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Increasing the Effectiveness of the Security Council's Chapter VII Authority in the Current Situations Before the International Criminal Court

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I. INTRODUCTION[1]

In 2003, the world was shocked and horrified to hear of the widespread killing, torture, forced displacement, and other atrocities visited upon the people of Darfur in the Sudan by the Sudanese

1. All information and views contained in this Comment are current as of March 2008.

Armed Forces ("SAF") and Arab Janjaweed militias.[2] The SAF and Janjaweed allegedly were fighting organized rebel groups,[3] but instead of targeting the rebels, they attacked civilian towns and villages based on the rationale that the civilians supported rebel forces.[4] The United States defined the killings as genocide[5] and pushed the United Nations to develop a court to try and punish those who committed these terrible crimes.[6] However, instead of creating a tribunal, similar to those created to prosecute the perpetrators of crimes in the Former Yugoslavia and Rwanda, in 2005 the United Nations Security Council chose to refer the crimes committed in Darfur to the International Criminal Court for investigation and possible prosecution. Although the situation in Darfur was not the International Criminal Court's first referral, it was the first initiated by the Security Council—which meant that, for the first time, the International Criminal Court could act with the full power of the Security Council behind it.

Three years earlier, in 2002, the International Criminal Court ("ICC") received its sixtieth ratification, empowering it to try those accused of "the most serious crimes of concern to the international community as a whole."[7] These "serious crimes" consist of genocide, crimes against humanity, war crimes, and the crime of aggression.[8] Despite the appalling pervasiveness of these crimes, the ICC has jurisdiction in only three instances: (1) if a State Party to the ICC refers a situation[9] to the ICC Prosecutor, (2) if the Prosecutor initiates

2. Int'l Comm'n of Inquiry on Darfur, *Report of the International Commission of Inquiry on Darfur to the United Nations Secretary-General* 3 (Jan. 25, 2005), *available at* http://www.un.org/News/dh/sudan/com_inq_darfur.pdf.

3. Prosecutor v. Harun & Abd-Al-Rahman, Case No. ICC-02/05-01/07, Warrant of Arrest for Ahmad Harun 3 (Apr. 27, 2007) [hereinafter *Harun & Abd-Al-Rahman*, Warrant of Arrest for Ahmad Harun], *available at* http://www.icc-cpi.int/library/cases/ICC-02-05-01-07-2_English.pdf.

4. Office of the Prosecutor, Int'l Criminal Court, Fact Sheet on the Situation in Darfur, the Sudan (Feb. 27, 2007), *available at* http://www.icc-cpi.int/library/organs/otp/ICC-OTP_Fact-Sheet-Darfur-20070227_en.pdf.

5. Jim VandeHei, *In Break with U.N., Bush Calls Sudan Killings Genocide*, WASH. POST, June 2, 2005, at A19.

6. Judi Aita, *Darfur War Crimes Referred to International Criminal Court*, AMERICA.GOV, Apr. 1, 2005, http://www.america.gov/st/washfile-english/2005/April/ 20050401122037E Aifas0.5436823.html.

7. Rome Statute of the International Criminal Court, art. 5.1, U.N. Doc. A/CONF.183.9 (1998), *available at* http://untreaty.un.org/cod/icc/statute/romefra.htm [hereinafter Rome Statute].

8. *Id.* However, the ICC will not have jurisdiction over the crime of aggression until the Assembly of States Parties has adopted a definition of the crime. *Id.* art. 5.2.

9. "Situation" is a technical term used by the ICC to refer to the serious crimes allegedly committed in a defined area.

an investigation *proprio motu*,[10] or (3) if the Security Council refers a situation to the Prosecutor pursuant to its authority under Chapter VII of the United Nations Charter.[11] If the Security Council does not refer the situation to the ICC, then the ICC depends entirely on the cooperation of states to conduct investigations and trials. Although the Rome Statute of the International Criminal Court places binding treaty obligations on all ratifying States Parties, and states may put "peer pressure" on each other to comply with or assist the ICC, the ICC lacks an enforcement mechanism with which to threaten States Parties into cooperating with the ICC. A Security Council referral, on the other hand, comes with the authority of Chapter VII of the United Nations Charter, which the ICC could use to conduct its investigations and ultimately to enforce its decisions. The Security Council, however, does not appear committed to using this authority. Without Chapter VII authority behind its actions, the ICC's investigative and enforcement powers in situations referred by the Security Council are much weaker. Which method of bringing a situation before the ICC will prove to be more effective? Does the substance of theoretical Security Council power under Chapter VII enhance enforcement in lieu of binding treaty obligations?

To act effectively, the ICC must have the ability to carry out investigations and prosecute the accused. In particular, the ICC must be able to conduct its investigations with minimal state interference, gain state assistance in enforcing ICC arrest warrants, hold trials in a timely manner, and carry out sentencing orders with the assistance of states. Whether the ICC can accomplish these goals depends on the amount of support (or rather, the lack of opposition) it receives from the United States. The United States opposed the ICC's creation, and Congress enacted legislation to prohibit American cooperation with the ICC.[12] The United States also signed a series of bilateral treaties, called Article 98 agreements, which prohibit signatories from referring investigations of any members of the American military stationed in ICC States Parties.[13] Not only does the United States' non-membership in the ICC result in a significant loss of potential funding

10. *Proprio motu* means "on one's own initiative." Dictionary.com, http://dictionary.reference.com/browse/proprio%20motu (last visited Jan. 1, 2008).

11. Rome Statute, *supra* note 7, art. 13.

12. *See, e.g.*, American Servicemembers' Protection Act, 22 U.S.C. §§ 7421-7433 (2000).

13. *Id.* § 7426(c). By May 2, 2005, the United States had concluded one hundred such agreements. Press Release, U.S. Dep't of State, U.S. Signs 100th Article 98 Agreement (May 3, 2005), *available at* http://www.state.gov/r/pa/prs/ps/2005/45573.htm.

to the ICC,[14] but the opposition of the most powerful state in the world also undermines the ICC's legitimacy, especially if the United States were to take actions impeding the ICC's investigations or trials.

Many U.S. objections to the ICC stem from the independent ability of the Prosecutor and States Parties to bring situations before the ICC, leaving open the possibility that the ICC would try American citizens.[15] However, if in practice the State Party and Prosecutor referral methods prove ineffective because states refuse to cooperate in those cases, then the States Parties might consider removing these referral methods from the ICC's jurisdiction. If this circumstance occurred, then with only the Security Council referral mechanism left, the United States' primary objection to the ICC would disappear and the United States may be willing to support the ICC—perhaps even ratifying the Rome Statute to become a State Party to the ICC.

This Comment will explore the efficacy of the ICC referral mechanisms, focusing on the State Party and Security Council referral methods under which the ICC has already received requests to investigate and potentially prosecute individuals. In order to measure the effectiveness of the ICC's referral mechanisms, this Comment will look primarily at the current situations before the ICC. At this time, the ICC is investigating four situations. Three situations are referrals from States Parties: the Democratic Republic of the Congo ("DRC"), Uganda, and the Central African Republic. The fourth is a referral from the Security Council: Darfur in the Sudan.[16] The ICC has made substantial progress on only one of its State Party referrals—the DRC. Specifically, the ICC Prosecutor conducted investigations in the DRC, issued arrest warrants, conducted pre-trial hearings, and commenced a trial of one of the accused. In the Ugandan situation, however, the ICC's prosecution of individuals has stagnated and none of the individuals for whom arrest warrants have been issued has been

14. Funding for the ICC is based upon contributions from States Parties to the Rome Statute. Rome Statute, *supra* note 7, art. 115. These contributions are calculated using the scale of assessment adopted by the United Nations. *Id.* art. 117. The United States is the largest contributor to the United Nations's budget, and so would be required to contribute a significant amount of money to the ICC if it were to ratify the Rome Statute. Press Release, General Assembly, Fifth Committee Approves Assessment Scale for Regular, Peacekeeping Budgets, Texts on Common System, Pension Fund, as It Concludes Session, U.N. Doc. GA/AB/3787 (Dec. 22, 2006), *available at* http://www.un.org/News/Press/docs/2006/gaab3787.doc.htm.

15. Bureau of Political and Military Affairs, U.S. Dept. of State, The International Criminal Court, Fact Sheet (Aug. 2, 2002), *available at* http://www.state.gov/t/pm/rls/fs/23426.htm [hereinafter Fact Sheet] (listing the objections that the United States has to the Rome Charter); *see infra* Part V.

16. For a complete record of the situations, see International Criminal Court, Situations and Cases, http://www.icc-cpi.int/cases.html (last visited Jan. 28, 2008).

taken into custody. The Prosecutor opened an investigation of a third State Party referral, by the Central African Republic, in May 2007, and as the situation is still in the preliminary stage of investigation, it remains too early to assess its results.

With regard to the Security Council referral, there has been even less progress. The Prosecutor received the Sudan referral from the Security Council almost three years ago and has investigated the situation in Darfur since that time. However, he issued only two arrest warrants, neither of which has produced an actual arrest. As a result, the ICC is far from conducting trials of any alleged perpetrators of genocide, war crimes, or crimes against humanity in the region. Therefore, to supplement an analysis of Security Council referrals, this Comment will reference the experiences of the International Criminal Tribunal for the Former Yugoslavia ("ICTY").

The ICTY is an appropriate point of reference for evaluating the potential success of current and future Security Council referrals to the ICC for several reasons. First, the Security Council established the ICTY under Chapter VII of the United Nations Charter, and Chapter VII authority backs ICTY actions.[17] The Security Council can use this same Chapter VII power when it refers situations to the ICC.[18] Second, the ICTY and ICC were created "to prosecute persons responsible for serious violations of international humanitarian law,"[19] and each has jurisdiction over crimes against humanity, genocide, and war crimes.[20] Their similar purposes and the role that the Security Council can play in their affairs make the ICTY and the ICC comparable international courts. In particular, the ICTY offers valuable insight into the potential assistance that the Security Council's Chapter VII authority might offer to the ICC.

Part II of this Comment gives a brief overview of the International Criminal Court for those unfamiliar with its structure and jurisdiction. Part III relates the background of the four investigations currently before the International Criminal Court in

17. 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, annexed to The Secretary-General, *Report of the Secretary-General Pursuant to Paragraph 2 of Security Council Resolution 808*, preamble, *delivered to the Security Council*, U.N. Doc. S/25704/Annexes (May 25, 1993) [hereinafter ICTY Statute], *available at* http://www.un.org/icty/legaldoc-e/basic/statut/s25704.htm.

