in New York on ICC issues even when not representing the traditionally powerful states.

Regional organizations may also play a significant role in framing discussion and outcomes on the Council, as the adoption of Resolution 1970 highlighted. Some point to the letter sent to the Council by the Libyan permanent representative in February, 2011, urging the Council to refer the deteriorating situation in Libya to the Court.⁴³ As important as that unusual letter was to generating support, interviews with Russian and Chinese policymakers and other observers suggest that African Union and Arab League support for the resolution was instrumental in leading toward unanimous adoption. The Chinese Permanent Representative expressed this publicly when noting that his government took into consideration the “concerns and views of the Arab and African countries.”⁴⁴ Of course, the role of regional actors will vary according to the situation. The African Union’s position on the Sudan referral and the Kenya situation, for instance, has undermined Council engagement on these issues and helped generate a widespread if inaccurate perception that the Court is biased against Africa.⁴⁵

The Court's Interactions with the Council

Since the adoption of Resolution 1593, the ICC has become a familiar presence at the Council through the prosecutor's reports on referred situation countries.⁴⁶ With the addition of Resolution 1970, the prosecutor now reports to the Council four times annually, twice each year on Sudan and Libya. These reports review the work of the Court and the level of cooperation by governments and other actors. The prosecutor has not used the reporting to seek specific steps from the Council, so as to maintain a measure of independence and not take on a political role. However, there may be opportunities – particularly if structural change creates regular professional dialogue between the two institutions – for Court officials to be more specific about Council steps that could be helpful.

Apart from the briefings, the Court has interacted with the Council in other respects. The Court established a liaison office in New York in order to follow relevant issues at the UN and serve as a focal point for interaction between the institutions. The President of the Court and a senior member of the Office of the Prosecutor participated in the October 17th Council debate. Court officials interact with representatives of Council members in bilateral discussions, in New York and in capitals, and regularly connect with them at conferences and workshops that take place in research institutes and academic institutions worldwide. These kinds of interaction, particularly among the P-3 and Court officials, create a kind of comfort zone that permits cooperation and information-sharing to proceed on a bilateral level even if not at the level of Council decision making.

Even with such interaction, the Council has never formally expressed its support for Court activity under Resolutions 1593 and 1970, though individual members have done so. In the Darfur context, pre-trial chamber I of the Court has reported to the Council the non-cooperation of the governments of Sudan, Malawi, and Chad, the last two because of their failure to arrest Omar al-Bashir during visits to those countries.⁴⁷ The Council has not responded to any of these decisions, perhaps in part because of the uncomfortable situation into which this may put China, which has also welcomed Bashir to Beijing.

The Court itself is wary of getting drawn into the politics of the Council. During his presentation to the Council on October 17th, the President of the Court, Judge Sang-Hyun Song, emphasized the judicial independence of the Court. "But I must be clear," he said, "that, as a judicial institution, the ICC can work only on the basis of the law."⁴⁸ The prosecutor's representative echoed this theme, noting in a pointed remark, "It is important to underscore the need to respect the Office of the Prosecutor's independence at all times . . . Efforts to interfere with the independent exercise of the Office's mandate would only serve to undermine the legitimacy and credibility of the judicial process, thus giving credence to allegations of politicization of the process."⁴⁹

The converse is also true. Decisions made by the prosecutor or judgments adopted by chambers influence perceptions of the Court and the degree to which Council members want to extend support to it. In interviews, delegations in New York and in capitals referred to such issues

as the pace and length of proceedings; a docket in which more than half of the accused are fugitives from justice (ironically so, as the Council has not provided support in such situations); decisions to pursue or not to pursue investigations in particular cases; authorizations for arrest warrants of senior officials such as Bashir; the Court's pursuit, or non-pursuit, of alleged perpetrators on all sides of a conflict; and the Court's selection of crimes to charge in a given situation (for instance, not charging sexual violence cases early in the DRC situation). The Court jealously guards its independence, as it must under the Rome Statute, but its decisions and working methods are monitored by the actors whose support it needs.

Non-Governmental Organizations

NGOs have played a special role in Court activities since the earliest days of the negotiations that led to the adoption of the Rome Statute in the summer of 1998. They continue to enjoy a privileged place. Several have taken on roles as convener, bringing together officials of governments, the Court, international organizations, and other NGOs. Organizations such as Open Society, the International Centre for Transitional Justice, Chatham House, and Parliamentarians for Global Action have sponsored efforts focused on building the Council's support of the Court. Some have taken on an advisory role, especially where the organization enjoys expertise and access at both the Court and the Council. For instance, Human Rights Watch, with a significant presence at the UN and a profound long-term commitment to the Court and international justice, enjoys a special kind of access in New York and The Hague; according to many interviewees, it played a critical role in generating support for the referral of Libya to the ICC. Finally, several NGOs, including those already mentioned, play an important educational role, monitoring proceedings, analyzing the inner workings of the Court, conducting fact-finding in situation (and potential situation) countries. Many of these organizations partner with academic institutions in order to translate academic and other kinds of research into policy recommendations for the Court and the Council.

