

# THE INTERNATIONAL CRIMINAL COURT AND THE PARADOX OF AUTHORITY

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## I

### INTRODUCTION

The creation of the International Criminal Court (ICC) has been one of the boldest progressive moves in the history of international relations. At the heart of the Rome Statute is a commitment to the spirit and principle of international criminal justice. States under the jurisdiction of the ICC agree to cede sovereignty over individual perpetrators suspected of genocide, crimes against humanity, and war crimes unless they are able and willing to prosecute perpetrators of these crimes at home. Even heads of state have not been immune from the formal legal authority of the ICC.

Given the reach of its ambitions, it is unsurprising that the ICC has struggled to achieve some of its goals. It has, though, become a focal point for a vibrant and committed network of international advocates, lawyers, and civil society organizations committed to advancing international criminal justice.<sup>1</sup> States also recognize the ICC's importance. No fewer than 123 states have ratified the Rome Statute.<sup>2</sup> Among both states and, especially, nongovernmental organizations (NGOs), the ICC's authority is derived from what it *is*, especially the principles it embraces and the commitments it espouses.

What the ICC *does*, though, has elicited mixed reactions. In many instances, ICC investigations or arrest warrants have provoked a backlash, casting a shadow over not only the situations it investigates, but also over the Court. States that remain outside the ICC have protested vehemently when they come under its jurisdiction. Sudan, for example, has waged an active campaign against the ICC.<sup>3</sup> This took on a new dimension in 2009 when the Chief Prosecutor, Luis Moreno Ocampo, announced an arrest warrant against the President of

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1. This has been true even in Africa, when states have contested the ICC's authority. *See, e.g., Civil Society Rallies Support for Hague Court*, ALLAFRICA (Oct. 7, 2013), <http://allafrica.com/view/group/main/main/id/00026803.html>.

2. The States Parties to the Rome Statute, [https://www.icc-cpi.int/en\\_menus/asp/states%20parties/Pages/the%20states%20parties%20to%20the%20rome%20statute.aspx](https://www.icc-cpi.int/en_menus/asp/states%20parties/Pages/the%20states%20parties%20to%20the%20rome%20statute.aspx).

3. Plans for this anti-ICC campaign were announced almost immediately after the arrest warrant for President Bashir was issued. *Sudan Plans to Undertake Intensive Campaign Against ICC Decision*, SUDAN TRIBUNE (Mar. 5, 2009), <http://www.sudantribune.com/spip.php?article30381>.

Sudan, Omar al-Bashir. Russia and China have rejected the ICC's authority from the outset and have continued to protest that the ICC violates national sovereignty. The fact that both Russia and China are protected from the purview of the ICC by their power to veto Security Council Resolutions has failed to mute their critiques of the Court.

The United States has been a strong proponent of international criminal justice and yet has also refused to become a member of the ICC. Instead, it has engaged selectively with the ICC, sometimes serving as a staunch supporter and at other times mounting a vocal challenge to its authority. This challenge took on a dramatic form when Palestine announced its intention to join the ICC. The United States attempted to block Palestine's membership, threatening to cut aid to the Palestinian Authority (PA) if it did not abandon this effort.<sup>4</sup> More remarkable though, is the fact that several member states, each of which has voluntarily ratified the Rome Statute, have also challenged the ICC's authority. After arrest warrants were issued for Kenya's political elites, Kenya protested vehemently. Later, the government took its struggle to the African Union. In September 2013, the African Union held a summit to discuss the possibility of a collective African withdrawal from the ICC.<sup>5</sup> When this failed, they unified to contest the Court's authority, voting sitting heads of state in Africa immunity from the Court's jurisdiction over genocide, crimes against humanity, and war crimes.<sup>6</sup>

Scholars debate the impact of backlash on the authority of the ICC and on the status of international criminal justice. Some human rights scholars have argued that backlash is a regular occurrence, even a natural step, in the development and consolidation of new norms.<sup>7</sup> Others argue that the consequences of a backlash from powerful spoilers can be far more pernicious, especially in contexts where existing institutions are weak.<sup>8</sup> Alter, Helfer, and Madsen propose an alternative framework for evaluating the ICC. They compare the formal authority of international courts to their authority in practice. At a practical level, they suggest that authority may vary significantly across distinct audiences.<sup>9</sup> A court's "narrow" authority is defined in terms of its

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4. Jessica Schulberg, *75 Senators Want to Punish Palestine Before it Can Accuse Israel*, NEW REPUBLIC (Feb. 3, 2015), <https://newrepublic.com/article/120953/senators-threaten-cut-palestinian-funding-over-icc-membership>.