18. Rome Statute, *supra* note 7, art. 13(b).

19. ICTY Statute, *supra* note 17, art. 1; Rome Statute, *supra* note 7, art. 5. The only difference is that the ICTY's jurisdiction is limited to the territory of the former Yugoslavia, ICTY Statute, *supra* note 17, art. 8, while the ICC's jurisdiction potentially extends worldwide, Rome Statute, *supra* note 7, arts. 12-13.

20. ICTY Statute, *supra* note 17, arts. 3-5; Rome Statute, *supra* note 7, art. 5.

the DRC, Uganda, the Central African Republic, and the Sudan. Part IV applies the experiences of the ICTY to Security Council referrals to the ICC and examines whether the participation of the Security Council will make a difference in the ICC's ability to conduct investigations and arrest suspects. Part V discusses a key variable in determining the ICC's success in investigating the situation in the Sudan: the United States. More broadly, this Comment explores whether United States support is necessary for the ICC to prosecute cases in situations referred by the Security Council. However, this Comment also questions whether United States involvement would impede Security Council assistance to the ICC. If so, the potential advantages to the ICC of having the Chapter VII power of the Security Council could be moot.

This Comment concludes that, realistically, the Security Council's Chapter VII authority does not make Security Council referrals any more effective than referrals by States Parties or investigations opened by the ICC Prosecutor. However, were the United States to support the Security Council's referrals, the ICC would find its powers greatly enhanced with the authority of the Security Council behind it. The critical player behind the success of Security Council referrals may not be so much the Security Council, but the United States.

II. AN OVERVIEW OF THE INTERNATIONAL CRIMINAL COURT[21]

The International Criminal Court has four distinct organs: the three Trial Divisions, the Presidency, the Office of the Prosecutor, and the Registry. The ICC divides its eighteen judges among three Trial Divisions: the Pre-Trial Chambers, the Trial Chambers, and the Appeals Chamber.[22] Each Pre-Trial Chamber admits evidence, issues warrants, and determines if a crime falls under the ICC's jurisdiction.[23] The two Trial Chambers conduct trials and sentence the convicted.[24] The Appeals Chamber hears appeals and has the power to reverse or amend a decision or sentence or arrange for a new trial before a different Trial Chamber.[25] One of the eighteen judges serves as the President and two serve as Vice-Presidents.[26] These individuals

21. For a comprehensive overview of the ICC, see JENNIFER ELSEA, INTERNATIONAL CRIMINAL COURT: OVERVIEW AND SELECTED LEGAL ISSUES (2003).

22. Rome Statute, *supra* note 7, arts. 36.1, 39.1.

23. *Id.* art. 57.

24. *Id.* art. 76.

25. *Id.* art. 83.2.

26. *Id.* art. 38.

are responsible for administrative matters, such as assigning cases to the Pre-Trial Chambers.[27]

The Office of the Prosecutor consists of a Prosecutor, currently Luis Moreno-Ocampo, one or more Deputy Prosecutors, and the Prosecutor's staff.[28] After receiving a referral, the Prosecutor decides if further inquiry is necessary and, if so, opens an investigation.[29] In addition, the Prosecutor can initiate investigations *proprio motu*.[30] Upon a determination that there is a "reasonable basis to proceed with an investigation," the Prosecutor will request that the Pre-Trial Chamber authorize commencement of an investigation.[31] Finally, the Registry is responsible for the non-judicial administration of the ICC.[32]

Although not an organ of the ICC, the Assembly of States Parties ("ASP") plays an important role in its management. One representative from each State Party to the ICC belongs to the ASP.[33] If a State Party fails to comply with a request made by the ICC, the ICC can refer the matter to the ASP and the ASP determines what, if any, action to take.[34] The Rome Statute does not specify whether the ASP can level sanctions on States Parties. Given that the ICC has no standing army or other forces to compel a State Party to cooperate with the ICC, the ASP's penalties are limited to actions such as denying that state's ASP representative a vote. In addition, the ASP also has the power to amend the Rome Statute after the ICC has been in force for at least seven years.[35] Any amendment to the structure or workings of the Court would not become effective until one year after seven-eighths of the States Parties have ratified or accepted the amendment.[36]

As noted above, the ICC only has jurisdiction over "the most serious crimes of concern to the international community as a whole," defined as: genocide, crimes against humanity, war crimes, and the crime of aggression.[37] The ICC has jurisdiction over individuals (1)

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27. *Id.*
28. *Id.* art. 42.4.
29. *Id.* art. 15.2-3.
30. *Id.* art. 15.1.
31. *Id.* art. 15.3-4.
32. *Id.* art. 43.1.
33. *Id.* art. 112.1.
34. *Id.* arts. 87, 112.2(f).
35. *Id.* art. 121.1-2.
36. *Id.* art. 121.4.
37. *Id.* art. 5.1. However, the ICC will not have jurisdiction over the crime of aggression until the Assembly of States Parties has adopted a definition of the crime. *Id.* art. 5.2.

who commit these crimes and are nationals of States Parties or (2) who commit crimes in the territory of States Parties.[38] Thus, the ICC could try an individual from a non-State Party if he or she committed a crime in a state under the jurisdiction of the ICC.

However, a process called complementarity limits the ICC's jurisdiction.[39] Under complementarity, if a state with jurisdiction over a particular crime investigates an individual and decides to prosecute, then generally that state's jurisdiction will supersede the ICC's jurisdiction.[40] The ICC has jurisdiction only when the state appears "unwilling or unable genuinely to carry out the investigation or prosecution," or if the state's decision to refrain from prosecution "resulted from the unwillingness or inability of the State genuinely to prosecute."[41] As a final note, the ICC's jurisdiction extends only to those crimes committed since July 1, 2002, when the Rome Statute became effective and the ICC was formed.

III. THE STATUS OF THE SITUATIONS BEFORE THE INTERNATIONAL CRIMINAL COURT: A SLIDING SCALE OF SUCCESSES

A. *The Democratic Republic of the Congo*

The ICC's most advanced investigation to date is in the DRC. Although the ICC only has jurisdiction over crimes committed since its inception in 2002,[42] violence in the DRC dates back to 1998, when Rwandan- and Ugandan-backed rebels overthrew the government in Kinshasa.[43] In an address to the Assembly of States Parties, Prosecutor Moreno-Ocampo stated that numerous individuals potentially committed genocide, crimes against humanity, and war crimes in the DRC.[44] In July 2003, the Prosecutor announced that he

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38. *Id.* art. 12.2.

39. *Id.* art. 17.1; *see id.* art. 1 ("[ICC jurisdiction] shall be complementary to national criminal jurisdictions.").

40. *Id.* art. 17.1.

41. *Id.*

42. *Id.*

43. Pascal Kambale & Anna Rotman, *The International Criminal Court and Congo: Examining the Possibilities*, CRIMES OF WAR PROJECT, Oct. 2004, http://www.globalpolicy.org/intljustice/icc/2004/1004examine.htm.

44. Prosecutor Luis Moreno-Ocampo, *Report of the Prosecutor of the ICC, Mr. Luis Moreno-Ocampo, 2, delivered to the Second Assembly of States Parties to the Rome Statute of the International Criminal Court* (Sept. 8, 2003), *available at* http://www.icc-cpi.int/library/organs/otp/LMO_20030908_En.pdf.

would monitor the situation.[45] Shortly thereafter, in September 2003 he informed the ASP that while he was prepared to open an investigation under his *proprio motu* powers if necessary, a referral from the DRC, a State Party to the ICC, would facilitate the Office of the Prosecutor's efforts.[46] On March 3, 2004, Joseph Kabila, the President of the DRC, complied by referring all crimes committed in the DRC within the ICC's jurisdiction to the ICC.[47] The Prosecutor subsequently opened the ICC's first investigation on June 23, 2004.[48]

The Office of the Prosecutor currently is investigating crimes committed by a number of armed groups in the Ituri region, one of the most violent areas of the DRC.[49] Particularly, the Prosecutor is focusing on the recruitment and use of child soldiers: UNICEF estimates that 30,000 children are associated with armed groups in the DRC,[50] and the investigation of crimes against children led to the Prosecutor's first arrest. On January 13, 2006, the Prosecutor applied to Pre-Trial Chamber I (the chamber hearing pre-trial motions concerning the DRC situation) for an arrest warrant against Thomas Lubanga Dyilo. The warrant alleges that Lubanga Dyilo founded and presided over the Union Patriotic Congolese ("UPC"), a rebel group in the Ituri region, as well as the Patriotic Forces for the Liberation of the Congo ("FPLC"), the military wing of the UPC.[51] The warrant further alleges that due to his "*de facto* authority" over the UPC and the FPLC, Lubanga Dyilo was responsible for war crimes committed by the FPLC under Articles 8 and 25 of the Rome Statute: enlisting

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45. Press Release, Int'l Criminal Court, Prosecutor Receives Referral of the Situation in the Democratic Republic of the Congo (Apr. 14, 2004), *available at* http://www.icc-cpi.int /pressrelease_details&id=19&l=en.html.

46. *Id.*

47. *Id.*; Letter from Joseph Kabila, President of the DRC, to Luis Moreno-Ocampo, Prosecutor of the ICC (Mar. 3, 2004), *available at* http://www.icc-cpi.int/library/cases/ICC-01-04-01-06-39-AnxB1_French.pdf.

48. Press Release, Int'l Criminal Court, The Office of the Prosecutor of the International Criminal Court Opens Its First Investigation (June 23, 2004), *available at* http://www.icc-cpi.int/press/pressreleases/26.html.

49. Press Release, Int'l Criminal Court, Issuance of a Warrant of Arrest against Thomas Lubanga Dyilo (Mar. 17, 2006) [hereinafter Press Release on Lubanga Dyilo], *available at* http://www.icc-cpi.int/pressrelease_details&id=133.html; Lauren McCollough, *International Criminal Court Completes First Pre-Trial Hearing*, CRIMES OF WAR PROJECT, Nov. 29, 2006, http://www.crimesofwar.org/onnews/Lubanga.html.