IV. RECOMMENDATIONS

The Security Council has increasingly expressed its members' views that impunity contributes to conflict or the worsening of conflict and that individual accountability can contribute to stability and rule of law. The Court offers the Council a potential pathway toward achieving the goals of accountability. The Council's interest, in turn, may benefit a Court that needs assistance in generating governmental cooperation. This section highlights guiding principles for the Council-Court relationship and two kinds of Council efforts: structural improvements that can be made now, and substantive policies that may be undertaken by Council resolution or change in practice. It concludes with recommendations aimed toward increasing the involvement of China and Russia. This section owes a debt in particular to Ambassador Bruno Stagno Ugarte, whose workshop paper proposed or inspired a number of recommendations identified below.⁵⁰

Guiding Principles

Five principles should guide the relationship between the two institutions:

1. Sustained attention and follow-through. Court supporters generally believe that the Council, once it refers a situation, loses interest. In the case of both Sudan and Libya, the Council has mentioned each only once subsequently; the reference to Sudan, in a Presidential Statement, had little impact on the ground, while the reference to Libya, seeking to ensure the authorities' fair treatment of ICC officials held against their will in Libya, may have been of value in that moment but was tangential to the investigations.⁵¹ The Council has done nothing to encourage the arrest of individuals subject to ICC arrest warrants in the Libya or Sudan situations. It has begun to pay attention to the need for cooperation in investigations and arrests in the DRC and elsewhere. The Council should aim to provide more regular and supportive engagement, especially in the cases subject to a Council referral resolution but also in those other cases where the Council has weighed in with rhetorical support. The value of such support, however, also requires the Court to suggest specific areas and policies where Council engagement would be of most value.

2. Respect for the independence and mandate of the other. During the fall of Tripoli, P-3 members made statements suggesting that they believed Libya deserved the right to try those accused by the ICC prosecutor of committing crimes against humanity.⁵² These statements were widely viewed as clumsy interference with the Court's mandate to assess Libya's willingness and ability to try the accused itself. Once the Council has referred a situation to the ICC, it and its members should be careful not to interfere with the process that they themselves generate;

indeed, they should foster its independent role in the service of accountability goals they share. The principle of independence provides room for consultations on such matters, but the Council should recognize that its role and voice have the potential to interfere with the cooperation that the Court needs from situation countries.

3. Regular professional and technical engagement. The Court has critical legal and logistical needs relating to investigations and prosecutions, some of which may require the engagement of the Council. Some may touch on politically sensitive areas. For instance, one can imagine a situation of ongoing conflict where a government requests a Council deferral of investigations or prosecutions under Article 16. While the Council may make such a decision on the basis of many factors, including political and diplomatic ones, its access to information about an ICC investigation would be crucial to know whether deferral would be warranted. It should be in the interests of both institutions for such decisions to be based on educated understandings of a particular situation, within the bounds of the Court's independence. The possibility of having access to that kind of information would be strengthened by the existence of a professional, technical relationship between the two. Over time, professional relationships can show officials in both institutions the areas where greater cooperation may be possible, as well as the limits to such cooperation.

4. Transparency about process. One of the most significant problems facing the Court, especially the prosecutor and registrar, is the opaqueness of the decision making process within the Council. Council members, who must make decisions on the basis of as much information as possible, may also believe that the Court's processes are obscure. Both institutions may find it difficult to share information, the Council to protect its diplomatic communications and deliberations and the Court to protect the independence and confidentiality of the legal process. But at least on those matters where knowledge can help the other, the Council and the Court should find ways to share information that may be relevant to the other. Most important for both is an understanding of how things work, when and how decisions are made and by whom, points of contact for specific questions, and so forth. Transparency should not be seen as tantamount to public disclosure; it should reflect an openness to share relevant information, through regular process.

5. Broaden discussions beyond the Council. ICC states parties and regional groupings in New York should be engaged in Council discussions about the Court. Regional organizations have a special role in the UN system, and they have made their mark especially felt in the context of the ICC (such as the Libya referral). Some formal and informal groupings, such as European and Latin American ones, have served as consistent supporters of the Court throughout the UN in New York. Others have been mixed, especially the African Union, which boasts a large number of ICC member states yet has posed difficulties to the Court in the context of Sudan and Kenya.⁵³ Supportive states – led by Jordan and Tunisia, with assistance from non-state party but current Council member, Morocco – could play a more focused role with respect to the Arab League, which provided essential support for the adoption of the Libya referral resolution.⁵⁴

Structural Improvements

Two structural measures would provide a foundation for engagement between the two institutions consistent with the principles above:

1. Council Working Group on International Justice. The Council's Tribunals Working Group is devoted to issues related to the ICTY, ICTR, and Special Tribunal for Lebanon.⁵⁵ The members of the working group, usually the legal advisers at the missions of the Council member governments to the UN, help streamline decision making in areas that might seem too mundane for permanent representatives to handle – such as extending the terms of judges on the tribunals – or deal with other issues at a technical level, such as non-cooperation. Given the expansion of Council interest in Court work, a forum for professional discussion of the ICC would benefit the work of the Council. An expanded working group would not commit any Council member to any particular course of action, but it would provide a forum for technical discussions on a range of areas of common concern. The Working Group need not focus solely on the Council-referred cases, especially given the engagement of the Council in areas such as the Cote d'Ivoire, Central African Republic, DRC, Kenya, Mali, and Uganda. Under Article 6 of the ICC-UN Relationship Agreement, the ICC provides annual reports to the United Nations.⁵⁶ The annual report could serve as the basis for a further identification of Court needs.

2. Liaison for Court-Council Sanctions Committee. The Council has established sanctions programs targeting a number of individuals who are also subject to ICC investigation or prosecution, but not always. As Bruno Stagno Ugarte has pointed out, none of the Sudanese individuals for whom arrest warrants exist is on the Council's 1591 Sanctions Committee list.⁵⁷ There is no established, routine way for the ICC to engage with the Council on these kinds of matters. The Office of Legal Affairs coordinates assistance requests from the Court to the Council, but the Court needs a direct line to the Sanctions Committee.⁵⁸

The sanctions typically involve two principal tools against individuals: financial measures and travel bans. In the case of sanctioned individuals who are also wanted by the Court, one can imagine a number of possible troubling situations. If an individual is subject to an arrest warrant and a travel ban, and the individual is arrested and ready for transfer to The Hague, the Court Registry will need access to the Sanctions Committee to expedite any necessary tasks (such as ensuring the accused's safe passage to The Hague).⁵⁹ A working-level relationship, with regular contact between the Court and the Sanctions Committee, could ensure that the two are sensitive to one another's needs in the carrying out of each of their tasks.

Policy Improvements in Council Resolutions

Formal Council and UNGA structures, as noted above, would create a sound process so that the Council understands the needs of the Court. This is an essential but working-methods approach to building Council support. The Court would also benefit from specific policy change that is supportive of the Court's process. The following measures would translate the recent goodwill seen on the Council into specific measures of support:

1. Obligate states to cooperate with the Court. Referral resolutions have imposed obligations on the target states, Sudan and Libya, and other parties to the conflict, and they have encouraged cooperation by other states and regional and international organizations. This is short of the concrete obligations imposed under the resolutions establishing the ICTY and ICTR. Article 29(2) of the ICTY Statute should be a model for such obligations:

States shall comply without undue delay with any request for assistance or an order issued by a Trial Chamber, including, but not limited to:

(a) the identification and location of persons;

(b) the taking of testimony and the production of evidence;

(c) the service of documents;

(d) the arrest or detention of persons;

(e) the surrender or the transfer of the accused to the International Tribunal.⁶⁰

Council referrals involve the same kind of policy motivations that led to the ICTY and ICTR; likewise, the Council should impose similar kinds of obligations. They need not be limited to referral situations, since the Council's engagement in other areas – such as the DRC – clearly indicates the Council's expectations of support as well.

2. Respond to Court findings of non-cooperation. The Court has reported non-cooperation in the past, received with silence from the Council. Non-cooperation should be dealt with first through a discussion in the Tribunals Working Group. In the context of the ad hoc Tribunals, the Council did not always demand cooperation from states that failed to adhere to their obligations under Council resolutions and the statutes. But it laid a clear baseline of support and, from time to time, highlighted the expectation of cooperation.⁶¹ At the very least, the Council should ensure that non-cooperation reports from the Court are handled expeditiously according to a formal process.

3. Extend key Rome Statute protections in referral situations. Privileges and immunities advance cooperation, which can be undermined if governments do not respect the individuals conducting work on behalf of the Court. Libya highlighted this problem in June 2012 when Registry and defense counsel officials were held for a month in Libya, triggering a rare press statement on the ICC from the Council. All states, especially those subject to investigation, should accord Court officials privileges and immunities so that they may carry out their work efficiently and without external interference. Under Article 48 of the Rome Statute, Office of the Prosecutor and Registry staff “shall enjoy the privileges and immunities and facilities necessary for the performance of their functions, in accordance with the agreement on the privileges and immunities of the Court.”⁶² This provision should be extended in application to all states at the time of referral, and the Council may consider extending it in specific non-referral cases.