5. *African Union Summit on ICC Pullout over Ruto Trial*, BBC NEWS (Sept. 20, 2013), <http://www.bbc.co.uk/news/world-africa-24173557>.

6. *African Leaders Vote Themselves Immunity from New Court*, THE GUARDIAN, (July 3, 2014), <http://www.theguardian.com/global-development/2014/jul/03/african-leaders-vote-immunity-human-rights-court>.

7. Thomas Risse & Kathryn Sikkink, *The Power of Human Rights: International Norms and Domestic Change*, in *THE POWER OF HUMAN RIGHTS: INTERNATIONAL NORMS AND DOMESTIC CHANGE* (Thomas Risse, Stephen C. Ropp & Kathryn Sikkink eds., 1999).

8. Jack Snyder & Leslie Vinjamuri, *Trials and Errors: Principle and Pragmatism in Strategies of International Justice*, 28 INT'L SECURITY, Winter 2003-04.

9. See Karen J. Alter, Laurence R. Helfer & Mikael Rask Madsen, *How Context Shapes the Authority of International Courts*, 79 LAW & CONTEMP. PROBS., no. 1, 2016, at 9.

authority with respect to those that are directly involved in a particular case. They find that it is more common for courts to have “narrow authority” than to have “extensive authority” over a broader set of actors, including international legal scholars or international civil society. Courts also rely on partners to help enforce their mandates. These “compliance partners” constitute a court’s “intermediate authority.”<sup>10</sup>

The ICC challenges this finding. Recognition of the ICC’s authority has been stronger among international NGOs, civil society organizations, and international human rights lawyers than among actors that are directly implicated in specific situations and cases. For this transnational network of justice proponents, ICC authority is intrinsic to what the Court *is* and is underpinned first and foremost by a moral, legal, and institutional commitment to accountability for crimes against humanity, genocide, and war crimes. At the heart of this commitment is the belief and expectation that international criminal justice must be independent from politics.

By contrast, material support from states has been contingent on what the ICC *does*, rather than what it *is*. State support has been harder to rally when the ICC’s investigations impinge on states’ political interests or threaten to impede peace talks. But the ICC has been hard pressed to secure critical resources and state backing when a state’s leaders or those of its allies come under scrutiny.<sup>11</sup>

The upshot of this is that the ICC faces an “authority paradox.” On the one hand, its authority among civil society organizations and transnational advocates is intimately wrapped up in what the ICC is, and especially, in the assumption that justice must be independent from politics. On the other hand, the ICC is structurally dependent on states to enforce its mandate, most especially to help arrest perpetrators of international crimes. This dependence undercuts the ICC’s flexibility to manage the conflicting interests of its different constituencies.<sup>12</sup> Actions that help secure the support of powerful states threaten to alienate civil society. NGOs have challenged the ICC for applying “double standards”; for example, when it targets rebels and fails to acknowledge state crimes, or, in the case of Security Council referrals, when powerful states write in clauses that exempt their own nationals from ICC authority.<sup>13</sup>

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10. *Id.* at 10. Karen J. Alter uses the term “compliance partners” in her book on international courts, *THE NEW TERRAIN OF INTERNATIONAL LAW: COURTS, POLITICS, RIGHTS* (2014).

11. For a powerful discussion of the ICC’s tendency to accommodate the interests of powerful states, see DAVID BOSCO, *ROUGH JUSTICE: THE INTERNATIONAL CRIMINAL COURT IN A WORLD OF POWER POLITICS* (2014).

12. An extensive literature explores the relationship between politics, law, and the ICC. For a review of this literature see DAVID BOSCO, *ROUGH JUSTICE: THE INTERNATIONAL CRIMINAL COURT IN A WORLD OF POWER POLITICS* (2014); Leslie Vinjamuri & Jack Snyder, *Politics and Law in Transitional Justice*, 18 ANN. REV. POL. SCI. 303 (2015).