50. Press Release on Lubanga Dyilo, *supra* note 49.

51. Prosecutor v. Lubanga Dyilo, Case No. ICC-01/04-01/06, Warrant of Arrest 3 (Feb. 10, 2006) [hereinafter *Lubanga Dyilo*, Warrant of Arrest], *available at* http://www.icc-cpi.int/library/cases/ICC-01-04-01-06-2_tEnglish.pdf.

and conscripting children under the age of fifteen and using these children to participate in hostilities.[52]

At the time of the arrest warrant request, the DRC was holding Lubanga Dyilo in custody on suspicion of being involved in the killing of United Nations peacekeepers.[53] Nevertheless, the Office of the Prosecutor pushed for Pre-Trial Chamber I to issue an immediate warrant.[54] The Prosecutor stressed the urgency of the situation, stating that the political situation in the DRC was unstable and that the election of a new president in the spring of 2006 could affect the willingness and ability of DRC authorities to comply with an arrest warrant.[55] The Pre-Trial Chamber subsequently issued the warrant on February 10, 2006.[56] The ICC Registry informed DRC authorities of the Pre-Trial Chamber's decisions on March 14, and the DRC cooperated with the ICC by promptly sending Lubanga Dyilo to The Hague in a French military aircraft.[57] United Nations peacekeeping forces in the DRC[58] provided further support.[59] In addition, Pre-Trial Chamber I requested the cooperation of all States Parties "to identify, trace, freeze or seize the property and assets of Mr. Thomas Lubanga Dyilo" that could be used to pay reparations to crime victims.[60] Pre-Trial Chamber I made this request pursuant to Security Council Resolution 1596, in which the Security Council exercised its Chapter VII authority to announce that all states "shall" freeze the assets of persons designated by the Security Council Sanctions Committee.[61] The Committee listed Lubanga Dyilo as one of these persons.[62]

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52. *Id.* at 3-4. Article 8 gives the ICC jurisdiction over war crimes. Rome Statute, *supra* note 7, art. 8. Article 25.3(a) states that an individual is criminally responsible if that person commits a crime within the ICC's jurisdiction. *Id.* art. 25.3(a).

53. Prosecutor v. Lubanga Dyilo, Case No. ICC-01/04-01/06, Prosecutor's Submission of Further Information and Materials 3-4 (Jan. 25, 2006), *available at* http://www.icc-cpi.int/library/cases/ICC-01-04-01-06-32-AnxB_English.pdf.

54. *Id.*

55. *Id.* at 3.

56. *Lubanga Dyilo*, Warrant of Arrest, *supra* note 51, at 5.

57. Press Release, Int'l Criminal Court, First Arrest for the International Criminal Court (Mar. 17, 2006), *available at* http://www.icc-cpi.int/pressrelease_details&id=132.html.

58. The United Nations forces comprised part of the United Nations Mission in the Democratic Republic of the Congo ("MONUC"). *Id.*

59. *Id.*

60. Prosecutor v. Lubanga Dyilo, Case No. ICC-01/04-01/06, Request to States Parties to the Rome Statute for the Identification, Tracing and Freezing or Seizure of the Property and Assets of Mr. Thomas Lubanga Dyilo 2 (Mar. 31, 2006) [hereinafter *Lubanga Dyilo*, Request to States Parties], *available at* http://www.icc-cpi.int/library/cases/ICC-01-04-01-06-62-tEnglish.pdf.

61. *Id.* at 3; S.C. Res. 1596, ¶ 15, U.N. Doc. S/RES/1596 (Apr. 18, 2005).

62. *Lubanga Dyilo*, Request to States Parties, *supra* note 60, at 3-4; List of Individuals and Entities Subject to the Measures Imposed by Paragraphs 13 and 15 of Security Council

On January 29, 2007, Pre-Trial Chamber I determined that there is "sufficient evidence to establish substantial grounds to believe that Thomas Lubanga Dyilo is responsible, as a co-perpetrator, for the charges of enlisting and conscripting children under the age of fifteen years into the FLPC and using them to participate actively in hostilities" from September 2002 to August 2003.[63] His trial will begin on March 31, 2008.[64] Thus, Lubanga Dyilo will be the first person tried by the International Criminal Court.

Pre-Trial Chamber I also issued warrants of arrest for two other individuals. In July 2007, the ICC issued a warrant for Germain Katanga, formerly the highest-ranking commander of the Patriotic Resistance Force in Ituri ("FRPI").[65] The Court found reasonable grounds to believe that the FRPI and others attacked the village of Bogoro in the Ituri region in February 2003, murdering, harming, and imprisoning civilians, pillaging the village, committing sexual enslavement of women and girls, and using children under age fifteen to participate in the attack.[66] Furthermore, the Court found reasonable grounds to believe that Katanga, by designing the plan to attack and ordering its execution, was essential to its implementation and responsible for crimes against humanity and war crimes.[67] In March 2005, DRC authorities arrested Katanga in relation to an attack against MONUC peacekeepers in Ituri on February 25, 2005.[68] Thus, the DRC promptly executed the arrest warrant and surrendered Katanga to the ICC on October 18, 2007.[69]

Near the same time, Pre-Trial Chamber I also issued a warrant of arrest for Mathieu Ngudjolo Chui, an alleged former leader of the

Resolution 1596 (2005), *available at* http://www.un.org/Docs/sc/committees/DRC/1533_list.htm (last updated Feb. 6, 2007).

63. Prosecutor v. Lubanga Dyilo, Case No. ICC-01/04-01/06, Decision on the Confirmation of Charges 156-57 (Jan. 29, 2007), *available at* http://www.icc-cpi.int/library/cases/ICC-01-04-01-06-803-tEN_English.pdf.

64. Prosecutor v. Lubanga Dyilo, Case No. ICC-01/04-01/06, Decision Regarding the Timing and Manner of Disclosure and the Date of Trial 15 (Nov. 9, 2007), *available at* http://www.icc-cpi.int/library/cases/ICC-01-04-01-06-1019-ENG.pdf.

65. Prosecutor v. Katanga, Case No. ICC-01/04-01/07, Warrant of Arrest for Germain Katanga 3, 5 (July 2, 2007), *available at* http://www.icc-cpi.int/library/cases/ICC-01-04-01-07-1_tEnglish.pdf.

66. *Id.* at 4.

67. *Id.* at 5-6.

68. Prosecutor v. Katanga, Case No. ICC-01/04-01/07, Background Information Sheet 1-2 (Oct. 18, 2007), *available at* http://www.icc-cpi.int/library/cases/ICC-01-04-01-07-BckInfo-ENG.pdf.

69. *Id.* at 1.

National Integrationist Front ("FNI").[70] The Court found reasonable grounds to believe that Ngudjolo Chui was "essential" to the implementation of the attack on Bogoro described above and was responsible for committing crimes against humanity and war crimes.[71] Congolese authorities arrested Ngudjolo Chui on February 6, 2008 and immediately transferred him to the ICC.[72]

Successful completion of the ICC's first trial would enhance the ICC's credibility significantly, as would the continued issuance and prompt execution of arrest warrants for individuals allegedly involved in crimes committed in the DRC. The DRC's commitment to the ICC was tested when the ICC issued an arrest warrant for Ngudjolo Chui, who was not in the custody of the DRC, and the Congolese authorities' prompt execution of the warrant demonstrates the DRC's continued willingness to support the ICC. Future cooperation with the ICC will strengthen the Court's effectiveness, while lackluster efforts will prevent the ICC from progressing further with its mission to bring criminals to justice. Because this case remains the first test of the ICC in action, the situation in the DRC will play a leading role in demonstrating whether the ICC can effectively investigate and prosecute individuals without the aid of the Security Council. The success of the ICC under these circumstances will depend upon real commitment and cooperation from the involved States Parties.

B. Uganda

The Prosecutor's office received its first referral from the government of Uganda.[73] The Lord's Resistance Army ("LRA"), a splinter group of rebel forces from the former Ugandan People's Democratic Army, has attacked civilians in northern Ugandan since Yoweri Musveni became President of the country in 1986.[74] On

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70. Prosecutor v. Ngudjolo Chui, Case No. ICC-01/04-02/07, Warrant of Arrest for Mathieu Ngudjolo Chui 3, 5, 7 (July 6, 2007), *available at* http://www.icc-cpi.int/library/cases/ICC-01-04-02-07-1-tENG.pdf.

71. *Id.* at 5-6.

72. Press Release, Int'l Criminal Court, Third Detainee for the International Criminal Court: Mathieu Ngudjolo Chui (Updated) (Feb. 7, 2008), *available at* http://www.icc-cpi.int/press/pressreleases/329.html.

73. Press Release, Int'l Criminal Court, President of Uganda Refers Situation Concerning the Lord's Resistance Army (LRA) to the ICC (Jan. 29, 2004) [hereinafter Press Release, President of Uganda Refers Situation], *available at* http://www.icc-cpi.int/pressrelease_details&id=16&l=en.html.

74. Background Information on the Situation in Uganda 1 (Jan. 29, 2004), *available at* http://www.icc-cpi.int/cases/UGD/s0204/s0204_b.html (under "29.01.2004 - Background information on the situation in Uganda," select "English").

December 16, 2003, Museveni referred all crimes of the LRA to the ICC, requesting that the Prosecutor open an investigation.[75] The LRA committed a series of human rights abuses against civilians in Uganda, including summary executions, torture, mutilation, rape, and forced displacement.[76] To accomplish these crimes, the LRA abducted over 20,000 children and forced them to engage in a host of violent and inhuman acts, including ritual killings and mutilations.[77] In 2000, Uganda adopted an Amnesty Act granting amnesty to any person who engaged in armed rebellion against the Ugandan government since 1986 if that person "renounce[d] and abandon[ed] involvement in the war or armed rebellion;"[78] however, the Ugandan government later withdrew this offer as it applied to any top LRA leaders subsequently indicted by the ICC Prosecutor.[79]

The Prosecutor opened an investigation in Uganda on July 29, 2004,[80] and interpreted the Ugandan government's referral as applying to all crimes committed in Uganda, not just those of the LRA.[81] This broad interpretation opened the door for ICC investigation and potential indictment of members of the Ugandan government in addition to LRA affiliates.[82] Almost a year later, on July 8, 2005, Pre-Trial Chamber II of the ICC issued five warrants, previously filed by the Prosecutor, for the arrest of the following senior commanders of the LRA for committing war crimes and crimes against humanity: Joseph Kony, Vincent Otti, Raska Lukwiya, Okot Odhiambo, and Dominic Ongwen.[83] Pre-Trial Chamber II also issued requests that warrants for the arrest and surrender of the five commanders be transmitted to the DRC and the Sudan as well as Uganda,[84] because the LRA has additional bases in these states and

75. Press Release, President of Uganda Refers Situation, *supra* note 73.

76. Background Information on the Situation in Uganda, *supra* note 74.

77. *Id.*

78. The Amnesty Act, 2000, Part II, ¶ 4 (2000) (Uganda), *available at* http://www.c-r.org/our-work/accord/northern-uganda/documents/2000_Jan_The_Amnesty_Act.doc.