4. Impose financial, travel, and diplomatic sanctions on those accused by the ICC. The Council has extensive experience using sanctions to pursue its Chapter VII responsibilities. Apart from the well-known terrorism sanctions adopted since 9/11, it has imposed financial measures and travel bans on those accused of massive violations of humanitarian law in the DRC. However, the Council has not followed through with extensive support or use of the sanctions

committee in the context of crimes under the Rome Statute. The Council should expand its sanctions committee work by working with the Court to identify those actors who should be subject to sanctions. Such measures should be adopted for both referral and non-referral situations. Sanctions such as these have practical and symbolic importance, as they not only seek to deny a person access to resources to carry out unlawful acts. They also make a normative statement that such individuals, by acting unlawfully, should lose the privileges they may otherwise enjoy as leaders or officials, state or non-state. They demonstrate to states that such behavior entails consequences and penalty. Ultimately, if enforced, such measures may have the effect of limiting an individual's ability to evade ICC process.

Related to diplomatic sanctions is the UN policy of avoiding non-essential contacts with those subject to an ICC arrest warrant. UN Secretary General Ban Ki Moon recently restated the policy. It provides that "contacts between UN officials and persons who are the subject to [sic] warrants of arrest issued by the ICC should be limited to those which are strictly required for carrying out essential UN mandate activities." It continues, "The presence of UN officials at any ceremonial or similar occasion that is attended by any such person should be avoided."⁶³ There had been disquiet among observers who believe the policy may not always be well-understood and promoted among actors in the field; transparency over the policy is lacking.⁶⁴ Council support for the policy may include language in future resolutions that emphasizes, and spells out, the importance of excluding all but the most essential contacts with those accused of Rome Statute crimes by the Court.

5. Promote UN funding in referral situations. The funding restriction appears inequitable to many, as it enables the Council to use the ICC as a Chapter VII tool without providing even a portion of the resources for the Court to carry out its functions. Moreover, many argue that, because the General Assembly has budgetary authority in the UN system, the Council cannot, as a matter of law, preclude the Assembly from budgeting for ICC situations. On the other hand, some P-5 governments argue that the Council is not obligated to provide such resources, and that the Rome Statute states parties have committed to a process that includes the possibility of Council referrals without any concomitant obligation of the Council to fund them. Moreover, they argue, the Court itself benefits from a docket of important cases.

The ultimate issue has less to do with legal norms than functional realities: the Court's capacity to pursue investigations and prosecutions is stretched at a time when its docket is full. The budget, adopted by the Assembly of States Parties each year, is unlikely to support further serious referral cases. Future referrals should seek to eliminate the offending funding paragraph and replace it either with nothing or with a more encouraging commitment of the Council to assist the Court in financing referral-related work. States opposed to UN funding may yet use their clout to block such measures in the Fifth Committee (though, given the modest amount of funding at issue, they should refrain). The Obama administration, which may perceive a legal bar to such funding under U.S. law, should identify ways to avoid such bars, including by exploring with members of Congress waiver authority in those situations where financial support advances U.S. interests.

6. Eliminate jurisdictional restrictions. The limitations on jurisdiction, excluding non-state parties' nationals, undermine the reputation and credibility of the Court and are widely seen as political concessions to non-states parties, especially the United States, that do not recognize the jurisdiction of the Court over their nationals. The provision responds to an unlikely hypothetical situation, and yet it generates considerable frustration among supporters of the Court. Its symbolic importance was captured by the South African Permanent Representative to the UN during the October 17 debate, when he asked, "How can the Council begin to trust the Court and, consequently, expect others to trust it, when it is unwilling to subject nationals of its member countries to the scrutiny of the ICC?"⁶⁵ American concerns, expressed in the ASPA, helped motivate this provision, but they do not seem to require it.⁶⁶

7. Address the factors relevant to referral even if referral criteria are not achievable. Many observers claim that the lack of criteria to guide the Council's decisions to refer situations undermines both the Council and the Court. Over time, the perception of an unprincipled approach, and the reality of the Council's sole and unreviewable discretion to refer or not to refer, make the Court appear to be a mere tool of the Council and the Council to be driven by political considerations. Neither institution benefits from these impressions, even if, ultimately, the Council is unlikely to adopt criteria to which it would obligate itself.

A number of ideas have been expressed over the past year aiming to establish criteria for when the Council should refer a situation to the ICC. A set of referral criteria may be counterproductive over the long term, and they would be unlikely to gain the support of Council members, who would likely see such criteria as constraining their authority under Chapter VII. Some have suggested alternatives to criteria. The S-5, for instance, proposed that the P-5 avoid the use of the veto in situations where the Council would otherwise seek to prevent or end atrocities.⁶⁷ This, too, seems to lack traction among the P-5, apart from an apparent willingness of the French to agree if others agree to refrain from use of the veto. Nonetheless, P-5 states should recognize that the credibility of the Council's decisions is at stake; they should, at the least, try to provide a greater measure of transparency for outsiders to evaluate their decisions not to refer. Rather than focus on *criteria* that lead necessarily to referral, the Council should at least consider highlighting those factors likely to be taken into account in decisions whether to refer a situation.