13. *UN Security Council: Address Inconsistency in ICC Referrals: Use Debate on International Court to Forge a More Principled Relationship*, HUMAN RIGHTS WATCH (Oct. 16, 2012), <https://www.hrw.org/news/2012/10/16/un-security-council-address-inconsistency-icc-referrals>. For a similar argument, see Richard Dicker, *The International Criminal Court (ICC) and Double Standards of*

This article proceeds in three parts. First, it reviews the categories of authority that Alter, Helfer, and Madsen set out to frame their study of international courts. For these scholars, authority refers to the steps actors take to acknowledge and support international courts. This article suggests that politics have shaped the extent of the ICC's authority among state actors. Next, it considers implicit claims about the ICC's authority in contested areas. More specifically, it evaluates the oft-heard claim that self-referrals by African states of crimes on their own territory, together with the large number of African states that have joined the ICC, suggest that the ICC has strong support in Africa.<sup>14</sup> Third, this article suggests that UN Security Council (UNSC) referrals are not a robust indicator of the ICC's authority among major powers. State support of referrals has frequently proved to be an empty gesture with little subsequent follow-through. Too often, states have provided only minimal support to ensure the success of investigations, arrests, and trials. Finally, this article concludes by underscoring the paradox of authority at the heart of the ICC.

## II

### AUTHORITY AS A MEASURE OF ICC SUCCESS

How can we make sense of the ICC's record? International Relations scholars have suggested several explanations for states' failure to support international institutions and norms. Börzel and Risse argue that especially in areas of limited statehood, states may simply lack the capacity to comply with human rights norms.<sup>15</sup> But the Rome Statute was designed specifically to overcome this problem. The complementarity principle differentiates states that are willing and able to hold trials for the perpetrators of mass atrocities from those that are not, granting the ICC authority over crimes that take place in those states in this latter category. Hafner-Burton and Tsutsui argue that human rights treaty commitments offer a relatively low-cost mechanism for soliciting positive feedback in the international arena.<sup>16</sup> Support for a referral may simply be one additional and comparatively cheap step that states can take to demonstrate their role as good world citizens. If this is the case, it is not necessarily surprising that states fail to follow through. Regardless of whether states have good intentions or bad intentions, they enjoy a relatively cost-free

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*International Justice*, in THE LAW AND PRACTICE OF THE INTERNATIONAL CRIMINAL COURT 3 (Carsten Stahn ed., 2015). See also Louise Arbour, *The Relationship between the ICC and the UN Security Council*, 20 GLOBAL GOVERNANCE: REV. OF MULTILATERALISM AND INT'L ORGS.199 (2014).

14. Kenneth Roth, *Africa Attacks the International Criminal Court*, N.Y. REV. OF BOOKS, (Feb. 6, 2014), <http://www.nybooks.com/articles/archives/2014/feb/06/africa-attacks-international-criminal-court/>.

15. Tanja A. Börzel & Thomas Risse, *Human Rights in Areas of Limited Statehood: The New Agenda*, in *The Persistent Power of Human Rights* 63 (Thomas Risse, Thomas Ropp & Kathryn Sikkink eds., 2013).

16. Emilie M. Hafner-Burton & Kiyotero Tsutsui, *Justice Lost! The Failure of International Human Rights Law To Matter Where Needed Most*, 44 J. PEACE RES. 407, 413–15 (2007).

membership in joining and even referring situations to the ICC. Danner and Simmons have suggested that the decision to join is sincere and may demonstrate an intention. States join the ICC to tie their hands and make a credible commitment to reducing civil violence.<sup>17</sup> More recent work by Jo and Simmons argues that states that have ratified the Rome Statute have indeed killed fewer civilians.<sup>18</sup>

Alter, Helfer, and Madsen suggest that authority is critical to explaining international courts. Authority refers to the steps that actors take to acknowledge and practically support a court's work, including its operations, decisions, and judgments. They identify four types of authority: narrow legal authority, intermediate authority, extensive legal authority, and popular authority.<sup>19</sup> A court may have robust authority in one category but comparatively weak authority in another. Narrow authority refers to the relevant actors in the ICC's "situations," primarily rebel actors that are targeted by indictments or public officials. The intermediate authority of the ICC extends beyond these parties to include what Alter refers to as its "compliance partners": those states and other actors that are critical in providing the ICC support in gathering information, conducting arrests, or financing its operations.<sup>20</sup> These may include governments that refer a situation to the ICC, or in the case of Security Council referrals, states with a seat on the Security Council. The ICC's extensive legal authority has drawn on a vast network of civil society activists, legal academics, international NGOs, bar associations, and other justice entrepreneurs.