79. Akhavan Payam, *The* Lord's Resistance Army *Case: Uganda's Submission of the First State Referral to the International Criminal Court*, 99 AM. J. INT'L L. 403, 410 (2005).

80. Press Release, Int'l Criminal Court, Decision to Open Investigation (July 29, 2004), *available at* http://www.icc-cpi.int/pressrelease_details&id=33&l=en.html.

81. Office of the Prosecutor, Int'l Criminal Court, Statement by the Chief Prosecutor on the Uganda Arrest Warrants 2 (Oct. 14, 2005), *available at* http://www.icc-cpi.int/library/organs/otp/speeches/LMO_20051014_English.pdf.

82. *Id.*

83. *Id.* at 3-6.

84. Prosecutor v. Kony, Case No. ICC-02/04-01/05, Decision on the Prosecutor's Urgent Application Dated 26 September 2005, at 5 (Sept. 27, 2005), *available at* http://www.icc-cpi.int/library/cases/ICC-02-04-01-05-27_English.pdf.

the indicted individuals move between them.[85] Sudan, although not a State Party to the ICC, signed an ad hoc agreement with the Office of the Prosecutor pledging to surrender any indicted LRA leaders.[86] The Prosecutor highlighted the importance of these three states working together to carry out the arrests.[87]

Of the three countries, Uganda has made the most significant effort thus far to capture the five fugitives. The Ugandan government communicated with the governments of the DRC and the Sudan, as well as with MONUC and the United Nations peacekeeping forces in the Sudan ("UNMIS"), to coordinate actions against the LRA.[88] The Ugandan government formed a regional security group focused on disarming the LRA, executing the ICC's arrest warrants, and facilitating a dialogue between the Ugandan government and the LRA to reach a peaceful resolution to conflict.[89] In addition, the Ugandan government entered into negotiations with the LRA.[90] These negotiations led to the two parties signing a Cessation of Hostilities Agreement for a temporary cease-fire in parts of southern Sudan.[91] Although it is too soon to predict an outcome, the Ugandan government emphasizes "the positive effect that the warrants have had in motivating the LRA to attend peace talks," which could positively impact stability in the region.[92]

Despite Uganda's efforts, the subjects of the warrants either remain at large or have been killed. The Ugandan government confirmed that Raska Lukwiya was killed in combat in August 2006,[93] and Vincent Otti reportedly has been killed under orders of Joseph Kony in October 2007.[94] The ICC terminated proceedings against Raska Luwiya, but is awaiting confirmation of Vincent Otti's death

85. Office of the Prosecutor, Uganda Arrest Warrants, *supra* note 81, at 7.

86. Prosecutor v. Kony, Case No. ICC-02/04-01/05, Submission of Information on the Status of the Execution of Warrants of Arrest in the Situation in Uganda 16 (Oct. 6, 2006) [hereinafter *Kony*, Submission of Information on Warrants], *available at* http://www.icc-cpi.int/library/cases/ICC-02-04-01-05-116_English.pdf.

87. Office of the Prosecutor, Uganda Arrest Warrants, *supra* note 81, at 7.

88. *Kony*, Submission of Information on Warrants, *supra* note 86, at 11. The formal title of UNMIS is the United Nations Mission in Sudan.

89. Press Release, Security Council, Uganda's Foreign, Defence Ministers Brief Security Council, Call for Strong Measures to Disarm Lord's Resistance Army, U.N. Doc. SC/8695 (Apr. 19, 2006), *available at* http://www.un.org/News/Press/docs/2006/sc8695.doc.htm.

90. *Kony*, Submission of Information on Warrants, *supra* note 86, at 3.

91. *Id.* at 14.

92. *Id.* at 3.

93. *Id.* at 6-7.

94. Prosecutor v. Kony, Case No. ICC-02/04-01/05, Submission of Information Regarding Vincent Otti 2 (Nov. 8, 2007), *available at* http://www.icc-cpi.int/library/cases/ICC-02-04-01-05-258_English.pdf.

before ending proceedings against him.[95] Progress regarding the other three subjects has slowed or stalled. While the Office of the Prosecutor stated that it "does not possess information that would cast doubt as to the genuine nature of any State's willingness to cooperate in executing the warrants of arrest,"[96] only Uganda responded to the Prosecutor's request for an update on the status of warrant execution in those three states.[97] Neither the DRC nor the Sudanese government responded.[98]

Although no state has requested that the ICC withdraw the warrants, actions by the Sudanese government indicate that it would favor a withdrawal. Before beginning peace talks with members of the LRA in June 2006 (including with Joseph Kony, whom the Sudanese government did not arrest at the talks), Salva Kiir, the President of Southern Sudan, said that efforts to arrest LRA leaders had been unsuccessful. [99] Instead, he said that Sudan "opted for the peaceful solution," and "[if] we fail to convince them with logic to come back, then we can resort to implement[ing] the ICC order."[100] It would appear, then, that the Sudanese government is not engaged in executing the ICC arrest warrants. Additionally, Uganda has mixed views about the outstanding warrants: although Ugandan officials report that they told Kony in November 2006 that the indicted individuals "should not expect that the warrants of arrest [will] be withdrawn,"[101] the Ugandan government also has said that it will "consider" dropping the ICC's charges against Joseph Kony if he surrenders.[102]

The international community also has made only modest efforts to execute the LRA arrest warrants. Interpol promulgated the ICC warrants globally via "red notices."[103] In March 2006, the Security

95. Prosecutor v. Kony, Case No. ICC-02/04-01/05, Decision to Terminate the Proceedings Against Raska Lukwiga 2, 4 (July 11, 2007), *available at* http://www.icc-cpi.int/library/cases/ICC-02-04-01-05-248_English.pdf.

96. Prosecutor v. Kony, Case No. ICC-02/04-01/05, Submission of Additional Information on the Status of the Execution of the Warrants of Arrest in the Situation in Uganda 8 (Dec. 18, 2006) [hereinafter *Kony*, Submission of Additional Information on Warrants], *available at* http://www.icc-cpi.int/library/cases/ICC-02-04-01-05-132_English.pdf.

97. *Kony*, Submission of Information on Warrants, *supra* note 86, at 5.

98. *Id.*

99. *Southern Sudan Seeks Peace with LRA*, INDEP. ONLINE, June 9, 2006, http://www.int.iol.co.za/index.php (search for "Southern Sudan Seeks Peace with LRA"; select article).

100. *Id.*

101. *Kony*, Submission of Additional Information on Warrants, *supra* note 96, at 5.

102. Jeffrey Gettleman, *UN Envoy Meets with Ugandan Rebel*, N.Y. TIMES, Nov. 13, 2006, at A3.

103. *Kony*, Submission of Information on Warrants, *supra* note 86, at 6.

Council adopted Resolution 1663, encouraging UNMIS "to make full use of its current mandate and capabilities" against the LRA and Sudanese communities.[104] The Security Council also requested recommendations as to how the United Nations, and "in particular UNMIS, could more effectively address the problem of the LRA."[105] However, former UN Secretary-General Kofi Annan noted that UNMIS and MONUC "already have challenging tasks to perform in their respective areas of responsibility" and "should channel their capacities and resources primarily to address those challenges."[106] Although "UNMIS and MONUC can provide assistance," dealing with "the regional implications of LRA activities lies within the area of national responsibility of the Governments in the region."[107] Effectively, the Secretary-General has given the UN peacekeeping forces an "out" from executing the arrest warrants. Prosecutor Luis Moreno-Ocampo reported in late 2006 that while his office has received reports of "good faith-efforts to execute the warrants of arrest, . . . operational and coordination challenges remain significant," and that MONUC made ensuring the safe conduct of the DRC's first democratic presidential elections in forty years its top priority.[108] However, the presidential elections were completed in late 2006, and since that time MONUC has not made any efforts that have resulted in the capture of any of the remaining alleged criminals.

The longer the three remaining fugitives remain at large, the less effective the efforts of Uganda and the international community to arrest and try these individuals will prove to be. The Ugandan government also may determine that it is more advantageous to drop the ICC charges against the LRA leaders in exchange for a lasting peace agreement. Although dropping charges would mean that the ICC would not bring these alleged criminals to justice, this outcome should not be equated with failure. The efforts of the Prosecutor and the ICC play a crucial role in compelling parties to conduct meaningful negotiations, as well as reducing crime and violence—the very acts that the ICC is intended to deter.

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104. S.C. Res. 1663, ¶ 7, U.N. Doc. S/RES/1663 (Mar. 24, 2006).

105. *Id.* ¶ 8.

106. The Secretary General, *Report of the Secretary-General Pursuant to Resolutions 1653 (2006) and 1663 (2006)*, ¶ 51, *delivered to the Security Council*, U.N. Doc. S/2006/478 (June 29, 2006), *available at* http://daccessdds.un.org/doc/UNDOC/GEN/N06/415/40/PDF/N0641540.pdf?OpenElement.

107. *Id.* ¶ 52.

108. *Kony*, Submission of Additional Information on Warrants, *supra* note 96, at 10.

C. The Central African Republic

The government of the Central African Republic sent a letter of intent to the ICC Prosecutor on December 22, 2004, referring to the ICC any crimes within its jurisdiction committed in the territory of the Central African Republic.[109] At the end of 2002 and in the beginning of 2003, a large number of civilians were killed and raped in connection with armed conflict between the government of the Central African Republic and rebel forces after a failed coup attempt.[110] Unlike the other situations before the ICC, a majority of the crimes in the Central African Republic involve sexual violence: in just five months, the Office of the Prosecutor identified over six hundred victims.[111] In April 2006, the Court de Cassation, the highest court of the Central African Republic, confirmed that the national judicial system would be unable to carry out criminal proceedings to investigate, arrest, and prosecute the individuals who committed the crimes.[112] Therefore, the ICC has unambiguous jurisdiction over the perpetrators of those crimes.