Leadership of the UK, France, and United States

The P-3 have been supportive of the Court, but there is more they can do. Bruno Stagno Ugarte puts it this way:

*France and the United Kingdom, as the only two States Parties to the Rome Statute that are permanent members of the Security Council, could play a more proactive role or one that is at the very least more consistently in tune with the integrity of the Rome Statute. The United States, on the other hand, could at times be more cooperative in recognizing that an effective Court is not against its own interests.*⁶⁸

The French and British delegations in New York already play a leadership role on the Council, derived from their status as the only ones among the P-5 bound by the obligations of the Rome Statute. Other Council members respect the expertise of both missions, and especially their key officials. Moving forward on any of the recommendations identified above will require both governments to play an active role, probably the leading role, in pressing for action.

The United States continues to deepen its relationship with the Court. Recent steps – the transfer of Bosco Ntaganda from Rwanda to The Hague, the initiation of the Rewards for Justice program for those subject to ICC arrest warrants, and the overall positive attitude toward the Court – suggest that the Obama administration, with some Congressional buy-in or apathy, sees the ICC as an important part of the atrocity prevention matrix. Yet members of Congress may still raise roadblocks, and the ability of the United States to engage in deeper cooperation, including helping fund investigations that may be in the U.S. interest, remains constrained by restrictions in ASPA. When the UN Security Council has referred situations to the ICC (Sudan and Libya), the United States demanded restrictions on funding and limitations on the obligations of state cooperation to the targeted states. The administration should begin exploring with Congress the possibility of expanding the ability of the United States to cooperate with the Court, including by providing funding, in those situations where ICC investigations and prosecutions are consistent with American interests.

Engaging China and Russia

Chinese and Russian engagement on Court issues will be essential to building a cooperative relationship between the ICC and the Council. Court supporters – especially on the Council, but also throughout the UN system and among funders – should focus on several approaches in an effort to involve Chinese and Russian thinkers and policymakers in discussions about the ICC over the near- and long-term. At the same time, Chinese and Russian policymakers and diplomats should be open to constructive participation in such discussions.

1. Conduct diplomacy in New York to encourage support for Council improvements related to the ICC. Early indications suggest that China and Russia may be reluctant to move forward on some of the key efforts to build the Council-Court relationship, even in the technical sphere of the Council's informal Tribunal Working Group. Court supporters, especially the UK, France, and the United States, should work closely with the Chinese and Russian delegations to identify the concerns and develop ways to overcome them. This could mean a limited mandate for the working group at the outset, focused on technical exchange of information, and deferral of some of the recommended policy changes. Emphasis on the technical, professional aspect should be made. But if, in exchange for support of a working group and a commitment to consider substantive policy change in the future, the Chinese and Russian delegations require an incremental approach, Court supporters should accept that as the basis for a way forward.

2. Involve China and Russia in unofficial meetings related to international justice. The United Kingdom, France, and the United States have expressed relatively consistent support for

the ICC in recent years and have engaged with the community of governments, NGOs and scholars thinking through how to improve the Court and cooperation with it. By contrast, Chinese and Russian delegations have not participated regularly in discussions outside the Council or Assembly of States Parties. ICC supporters should seek to involve Chinese and Russian counterparts in the efforts to build a constructive Council-Court relationship by including them in unofficial discussions.

3. Build a knowledge base over the long term. Knowledgeable actors at the domestic and international levels should begin a long-term process of engaging Chinese and Russian foreign policy analysts on ICC issues. Sustainable Chinese and Russian support for a cooperative Council-Court relationship will require exchanges that go beyond legal scholars and involve security and policy analysts in government institutions and research institutes.

4. Build the profile of the domestic public international law community. International criminal law experts in China and Russia, natural constituencies to support national engagement with the ICC, would benefit from a higher profile in policymaking circles. Court supporters could encourage this in a number of ways: engaging them in building educational programs for non-law analysts in government (and for China, Party) institutions; establishing collaborations that involve domestic thinkers in addressing international justice issues; helping non-law academics and analysts take research trips to The Hague and to institutions in the United States and Europe; and funding internship opportunities for students.

5. Identify areas of collaboration in international justice. Chinese and Russian officials express commitment to the principles of accountability and justice, and their delegations have repeatedly voted in favor of ICC-supportive resolutions at the Council. These demonstrations of support should be advanced and nourished. Beyond the ICC, there are areas where Chinese engagement in particular could be especially useful, such as helping to build national jurisdictions (perhaps by involving Chinese help in infrastructure building).⁶⁹

ENDNOTES

¹ Fatou Bensouda, *International Justice and Diplomacy*, INTERNATIONAL HERALD TRIBUNE, March 19, 2013, available at <http://www.nytimes.com/2013/03/20/opinion/global/the-role-of-the-icc-in-international-justice-and-diplomacy.html>.

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³ 6849th Meeting of the UN Security Council, S/PV.6849, October 17, 2012 (*The promotion and strengthening of the rule of law in the maintenance of international peace and security*) (“October 17th Debate”), available at http://www.securitycouncilreport.org/atf/cf/%7B65BFCF9B-6D27-4E9C-8CD3-CF6E4FF96FF9%7D/s_pv_6849.pdf.