Few conclusions can be drawn from the ICC's involvement in the Central African Republic at this time. The Prosecutor has said that his office's investigation will focus on crimes committed from 2002 and 2003 and that he will monitor allegations of any crimes committed since the end of 2005.[113] At the time of writing, the Office of the Prosecutor's investigation was not aimed at any particular suspect.[114] Because the investigation is only in its preliminary stages, the Office of the Prosecutor has not yet released any detailed information about its progress.

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109. Press Release, Int'l Criminal Court, Prosecutor Receives Referral Concerning Central African Republic (Jan. 7, 2005), *available at* http://www.icc-cpi.int/pressrelease_details&id=87&l=en.html; Office of the Prosecutor, Int'l Criminal Court, Background Information on the Situation in the Central African Republic 1 (May 22, 2007), *available at* http://www.icc-cpi.int/library/press/pressreleases/ICC-OTP-BN-20070522-220_A_EN.pdf.

110. Press Release, Int'l Criminal Court, Prosecutor Opens Investigation in the Central African Republic (May 22, 2007), *available at* http://www.icc-cpi.int/pressrelease_details&id=248&l=en.html; Office of the Prosecutor, *supra* note 109.

111. Office of the Prosecutor, Background Information on the Situation in the Central African Republic, *supra* note 109, at 2.

112. *Id.* at 3.

113. *Id.* at 1-2.

114. *Id.* at 4.

D. The Sudan

On March 31, 2005, the Security Council, acting under its Chapter VII powers, referred the violent atrocities committed in Darfur to the ICC.[115] In Resolution 1593, the Security Council ordered that "the Government of Sudan and all other parties to the conflict of Darfur *shall* cooperate fully" with the ICC and the Prosecutor. [116] Furthermore, the Security Council urged all non-States Parties to cooperate fully, even though they do not have any obligation to do so under the Rome Statute.[117] The Resolution also invited the Prosecutor to address the Security Council three months after opening an investigation and every six months thereafter to keep the Council informed of the ICC's progress.[118] However, the Resolution expressly stated that none of the ICC's expenses would be borne by the United Nations,[119] even though Article 115 of the Rome Statute encourages the United Nations to provide funds, "in particular in relation to the expenses incurred due to referrals by the Security Council."[120]

Security Council Resolution 1593 was written with great care in order to avoid a U.S. veto of the referral provision. The United States abstained from the Security Council's vote and opted "not to oppose the resolution because of the need for the international community to work together in order to end the climate of impunity in the Sudan, and because the resolution provided protection from investigation or prosecution for U.S. nationals and members of the armed forces of non-State[s] parties."[121] Anne Woods Patterson, the U.S. representative to the Security Council, stated that the stipulation providing that United Nations funding would not be given to the ICC was "extremely important" and that "[a]ny effort to retrench on that principle by the United Nations or other organizations to which the United States contributed could result in [the United States] withholding funding or taking other action in response."[122] Despite its

115. S.C. Res. 1593, ¶ 1, U.N. Doc. S/RES/1593 (Mar. 31, 2005).

116. *Id.* ¶ 2 (emphasis added).

117. *Id.*

118. *Id.* ¶ 8.

119. *Id.* ¶ 7.

120. Rome Statute, *supra* note 7, art. 115(b).

121. Press Release, Security Council, Security Council Refers Situation in Darfur, Sudan, to Prosecutor of Int'l Criminal Court, U.N. Doc. SC/8351 (Mar. 31, 2005), *available at* http://www.un.org/News/Press/docs/2005/sc8351.doc.htm; *see* S.C. Res. 1593, *supra* note 115, ¶ 6 (stating that any nationals or officials from contributing states that are Non-States Parties to the Rome Statute are subject to that state's exclusive jurisdiction, unless expressly waived by the contributing state).

122. Press Release, Security Council, *supra* note 121.

unwillingness to finance the ICC, Patterson declared that the United States "would be an important contributor to the peacekeeping and related humanitarian efforts in the Sudan."[123]

The Prosecutor decided to open an investigation in Darfur on June 6, 2005.[124] In his initial statement, Prosecutor Moreno-Ocampo stressed the importance of "sustained cooperation from national and international authorities" to complement efforts by the African Union and others to end the violence in Darfur.[125] In this regard, assistance from the Sudanese government is of particular importance to the conduct of the investigation. However, the Sudanese government has a mixed record on cooperation. In May 2006, the Sudanese government provided information to the Office of the Prosecutor about the Sudanese legal system and the parties to the conflict in Darfur.[126] The staff of the Office of the Prosecutor also met with Sudanese government officials and obtained a limited number of documents about the events in the Sudan.[127] Nevertheless, a considerable number of requests for documents and interviews made by the Office of the Prosecutor remain outstanding.[128] More recently, it appears that the Sudanese government has backtracked from its initial decision to cooperate with the ICC. In February 2007, the Sudanese Minister of State of Foreign Affairs advised the Prosecutor that because its officials were investigating the situation in Darfur, "they could not allow another investigation to take place on [Darfur's] territory."[129] The Sudanese government further entrenched its position in April 2007, by posting on the official website of the Ministry of Foreign Affairs of the Sudan a document stating that the government had "no intention" of cooperating with the ICC.[130] Prosecutor Moreno Ocampo told the Security Council in December 2007 that the "degree of

123. *Id.*

124. Press Release, Int'l Criminal Court, The Prosecutor of the ICC Opens Investigation in Darfur (June 6, 2005), *available at* http://www.icc-cpi.int/pressrelease_details&id=107&l=en.html.

125. *Id.*

126. The Prosecutor, *Statement of the Prosecutor of the International Criminal Court, Mr. Luis Moreno-Ocampo to the UN Security Council Pursuant to UNSCR 1593 (2005)*, 1-2, *delivered to the Security Council* (Dec. 14, 2006), *available at* http://www.icc-cpi.int/library/organs/otp/LMO_20061214_en.pdf.

127. *Id.* at 5.

128. *Id.* at 6.

129. The Prosecutor, *Fifth Report of the Prosecutor of the International Criminal Court to the UN Security Council Pursuant to UNSCR 1593 (2005)*, 10, *delivered to the Security Council* (June 6, 2007) [hereinafter *Fifth Report*], *available at* http://www.icc-cpi.int/library/organs/otp/OTP_ReportUNSC5-Darfur_English.pdf.

130. *Id.* at 11.

cooperation" previously provided by the Government of the Sudan "no longer exists."[131]

The Prosecutor has addressed the Security Council several times concerning the development of his Office's investigation. Although the Office of the Prosecutor has made "good progress" in collecting information about the range of crimes committed in Darfur,[132] continuing violence is hampering the Prosecutor's investigative efforts.[133] Thus, the bulk of the Prosecutor's investigation has taken place outside of the country,[134] although the Office of the Prosecutor has managed to conduct five missions to the Sudan and speak with government officials.[135]

Despite these drawbacks, the Prosecutor announced to the Security Council in December 2006 that his Office had gathered evidence of both crimes against humanity and war crimes in the Darfur region.[136] On May 1, 2007, the ICC issued arrest warrants for two individuals, Ahmad Harun and Ali Kushayb. Ahmad Harun was the Minister of State for the Interior of the Government of Sudan, and Pre-Trial Chamber 1 found reasonable grounds to believe that he coordinated the SAF and Janjaweed responses to the rebel insurgencies, including attacks on villages.[137] Ali Kushayb was a senior tribe leader and member of the Popular Defense Force and commanded thousands of Janjaweed from August 2003 to March 2004.[138] Pre-Trial Chamber 1 found reasonable grounds to believe that

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131. The Prosecutor, *Sixth Report of the Prosecutor of the International Criminal Court to the UN Security Council Pursuant to UNSCR 1593 (2005)*, 4, *delivered to the Security Council* (Dec. 5, 2007) [hereinafter *Sixth Report*], *available at* http://www.icc-cpi.int/library/organs/otp/OTP-RP-20071205-UNSC-ENG.pdf.

132. The Prosecutor, *Second Report of the Prosecutor of the International Criminal Court, Mr. Luis Moreno Ocampo, to the Security Council Pursuant to UNSC 1593 (2005)*, 1, *delivered to the Security Council* (Dec. 13, 2005) [hereinafter *Second Report*], *available at* http://www.icc-cpi.int/library/organs/otp/LMO_UNSC_ReportB_En.pdf.

133. The Prosecutor, *Third Report of the Prosecutor of the International Criminal Court to the UN Security Council Pursuant to UNSCR 1593 (2005)*, 1, *delivered to the Security Council* (June 14, 2006), *available at* http://www.icc-cpi.int/library/cases/OTP_ReportUNSC_3-Darfur_English.pdf ("The continuing insecurity in Darfur is prohibitive of effective investigations inside Darfur . . . .").

134. *Id.*

135. Office of the Prosecutor, Fact Sheet on the Situation in Darfur, *supra* note 4.

136. The Prosecutor, *Fourth Report of the Prosecutor of the International Criminal Court, Mr. Luis Moreno Ocampo, to the UN Security Council Pursuant to UNSCR 1593 (2005)*, 1, *delivered to the Security Council* (Dec. 14, 2006), *available at* http://www.icc-cpi.int/library/organs/otp/OTP_ReportUNSC4-Darfur_English.pdf.

137. *Harun & Abd-Al-Rahman*, Warrant of Arrest for Ahmad Harun, *supra* note 3, at 5.

138. Prosecutor v. Harun & Abd-Al-Rahman, Case No. ICC-02/05-01/07, Warrant of Arrest for Ali Kushayb 5 (May 1, 2007), *available at* http://www.icc-cpi.int/library/cases/ICC-02-05-01-07-3_English.pdf.