⁴ See Security Council Report, *The Rule of Law: The Security Council and Accountability*, January 18, 2013, available at http://www.securitycouncilreport.org/atf/cf/%7B65BFCF9B-6D27-4E9C-8CD3-CF6E4FF96FF9%7D/cross_cutting_report_1_rule_of_law_2013.pdf.

⁵ Statement of Ambassador Vitaly Churkin, Permanent Representative of the Russian Federation, October 17th Debate, pp. 19-20.

⁶ Statute of the International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia since 1991, S.C. Res. 827, U.N. Doc. S/RES/827 (May 25, 1993) [“ICTY Statute”]; Statute of the International Criminal Tribunal for the Prosecution of Persons Responsible for Genocide and Other Serious Violations of Humanitarian Law Committed in the Territory of Rwanda and Rwandan Citizens Responsible for Genocide and Other Such Violations Committed in the Territory of Neighboring States, Between 1 January 1994 and 31 December 1994, Annex to S.C. Res. 955, U.N. Doc. S/RES/955 (Nov. 8, 1994) [“ICTR Statute”]. The quotations in the text are to these resolutions.

⁷ Discussion of the political background to creation of the ICTY and ICTR may be found in Gary Bass, *STAY THE HAND OF VENGEANCE* (2000), and David Scheffer, *ALL THE MISSING SOULS* (2012).

⁸ *The Security Council and Accountability*, *supra* note 4, at 15.

⁹ See Scheffer, *ALL THE MISSING SOULS*, *supra* note 7, pp. 175 – 186.

¹⁰ Rome Statute of the International Criminal Court, Article 115, July 17, 1998, 2187 U.N.T.S. 90 (*entered into force* July 1, 2002) ["Rome Statute"], available at <http://www.icc-cpi.int/NR/rdonlyres/ADD16852-AEE9-4757-ABE7-9CDC7CF02886/283503/RomeStatutEng1.pdf>, (emphasis added).

¹¹ See S.C. Res. 1422, U.N. Doc. S/RES/1422 (July 12, 2002). For a discussion of the politics around Resolution 1422, see Charles Jalloh, Dapo Akande & Max du Plessis, *Assessing the African Union Concerns about Article 16 of the Rome Statute of the International Criminal Court*, 4 African J. Legal Studies 5, 16 – 20 (2011).

¹² Negotiated Relationship Agreement Between the International Criminal Court and the United Nations, Article 3, *entered into force* October 4, 2004, available at http://www.icc-cpi.int/NR/rdonlyres/916FC6A2-7846-4177-A5EA-5AA9B6D1E96C/0/ICCASP3Res1_English.pdf.

¹³ See Report of the International Criminal Court, U.N. Doc. A/67/308 (August 14, 2012), at 19, *available at* http://www.icc-cpi.int/en_menus/icc/reports%20on%20activities/court%20reports%20and%20statements/Pages/un-report-14-08-2012.aspx.

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¹⁶ See, e.g., *Decision on the Non-compliance of the Republic of Chad with the Cooperation Requests Issued by the Court Regarding the Arrest and Surrender of Omar Hassan Ahmad Al-Bashir*, The Prosecutor v. Omar Hassan Ahmad Al Bashir, Case No. ICC-02/05-01/09, March 26, 2013.

¹⁷ Statement of Judge Sang-Hyun Song, October 17th Debate, at 5.

¹⁸ Statement by the President of the Security Council, S/PRST/2010/11 (June 29, 2010), *available at* <http://www.securitycouncilreport.org/atf/cf/%7B65BFCF9B-6D27-4E9C-8CD3-CF6E4FF96FF9%7D/IJ%20SPRST%202010%2011.pdf>.

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²² SC Res. 2098, U.N. Doc. S/RES/2098 (March 28, 2013).