Ali Kushayb implemented a counter-insurgency strategy resulting in the commission of crimes against humanity and war crimes and that he personally participated in some of the acts.[139] Both men's warrants charge them with committing war crimes and crimes against humanity.[140]

Yet, despite the fact that the whereabouts of each of these individuals in the Sudan is widely known, the Sudanese government has not turned either of them over to the ICC. Ahmad Harun is serving as the Minister of State for Humanitarian Affairs, a position he has held since 2006 in the current government of Sudan.[141] And Ali Kushayb, although previously reported to be in the custody of the Sudanese Police pursuant to a Sudanese warrant of arrest for different crimes,[142] now has been "released for lack of evidence" and is "moving about freely in the Sudan."[143] The Security Council has not acted to enforce the arrest warrants or lend any assistance to the ICC to bring these two individuals before the ICC.

The Security Council's work to bring peace and security to the region by deploying UN military personnel continues, but its efforts have yet to be successful. In August 2006, the Security Council passed Resolution 1706 in recognition of the continuing violence in Darfur.[144] The Council ordered the deployment of additional military personnel to the region to establish security, protect victims, and facilitate the work of UN personnel in Darfur.[145] However, UN military personnel mandates are not directed specifically towards aiding the ICC in investigating the situation and bringing potential criminals to justice, and Resolution 1706 does not provide for the protection of ICC witnesses.[146] The Prosecutor has stressed the necessity of protecting

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139. *Id.*

140. Prosecutor v. Harun & Abd-Al-Rhaman, Case No. ICC-02/05-01/07, Request to the Republic of the Sudan for the Arrest and Surrender of Ahmad Harun 3 (June 4, 2007) [hereinafter *Harun & Abd-Al-Rhaman*, Arrest and Surrender of Ahmad Harun], *available at* http://www.icc-cpi.int/library/cases/ICC-02-05-01-07-13-tEN_English.pdf; Prosecutor v. Harun & Abd-Al-Rhaman, Case No. ICC-02/05-01/07, Request to the Republic of the Sudan for the Arrest and Surrender of Ali Kushayb 3 (June 4, 2007), *available at* http://www.icc-cpi.int/library/cases/ICC-02-05-01-07-14-tEN_English.pdf.

141. *Harun & Abd-Al-Rhaman*, Arrest and Surrender of Ahmad Harun, *supra* note 140.

142. *Fifth Report*, *supra* note 129, at 7 (citing a letter from the Sudanese Ministry of Justice to the Office of the Prosecutor dated December 9, 2006).

143. *Sixth Report*, *supra* note 131, at 1, 3.

144. S.C. Res. 1706, U.N. Doc. S/RES/1706 (Aug. 31, 2006).

145. *Id.* ¶¶ 1, 3, 9(a), 10, 12(a).

146. Situation in Darfur, Sudan, ICC-02/05-16, Prosecutor's Response to Cassese's Observations on Issues Concerning the Protection of Victims and the Preservation of Evidence in the Proceedings on Darfur Pending before the ICC 7 (Sept. 11, 2006), *available at* http://www.icc-cpi.int/library/cases/ICC-02-05-16_English.pdf.

witnesses: "The establishment of an effective system for the protection of ICC victims and witnesses is a precondition to the conduct of investigative activities in Darfur."[147] Due to the extreme violence in the region, the ICC may not be able to ensure the protection of witnesses or victims. It appears that until Darfur and the surrounding region are more stable, or the Security Council or another international organization takes it upon itself to protect victims and ICC witnesses, the Prosecutor's investigation will be restricted to gathering evidence and interviewing witnesses and victims primarily outside of Darfur. These restraints limit the scope of the investigation considerably.

IV. THE APPLICABILITY OF THE ICTY'S EXPERIENCES TO THE ICC

The ICTY's experience in investigating and prosecuting individuals with the possibility of Security Council assistance is helpful in evaluating the potential of Security Council aid to the ICC. In comparison to the ICC, which has existed for only five years and at the time of this writing is about to begin its first fledgling trial, the ICTY has been a fully functioning court for more than ten years and has conducted numerous trials. As an international court established by the Security Council, the ICTY provides a good example of how the Security Council, as well as states, may be expected to act after the Security Council refers a situation to the ICC pursuant to its Chapter VII authority. This Part begins by describing the extent of the Security Council's powers under the United Nations Charter. It then discusses the role that the Security Council has played in ICTY proceedings and the effect that the Security Council's initiatives have had on countries legally bound to obey its orders. This Part concludes with an analysis of what the ICTY's proceedings foreshadow for ICC Security Council referrals. Specifically, it analyzes whether referrals by the Security Council will, in actuality, result in state cooperation with the ICC's investigations and arrests, as compared to referrals brought by States Parties or the Prosecutor.

A. The Power of the Security Council

Under Article 24 of the United Nations Charter ("UN Charter"), the Security Council has primary responsibility for maintaining international peace and stability.[148] Specifically, the

147. *Second Report, supra* note 132, at 4.

148. U.N. Charter art. 24, para. 1.

Security Council "shall determine the existence of any threat to the peace . . . and shall make recommendations, or decide what measures shall be taken in accordance with Articles 41 and 42, to maintain or restore international peace and security."[149]

The Security Council's Chapter VII enforcement powers encompass actions that either involve or do not involve the use of armed forces. Article 41 contains a non-exhaustive list of measures the Security Council may take that do not involve the use of armed forces, such as suspending economic and diplomatic relations.[150] If the Security Council deems that such non-military actions are or will be inadequate, then it can take military action to maintain or restore international peace and security.[151] All United Nations members are obligated to carry out decisions made by the Security Council,[152] and these obligations prevail over any conflicting provisions in other international agreements.[153] Thus, Security Council resolutions made under its Chapter VII authority "are binding as law and mandatory as policy, so long as the operative paragraphs indicate a direct imperative."[154]

B. The Implementation of Security Council Power in the ICTY

The Security Council has been "most creative" in fashioning appropriate responses to threats to the peace under Article 41,[155] and it is under this Article that it established the ICTY to prosecute those persons "responsible for serious violations of international humanitarian law committed in the territory of the former Yugoslavia."[156] The Security Council ordered "all States shall cooperate fully with the International Tribunal" and are obligated to comply with orders or requests for assistance made by Trial Chambers of the ICTY.[157] Article 29 of the Statute of the ICTY confirms this commitment and specifically says that states "shall" cooperate with

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149. *Id.* art. 39.

150. *Id.* art. 41.

151. *Id.* art. 42.

152. *Id.* art. 25.

153. *Id.* art. 103.

154. Christopher C. Joyner, *Strengthening Enforcement of Humanitarian Law: Reflections on the International Criminal Tribunal for the Former Yugoslavia*, 6 DUKE J. COMP. & INT'L L. 79, 88 (1995).

155. Faiza Patel King, *Sensible Scrutiny: The Yugoslavia Tribunal's Development of Limits on the Security Council's Powers under Chapter VII of the Charter*, 10 EMORY INT'L L. REV. 509, 521 (1996).

156. S.C. Res. 827, ¶ 2, U.N. Doc. S/RES/827 (May 25, 1993).

157. *Id.* ¶ 4.

the ICTY, for example, by arresting persons or transferring accused to the ICTY.[158] Therefore, orders by the Trial Chambers "shall be considered to be the application of an enforcement measure under Chapter VII of the Charter of the United Nations."[159]

If a state does not cooperate with an order of the Trial Chamber, then the ICTY can appeal to the Security Council. For example, when issuing a warrant of arrest, the Registrar of the ICTY may submit a copy of the arrest warrant to the national authorities of the state in which the accused is believed to be located.[160] A state must report to the Registrar why it is unable to make the arrest; otherwise, the ICTY will deem the state's inaction a failure to execute the warrant.[161] In such a scenario, the Prosecutor of the ICTY can notify the Security Council of the state's failure to arrest the individual:[162] the "implication . . . is that any responsive or punitive action taken against the delinquent government will be decided upon and imposed by the Security Council acting as the Tribunal's enforcement agent."[163] But in practice, the Security Council has failed to take any practical action when the ICTY has appealed to it for assistance. In 1996, for example, ICTY President Antonio Cassese informed the Security Council on two separate occasions that the Federal Republic of Yugoslavia ("FRY") had failed to execute warrants.[164] The Security Council's only response was to issue statements "deploring" the FRY's failure to act.[165]

The Security Council further provided for enforcement of the ICTY's directives when it empowered states to establish a

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158. ICTY Statute, *supra* note 17, art. 29.

159. The Secretary-General, *Report of the Secretary-General Pursuant to Paragraph 2 of Security Council Resolution 808 (1993)*, ¶ 126, *delivered to the Security Council*, U.N. Doc. S/25704 (May 3, 1993).

160. 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, Rules of Procedure and Evidence, R. 55(D), U.N. Doc. IT/32 (Feb. 11, 1994).

161. *Id.* at R. 59.

162. The ICTY's applicable rule states:

> If the Prosecutor satisfies the Trial Chamber that the failure to effect personal service was due in whole or in part to a failure or refusal of a State to cooperate with the Tribunal in accordance with Article 29 of the Statute, the Trial Chamber shall so certify. After consulting the Presiding Judges of the Chambers, the President shall notify the Security Council thereof in such manner as the President thinks fit.

Id. at R. 61(E).

163. Joyner, *supra* note 154, at 93.

164. Jelena Pejic, *The Tribunal and the ICC: Do Precedents Matter?*, 60 ALB. L. REV. 841, 850 (1997).

165. *Id.* (quoting Qin Huasun, Statement by the President of the Security Council, U.N. Doc. S/PRST/23 (May 8, 1996)).

multinational Implementation Force ("IFOR") in Bosnia and Herzegovina.[166] NATO founded IFOR to implement the military aspects of the Dayton Peace Agreement ("DPA").[167] The DPA does not give explicit instructions to IFOR about cooperating with the ICTY or, in particular, apprehending indictees. However, the DPA does order its signatories to comply with the ICTY[168] and authorizes IFOR "to take such action as required, including the use of necessary force, to ensure compliance" with the DPA.[169] Consistent with this approval, the DPA has granted IFOR the authority "to use military force to search for and arrest persons indicted by the International Tribunal."[170]

Despite this mandate, IFOR contributed minimally to the ICTY's efforts to bring criminals of the Former Yugoslavia to justice. Some viewed the Security Council-imposed obligation to search for and arrest criminals for the ICTY as solely a "state obligation" that did not apply to IFOR forces.[171] Under this rationale, "it is perfectly proper for states or NATO to decide that IFOR will not be assigned the mission to search for and arrest indicted war criminals so long as states take action to give effect to their obligation."[172] NATO officers argued "they will arrest such men [indicted persons] only if they are noticed by their soldiers in the course of their normal duties and if the soldiers feel that the circumstances permit."[173] As a result, IFOR troops did not seek out and arrest even the most accessible of indicted war criminals.[174] After several years, a few states' divisions of IFOR (including the U.S. division) did adopt a "case-by-case approach" and

166. S.C. Res. 1031, ¶¶ 14-15, U.N. Doc. S/RES/1031 (Nov. 30, 1995).

167. The General Framework Agreement for Peace in Bosnia and Herzegovina, Annex 1A: Agreement on the Military Aspects of the Peace Settlement, art. 1, ¶ 1(a), U.N. Doc. S/1995/999 (Dec. 14, 1995).