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- ²⁴ Statement of the President of the Security Council, S/PRST/2012/28 (December 19, 2012).
- ²⁵ SC Res. 2085, U.N. Doc. S/RES/2085 (December 20, 2012), para. 19.
- ²⁶ *The Security Council and Accountability*, *supra* note 4, at 30.
- ²⁷ See, e.g., Bruno Stagno Ugarte, *Enhancing P-3 Cooperation with the International Criminal Court*, draft of November 22, 2012, available at <http://www.councilandcourt.org/files/2012/11/P3-Paper-by-Bruno-Stagno.pdf>.
- ²⁸ See Thom Shanker and Rick Gladstone, *Armed U.S. Advisers to Help Fight Renegade African Group*, THE NEW YORK TIMES, October 14, 2011, available at <http://www.nytimes.com/2011/10/15/world/africa/barack-obama-sending-100-armed-advisers-to-africa-to-help-fight-lords-resistance-army.html>.
- ²⁹ See Jeffrey Gettleman, *Rebel Leader in Congo is Flown to The Hague*, THE NEW YORK TIMES, March 22, 2013, available at <http://www.nytimes.com/2013/03/23/world/africa/war-crimes-suspect-bosco-ntaganda-leaves-congo-for-the-hague.html>. See also David Kaye, *America's Honeymoon with the ICC*, FOREIGN AFFAIRS, April 17, 2013, available at <http://www.foreignaffairs.com/articles/139170/david-kaye/americas-honeymoon-with-the-icc>.
- ³⁰ See American Servicemembers Protection Act ("ASPA"), Public Law 107-206, as amended, available at http://www.amicc.org/docs/ASPA_2008.pdf.
- ³¹ Interviews conducted by the author, Beijing, June 2012. Trip report available from lead author by request.
- ³² Michael Wines, *Sudanese Leader is Welcomed in Visit to China*, THE NEW YORK TIMES, June 29, 2011, available at <http://www.nytimes.com/2011/06/30/world/asia/30china.html>.
- ³³ Statement of Ambassador Li Baodong, October 17th Debate, at 11-12.
- ³⁴ But see Ian Bremmer, *Xi dreamed a dream of China's rise . . .*, March 20, 2013, <http://blogs.reuters.com/ian-bremmer/2013/03/20/xi-dreamed-a-dream-of-chinas-rise/> (arguing that, "in the near future you'll see China's formal renunciation of its policy of non-intervention in the affairs of other countries.").
- ³⁵ A useful review of Chinese foreign policy institutions may be found at Linda Jakobson and Dean Knox, *New Foreign Policy Actors in China*, SIPRI Policy Paper 26, September 2010, available at <http://books.sipri.org/files/PP/SIPRIPP26.pdf>.
- ³⁶ See *supra* note 5.
- ³⁷ See, e.g., Baldur Thorhallsson, *Small States in the UN Security Council: Means of Influence?* THE HAGUE JOURNAL OF DIPLOMACY 7 (2012), 135, 152-160.
- ³⁸ Letter dated 1 October 2012 from the Permanent Representative of Guatemala to the United Nations addressed to the Secretary-General, and annexed Concept Note, U.N. Doc. S/2012/731 (October 1, 2012),

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³⁹ AFP, *Rwanda slams West's 'wagging finger' on justice at UN*, April 15, 2013, available at <http://www.google.com/hostednews/afp/article/ALeqM5jHDtn4FejBfZAAAnUWd2-WOYxcXgg?docId=CNG.e33f210744b0555de16483492581b31d.491>.

⁴⁰ India was the reluctant delegation compared to the support offered by South Africa and Brazil. See U.N. SCOR, 66th Sess., 6491st mtg., U.N. Doc. S/PV.6491 (Feb. 26, 2011) (statements of India and Brazil). See also Statement of Mr. Mashabane (South Africa), October 17th Debate at 16

⁴¹ Statement by the President of the Security Council, S/PRST/2008/21 (June 16, 2008). As one longtime participant and observer of Council working noted to the researchers of this report, achieving a presidential statement (PRST) can be more difficult than a resolution because adoption requires full Council consensus – and is not subject merely to five potential vetoes but to fifteen. Email to author, February 8, 2013.

⁴² See, e.g., *Revised Draft Resolution: Enhancing the Accountability, Transparency, and Effectiveness of the Security Council*, A/66/L.42/Rev.1 (May 3, 2012).

⁴³ Resolution 1970 makes reference to this letter, highlighting its significance.

⁴⁴ Statement of Ambassador Li Baodong, *supra* note 33.

⁴⁵ An excellent overview of the African Union-Court-Council relationship may be found at Tendayi Achiume, *The African Union, the International Criminal Court, and the United Nations Security Council*, Background Paper, November 2012, available at <http://www.councilandcourt.org/files/2013/04/ICC-AU-UNSC-Position-Paper-FINAL.pdf>.

⁴⁶ Reports on the Libya situation may be found at http://www.icc-cpi.int/en_menus/icc/situations%20and%20cases/situations/icc0111/reports%20to%20the%20unsc/Pages/index.aspx. Reports on the situation in Darfur, Sudan, may be found at http://www.icc-cpi.int/en_menus/icc/situations%20and%20cases/situations/situation%20icc%200205/reports%20to%20the%20unsc/Pages/reports%20to%20the%20security%20counsel%20of%20the%20united%20nations%20organisation.aspx.

⁴⁷ See Decision Pursuant to Article 87(7) of the Rome Statute on the Failure by the Republic of Malawi to Comply with the Cooperation Requests Issued by the Court with Respect to the Arrest and Surrender of Omar Hassan Ahmad Al Bashir, *The Prosecutor v. Omar Hassan Ahmad Al Bashir*, Case No. ICC-02/05-01/09, December 12, 2011, available at http://www.icc-cpi.int/en_menus/icc/situations%20and%20cases/situations/situation%20icc%200205/related%20cases/icc02050109/court%20records/chambers/ptci/Pages/139.aspx; and Decision pursuant to article 87(7) of the Rome Statute on the refusal of the Republic of Chad to comply with the cooperation requests issued by the Court with respect to the arrest and surrender of Omar Hassan Ahmad Al Bashir, *The Prosecutor v. Omar Hassan Ahmad Al Bashir*, Case No. ICC-02/05-01/09, December 13, 2011, available at http://www.icc-cpi.int/en_menus/icc/situations%20and%20cases/situations/situation%20icc%200205/related%20cases/icc02050109/court%20records/chambers/ptci/Pages/140.aspx.