168. *Id.* art. 9, ¶ 1(g).

169. *Id.* art. 1, ¶ 2(b); Pejic, *supra* note 164, at 851; *see* Walter Gary Sharp, Sr., *International Obligations to Search for and Arrest War Criminals: Government Failure in the Former Yugoslavia?*, 7 DUKE J. COMP. & INT'L L. 411, 443-45 (1997) (giving an overview of the DPA and IFOR's powers under the agreement).

170. Sharp, *supra* note 169, at 445.

171. *Id.* at 445-46 (citing John T. Burton, *"War Crimes" During Military Operations Other than War: Military Doctrine and Law 50 Years after Nuremburg and Beyond*, 149 MIL. L. REV. 199, 203-04 (1995)).

172. *Id.* at 446.

173. Stacy Sullivan, *Bosnia's Most Wanted Mostly Accessible; War Crimes Suspects Maintain High Profile in Croat-Run Town, but Police Pay No Mind*, WASH. POST, Nov. 27, 1996, at A21.

174. *See id.* (giving examples of several high-profile Bosnian business owners who were indicted but never arrested).

arrest a small number of indicted war criminals.[175] In fact, it was the "military, diplomatic, and financial might" of the United States, and not the Chapter VII authority behind the ICTY Charter, that eventually led to former Serbian and Yugoslav President Slobodan Milosevic's arrest and transfer to the ICTY.[176]

Yet, even though the ICTY does not enjoy the full force of the Security Council's Chapter VII powers, it has conducted numerous trials and brought many criminals to justice. As of July 2006, the ICTY had concluded proceedings against ninety-six of 161 charged indictees.[177] According to the ICTY, only six fugitives remain at large.[178] This success is due largely to states' increased cooperation with the ICTY, especially within the region of the former Yugoslavia.[179] Former Yugoslavian states began to arrest indictees after the international community increased diplomatic pressure.[180] In addition, other states, such as Austria and Germany, arrested indictees that surfaced in their territories and transferred them to the ICTY.[181] The Prosecutor of the ICTY also made several arrests with the help of UN forces in Croatia and the NATO Stabilization Force in Bosnia-Herzegovina.[182]

It is impossible to determine to what extent states cooperated because of the Chapter VII authority placed behind the ICTY by the Security Council. From the plain language of the Charter, it would appear that the grant of Chapter VII authority would have some impact on state conduct. However, the Security Council's lack of definitive and forceful action in support of the ICTY when states failed to cooperate with the ICTY may indicate that Security Council threats neither deter states from noncompliance nor cause them to cooperate

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175. Michael P. Scharf, *The Tools for Enforcing International Criminal Justice in the New Millennium: Lessons from the Yugoslavia Tribunal*, 49 DEPAUL L. REV. 925, 959-64 (2000).

176. Jack Goldsmith, *The Self-Defeating International Criminal Court*, 70 U. CHI. L. REV. 89, 93 (2003) (citations omitted). The United States threatened to withhold from the successor regime in Yugoslavia half a billion dollars of US and IMF aid. *Id.*

177. President of the Int'l Tribunal, *Report 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*, 4, U.N. Doc. A/61/271-S/2006/666 (Aug. 21, 2006), *available at* http://www.un.org/icty/rappannu-e/2006/AR06.pdf.

178. *Id.* ¶ 75.

179. *See id.* ¶¶ 75-86 (detailing the cooperation of states that have assisted the ICTY). Still, not all states have supported the ICTY. The President of the ICTY has reported that Serbia does not consistently or expeditiously cooperate with the ICTY, even though all six of the remaining fugitives have ties to Serbia. *Id.* ¶ 79.

180. Sean D. Murphy, *Progress and Jurisprudence of the International Criminal Tribunal for the Former Yugoslavia*, 93 AM. J. INT'L L. 57, 59-60 (1999).

181. *Id.* at 59, 64-65.

182. *Id.* at 60.

with the ICTY. This lack of practical support from the Security Council makes the ICTY's achievements all the more remarkable.

C. *Lessons from the ICTY as Applied to the ICC*

The key factor that could render Security Council referrals to the ICC more effective than State Party or Prosecutor referrals is the power of the Security Council. However, at least in the case of the ICTY, the Security Council has been unwilling to take any definitive action to enforce its directives. This reluctance could have a detrimental impact on any Security Council referrals to the ICC, including the ICC's investigation in Darfur.

Under its Chapter VII authority, the Security Council has the theoretical power to compel states to cooperate with the ICC's investigation in Darfur and to take repercussive actions against those states that do not cooperate. However, there is no precedent for the Security Council taking this kind of action. When the President of the ICTY referred instances of state noncompliance to the Security Council, the Security Council issued weak remonstrances to those states and failed to take further action.[183] In the case of Darfur, it is unlikely that the Security Council would admonish a non-compliant state, given the United States' lukewarm stance regarding the Security Council's referral. Because it is opposed to the ICC in general, the United States could stymie any attempt by the Security Council to enforce arrest warrants issued by the ICC, or even any effort to issue a statement condemning a state's unwillingness to cooperate with the ICC. And if the Security Council did invoke its Chapter VII authority to issue a statement, there is no guarantee that this condemnation would cause a state to begin cooperating with the ICC. Thus, the Security Council's Chapter VII theoretical authority is, in practice, ineffective if it is not backed up by a legitimate threat of repercussion.

Furthermore, even if the Security Council has deployed United Nations military forces to a particular area to promote peace and stabilization, it does not follow that those forces will be given a mandate to cooperate with the ICC or, if such a mandate did exist, that those forces would expend any significant effort to arrest ICC suspects or otherwise help the ICC Prosecutor with his investigations. For example, although IFOR had the authority to search for and arrest suspects indicted by the ICTY, NATO forces did not immediately take the initiative to enforce arrest warrants or actively

183. *See supra* text accompanying notes 164-165.

search for indictees. Even when NATO forces began to search for and arrest ICTY indictees, these arrests were carried out by NATO forces from select countries only, instead of reflecting a far-reaching effort embarked upon by the whole of IFOR.[184]

Given that NATO and IFOR interpreted their Security Council and DPA authority narrowly to avoid responsibility for searching for and arresting indictees, the Security Council should be more explicit in its directives. The Security Council could invoke its Chapter VII authority to order forces to cooperate with and assist an international court in any way possible. This potential approach should be contrasted with the situation in the Sudan, where the Security Council did not give United Nations forces deployed to Darfur instructions to search for future ICC indictees or to aid the ICC Prosecutor with his investigation.[185] In a number of important aspects, the reluctance of the Security Council to use its Chapter VII powers to back its Darfur referral places the referral on the same footing as the State Party referral investigations in the DRC and Uganda. In the investigation of the Darfur situation, the ICC must rely exclusively on the willingness of States Parties to comply with their international treaty obligations and on the goodwill of non-States Parties to lend assistance, without the additional help that the Security Council could provide (such as forcing States Parties and non-States Parties alike to cooperate with the ICC). With no real threat of penalty, States Parties inclined to be uncooperative have little incentive to lend support to the ICC.

Nevertheless, the fact that the Security Council chooses not to help the ICC does not mean that the ICC will be unable to complete its investigations, arrest indictees, hold trials, or bring criminals to justice. The ICTY has managed to try and convict many indictees without the full weight of the Security Council's Chapter VII powers behind it. The ICC itself has had some initial success without any help from the Security Council. In the DRC situation, Pre-Trial Chamber I recognized the instability of the DRC government and quickly issued an arrest warrant in order to bring Lubanga Dyilo into ICC custody. States Parties to the ICC also have assisted the ICC with its investigations: the DRC cooperated with the ICC by turning over Lubanga Dyilo, Katanga, and Ngudjolo Chui to the ICC, and France provided a military escort for Lubanga Dyilo.[186] The Prosecutor wisely issued his first warrant against an individual already in the custody of

184. *See supra* text accompanying notes 166-176.

185. *See supra* text accompanying notes 144-146.

186. *See supra* text accompanying notes 54-57, 69, 72.

a State Party willing to cooperate with the ICC. Instead of drawing world attention to a potentially drawn-out search that might not culminate in an arrest, and giving States Parties the opportunity to renege on their treaty commitments, the Prosecutor kept the focus on an ICC that was fulfilling its mandate of bringing the criminals who committed the most serious crimes to justice. The efficient completion of the ICC's first trial will only add to the ICC's credibility as a functioning and effective international court.

Although the ICC shows promise, it faces difficulties as well. Despite the issuance of multiple arrest warrants in the Uganda situation, no state has arrested a single indicted person and turned him over to the ICC to date. Uganda and the Sudan also have indicated their reluctance to hand the indicted over to the ICC for fear that it could jeopardize the peace process in Uganda.[187] Because the ICC has no standing force of its own, there is little the ICC can do to compel states to cooperate with and aid its investigations. Similarly, the ICC has issued arrest warrants related to its investigation in Darfur, and no state has acted to execute the warrants.[188] The Security Council could use its Chapter VII authority to adopt a resolution ordering states to assist the ICC. The Security Council also could take action under Article 41 of the UN Charter to punish states refusing to cooperate with the ICC by, for example, severing diplomatic relations or imposing limited economic sanctions. Such action could be particularly useful against states where the indictees are known to be residing. But the Security Council has yet to take such an action, and as the ICTY's experiences demonstrate, the Security Council is unlikely to do so in the near future. Undoubtedly, the ICC would be better equipped if its actions had the threat of Security Council enforcement behind them. The ultimate question then becomes how to change the approach of the Security Council from a policy of merely referring situations to the ICC and taking no further action, to a strategy of putting real Chapter VII authority behind its referrals and compelling states to assist with the ICC's investigations.