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⁴⁸ Statement of Judge Song, October 17th Debate, at 4.

⁴⁹ Statement of Phakiso Mochochoko, Office of the Prosecutor, October 17th Debate, at 6.

⁵⁰ See *supra* note 27.

⁵¹ See Security Council Press Statement on International Criminal Court Staff Detained in Libya, U.N. Doc. SC/10674 (June 15, 2012), available at <http://www.un.org/News/Press/docs//2012/sc10674.doc.htm>.

⁵² See, e.g., Colum Lynch, *Rice says Libyan people can decide whether to try Qaddafi; ICC says not so fast*, Foreign Policy: Turtle Bay Blog, August 23, 2011, available at http://turtlebay.foreignpolicy.com/posts/2011/08/23/rice_says_libyan_people_can_decide_whether_to_try_qaddafi_icc_says_not_so_fast; Nicholas Watt and Richard Norton-Taylor, *Muammar Gaddafi could stay in Libya, William Hague concedes*, THE GUARDIAN, July 25, 2011, available at <http://www.guardian.co.uk/world/2011/jul/25/gaddafi-libya-william-hague-plan>; DPA, France FM: Gadhafi could remain in Libya if he gives up power, HA'ARETZ, July 20, 2011, available at <http://www.haaretz.com/news/middle-east/france-fm-gadhafi-could-remain-in-libya-if-he-gives-up-power-1.374255>.

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⁵⁴ The new Middle East/North Africa adviser at the Office of the Prosecutor could play a coordinating role in encouraging broader Arab engagement. See International Criminal Court, *ICC Prosecutor announces the appointment of Mohammed Ayat as Special Adviser on regional cooperation with MENA*, March 15, 2013, available at http://www.icc-cpi.int/en_menus/icc/press%20and%20media/press%20releases/Pages/pr8330315-2106.aspx.

⁵⁵ See http://www.un.org/en/sc/repertoire/subsidiary_organ/working_groups.shtml#cat6.

⁵⁶ See *supra* note 13.

⁵⁷ See Enhancing P-3 Cooperation, *supra* note 27.

⁵⁸ See *supra* note 13.

⁵⁹ See SC Res. 2078, op 10(c), U.N. Doc. S/RES/2078 (November 28, 2012) (deciding that certain travel prohibitions do not apply “[w]here the Committee authorizes in advance, and on a case by case basis, the transit of individuals . . . participating in efforts to bring to justice perpetrators of grave violations of human rights or international humanitarian law.”).

⁶⁰ Statute of the ICTY, *supra* note 6, Article 29.

⁶¹ See, e.g., SC Res.1503, U.N. Doc. S/RES/1503 (August 28, 2003) (calling on states to “intensify cooperation” with the ICTY and ICTR).

⁶² Rome Statute, Article 48(3).

⁶³ See Letter from the Secretary General to the President of the Security Council, April 3, 2013, *available at* <http://www.councilandcourt.org/files/2012/11/SG-Letter-of-3-April-2013.pdf>. See also Statement of Ms. Patricia O'Brien, Under-Secretary-General for Legal Affairs, The Legal Counsel, United Nations, September 23, 2009, at 8, *available at* http://untreaty.un.org/ola/media/info_from_lc/POB-keynote.pdf. The Office of the Prosecutor has called for such a policy for some time. See Office of the Prosecutor, *Prosecutorial Strategy: 2009-2012*, February 1, 2010, at page 12, *available at* <http://www.icc-cpi.int/NR/rdonlyres/66A8DCDC-3650-4514-AA62-D229D1128F65/281506/OTPPProsecutorialStrategy20092013.pdf>.

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⁶⁵ Statement of Mr. Mashabane (South Africa), October 17 Debate, at 16-17.

⁶⁶ APSA contains waiver provisions that enable the President to authorize cooperation with the Court so long as certain certifications are made. The jurisdictional exemptions do not seem to be required by ASPA or other provisions of U.S. law.

⁶⁷ See Revised Draft Resolution of Costa Rica, Jordan, Liechtenstein, Singapore and Switzerland, U.N. Doc. A/66/L.42/Rev.1 (May 3, 2012), *available at* [http://www.responsibilitytoprotect.org/A%2066%20L%2042%20rev%201%20\(2\).pdf](http://www.responsibilitytoprotect.org/A%2066%20L%2042%20rev%201%20(2).pdf).

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