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187. *See supra* text accompanying notes 99-102.

188. *See supra* text accompanying notes 141-143.

V. THE UNITED STATES: THE FORCE BEHIND THE SECURITY COUNCIL'S ACTIONS

When 120 countries adopted the Rome Statute of the International Criminal Court on July 17, 1998,[189] one vital state's vote was missing: the United States.[190] Although the ICC can, and is, functioning without the support of the United States, the United States is a powerful member of the Security Council. As a result, it can impede any real efforts by the Security Council to give effective assistance to the ICC.

U.S. influence over the Security Council in matters relating to the ICC is evident in examining the Darfur situation. Likely the only reason the United States abstained instead of vetoing the referral[191] was the grave situation in Darfur and the political ramifications should the United States have worked against an effort to bring the perpetrators of such violent crimes to justice. Still, the absence of any mention of the ICC in Security Council Resolution 1706, which deployed United Nations personnel to Darfur, [192] was undoubtedly at least in part due to the United States' reluctance to assist the ICC in any way. As evinced by the events leading up to the transfer of Slobodan Milosevic to the ICTY, U.S. military and financial resources can be a powerful force behind Security Council resolutions designed to bring criminals to justice.[193] Thus, the most effective way to increase the Security Council's exercise of Chapter VII authority to the benefit of the ICC would be to obtain U.S. support of the ICC.

The ICC could wait and hope that future U.S. administrations will view the ICC in a more favorable light. While the current Bush administration opposes joining the ICC, a Democratic administration could decide to sign the Rome Statute and submit the treaty to the Senate for ratification. However, even Democrats have expressed a number of concerns about the current design of the ICC. President Clinton signed the Rome Statute on December 31, 2000, but declared that the treaty had "significant flaws," and until the international

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189. Alessandra Stanley, *US Dissents, but Accord is Reached on War-Crime Court*, N.Y. TIMES, July 18, 1998, at A3.

190. Goldsmith, *supra* note 176, at 100 (" 'The choice was to do what we did and hope that the U.S. will someday, decide to join,' or . . . to 'so undermine the court that it makes an eventual American buy-in not worth it.' Here, 'undermine the court' means establish a court with effective immunity for the United States." (quoting Lloyd Axworthy, the Foreign Minister of Canada, in Stanley, *supra* note 189)); Fact Sheet, *supra* note 15.

191. *See supra* note 121 and accompanying text.

192. *See supra* text accompanying notes 144-146.

193. *See supra* note 176 and accompanying text.

community fixed those problems, he would not submit the treaty to the Senate for ratification.[194] On May 6, 2002, President Bush rescinded President Clinton's signature of the treaty, stating that the United States did not intend to ratify the Rome Statute.[195] In light of U.S. actions, the ICC cannot rely on the U.S. government eventually changing its mind. Instead, the ICC must consider changes it could make to its structure and jurisdiction in order to gain the United States', and thus the Security Council's, full backing and support and whether these changes would unfairly bias the ICC in favor of the United States.

The United States' most serious concern regarding the ICC is the possibility that American citizens (primarily, American soldiers) could be brought before it.[196] As stated previously, the ICC has jurisdiction over individuals who are nationals of States Parties and individuals who commit crimes in the territory of States Parties.[197] So if an American allegedly committed a crime in the territory of a State Party, or in the territory of a non-State Party that accepted the jurisdiction of the ICC, then the ICC could bring that person before it. The Rome Statute provides an escape clause through the complementarity process.[198] But the United States has reservations about the ICC making the determination of whether a state is able to carry out the investigation or prosecution impartially[199] and fears that a decision of the ICC could be influenced by outside political forces instead of a thorough review of a state's judicial system.

There are several possible ways that the Rome Statute could be amended to address the objections of the United States. For instance, the jurisdiction of the ICC could be limited to nationals of states who have ratified the Rome Statute.[200] The drawback to this approach is that states whose nationals have committed serious crimes simply could elect not to ratify the Rome Statute, or withdraw from the ICC, to avoid ICC jurisdiction. This approach would be particularly

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194. *Statement on the Rome Treaty on the International Criminal Court*, 37 WKLY. COMPILATION PRESIDENTIAL DOCUMENTS, Dec. 31, 2000, at 4.

195. Press Release, U.S. Dep't of State, International Criminal Court: Letter to UN Secretary General Kofi Annan (May 6, 2002), *available at* http://www.state.gov/r/pa/prs/ps/2002/9968.htm.

196. Fact Sheet, *supra* note 15.

197. *See supra* text accompanying note 38.

198. *See supra* text accompanying notes 39-41.

199. Fact Sheet, *supra* note 15.

200. Of course, if the United States joined the ICC, then U.S. citizens would be within ICC jurisdiction once more. But limiting the ICC's jurisdiction to nationals of States Parties could be effective in obtaining U.S. support of the ICC through more powerful Security Council resolutions.

troublesome in the case of states whose governments are controlled by perpetrators of serious crimes. Another option would be to let the Security Council decide whether a state sufficiently investigated an individual and made a reasonable decision regarding whether to prosecute that individual. The United States then always would be able to veto any decision that the investigation into and prosecution of an American citizen was insufficient. But this option also has an important drawback: the United States and the veto-holding members of the Security Council would in effect be able to immunize themselves from ICC jurisdiction. This alternative also would detract from the credibility of the ICC itself in the eyes of non-Security Council member states and could undermine the Court's legitimacy.

Along similar lines, the U.S. government believes that the Prosecutor should not have the ability to initiate investigations with his *proprio motu* powers. Because the Prosecutor cannot be held accountable by the Security Council or an elected body, but only by the ICC itself, the U.S. Department of State argues that the ICC "lacks fundamental checks and balances."[201] This again reflects the fear of the United States that American citizens could be brought before the ICC for political reasons, even if their actions had already been investigated and tried before U.S. courts. To address this concern, the ICC could take away the *proprio motu* powers of the Prosecutor and limit the ICC's jurisdiction to referrals by States Parties and the Security Council, or even just the Security Council. At the Rome Conference, the United States maintained that, similar to the ICTY and ICTR ad hoc tribunals, ICC prosecutions should be limited to those referred by the Security Council.[202] However, other delegates argued "a Security Council gatekeeper would preclude legitimate prosecutions and thus undermine the aim of universal justice,"[203] if the Security Council were led to make its decisions for purely political reasons instead of basing its decisions on the merits of the cases. Furthermore, the veto power of the five permanent members of the Security Council would make them "and their close allies immune from prosecution."[204] For these reasons, the founders of the ICC established three separate methods of bringing cases to the ICC.

Another way that the ICC could be changed to appease the United States would be to modify the Security Council's power to delay an ICC investigation or prosecution by the ICC. Currently, the

201. *Id.*

202. Goldsmith, *supra* note 176, at 90.

203. *Id.*

204. *Id.*

Security Council can vote to delay an investigation or prosecution for twelve months and renew that resolution indefinitely,[205] but if one permanent member vetoes the delay, the investigation or prosecution can continue.[206] However, the Rome Statute could be amended to reverse this process: instead of voting to delay an investigation or prosecution, the Security Council instead could be required from time to time to vote to support the ICC continuing an investigation. Under this approach, a permanent member of the Security Council could use its veto power to prevent the Security Council from supporting the continuation of an investigation, which would then delay it. This option would enable the United States (or any other Security Council member) to protect its citizens by vetoing any resolution directed towards continuing an investigation or prosecution. It also would address U.S. concerns both about the ICC's power to determine whether a state was unwilling or unable to prosecute an individual and about the Prosecutor's lack of accountability. But again, the United States and other permanent members of the Security Council could vote to immunize themselves from the ICC's jurisdiction, which weakens the ICC's "aim of universal justice."[207] Knowledge that investigations require recurring Security Council reapproval also could have a negative impact on the conduct of the investigations themselves.

In any event, if the ICC made these radical changes to its structure and jurisdiction, there is no guarantee that the United States would reverse its position and support the ICC and thus back, and perhaps even initiate, Security Council resolutions to enforce ICC decisions and requests for assistance. However, given that the United States was a strong supporter of the creation of an international criminal court and was a major player in the negotiations through the Rome Conference in 1998,[208] it is likely that the United States would look upon a modified ICC with favor.

VI. CONCLUSION

Under the current structure of the ICC and in the current political climate, Security Council referrals to the ICC have no more enforcement behind them than State Party referrals or investigations initiated by the ICC Prosecutor, even though the Security Council

205. Rome Statute, *supra* note 7, art. 16.

206. Goldsmith, *supra* note 176, at 90-91.

207. *Id.* at 90.

208. ELSEA, *supra* note 21, at 2-3 (internal citations omitted).

theoretically can back up its referrals with Chapter VII authority. This is the case because the Security Council has not chosen to exercise its Chapter VII powers outside of the referral itself. However, the ICC could choose to modify its structure and jurisdiction in the hope of gaining the support of the United States. If the United States reversed its position on the ICC, then the United States could influence the Security Council to issue more effective resolutions that would raise the chances of states assisting the ICC in its investigations and enforcing ICC arrest warrants. The ICC has to make a choice. If it elects to stay the course, the potential effectiveness of the Court is constrained. However, if the ICC decides to significantly change its structure in response to U.S. objections, then its mandate to punish "the most serious crimes of concern to the international community" could be limited to punishing only those "most serious" crimes committed by individuals outside of the permanent five members of the Security Council.[209] This puts the ICC in a difficult position in its developing years.

Any effort to amend the Rome Statute would take years, and in any event no State Party can propose an amendment to the ICC until July 31, 2009.[210] In the intervening period, it will be interesting to monitor the progress of the current investigations and prosecutions. If the Ugandan rebels are captured in the near future, and the government of the Sudan decides to hand over Ahmad Harun and Ali Kushayb, then perhaps the Chapter VII authority of the Security Council will not be necessary to the ICC's success. If investigations and prosecutions continue to stall because no arrest warrants are executed, and the ICC has no one to try in two of its investigations, then the ICC should debate what modifications it could make to bring the United States on board, and as a consequence, what sacrifices it is willing to make to its own legitimacy.

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209. Rome Statute, *supra* note 7, at preamble.

210. *See supra* text accompanying notes 35-36.

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