While each of these explanations offers some insights into state behavior before international courts, politics has played a crucial role in shaping the authority of international courts. In states with limited institutional capacity, politics has been integral to states' decisions to support or challenge ICC investigations. The same has been true in states with consolidated rule of law institutions that have been called on to support the ICC's work in third party states. Politics, especially states' political interests in peace, security, and stability, has been a strong driver of states' choices to recognize or withhold support from the ICC. When the ICC's pursuits undermine states' interests, states have been quick to defer or evade ICC justice.

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17. Beth A. Simmons & Allison Danner, *Credible Commitments and the International Criminal Court*, 64 INT'L ORG. 225, 232 (2010).

18. Hyeran Jo and Beth A. Simmons, Can the International Criminal Court Deter Atrocity? (Dec. 18, 2014), [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2552820](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2552820) (an updated version of this is forthcoming in *International Organization*).

19. Alter, Helfer & Madsen, *supra* note 9, at 9–12.

20. On the idea of compliance partners, see KAREN ALTER, *THE NEW TERRAIN OF INTERNATIONAL LAW: COURTS, POLITICS, RIGHTS* (2014).

## III

## SELF-REFERRALS, AFRICA, AND ICC AUTHORITY

The ICC celebrated its ten-year anniversary in 2012. Scholars and practitioners have taken an active interest in evaluating the impact of the Court's activities.<sup>21</sup> At first glance, the ICC appears to have been remarkably successful. In a little over a decade, it has opened nine situations and has undertaken nearly as many preliminary investigations.<sup>22</sup> At 123 members, a majority of the world's states have ratified the Rome Statute, in effect voluntarily agreeing to delegate authority for prosecution of genocide, crimes against humanity, and war crimes to the ICC, unless a state is willing and able to prosecute these perpetrators at home.

There are also other signs that the ICC's authority has increased. The U.S. stance toward the ICC appears to have softened. Although it initially was a strong proponent of a permanent international criminal court, the United States later refused to sign or ratify the Rome Statute.<sup>23</sup> The decision to support an independent prosecutor combined with the failure of the United States to secure an exemption from ICC justice for its citizens secured its fate as a nonmember. The U.S. government proceeded to negotiate bilateral immunity agreements with individual state members of the ICC. These agreements required states to declare that no American nationals would be turned over to the ICC. If a state refused to agree to this, then it would forgo military aid from the United States.<sup>24</sup>

The U.S. efforts to restrict the ICC were initially seen as a major hindrance to its success. Even when the United States supported the ICC, it did so through a strategy of passive acquiescence rather than active support. When the Security Council voted to refer Darfur to the ICC, the United States abstained from voting. This effectively enabled the Resolution to pass.<sup>25</sup>

This has been at least partially remedied during the Obama Administration. Stephen Rapp, Ambassador-at-large for War Crimes in the U.S. Department of State, led the United States in its more active and constructive approach to the ICC. This reflected Rapp's own experience and commitment to international criminal justice but also a period when the United States sought to engage more productively with multilateral institutions, prompting David Kaye, a prominent

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21. See, for example, the active exchange about the ICC by scholars and activists on Open Democracy's openGlobalRights, <https://www.opendemocracy.net/openglobalrights/international-criminal-court>; see also Jo & Simmons, *supra* note 18.

22. See the ICC website for details of ICC investigations and preliminary examinations, available at *All Situations*, INTERNATIONAL CRIMINAL COURT, [https://www.icc-cpi.int/en\\_menus/icc/situations%20and%20cases/situations/Pages/situations%20index.aspx](https://www.icc-cpi.int/en_menus/icc/situations%20and%20cases/situations/Pages/situations%20index.aspx) (last visited Dec. 19, 2015).

23. David SCHEFFER, *ALL THE MISSING SOULS: A PERSONAL HISTORY OF THE WAR CRIMES TRIBUNALS* (PRINCETON UNIVERSITY PRESS (2011)).

24. Judith Kelley, *Who Keeps International Commitments and Why? The International Criminal Court and Bilateral Nonsurrender Agreements*, 101 AM. POL. SCI. REV. 573, 573-74 (2007).

25. Press Release, Security Council, Security Council Refers Situation in Darfur, Sudan, to Prosecutor of International Criminal Court, U.N. Press Release SC/8351 (Mar. 31, 2005).

legal scholar, to declare that the United States and the ICC had entered a “honeymoon” phase.<sup>26</sup>

Despite this appearance of increased authority, the ICC’s record has been bleak on other dimensions. The United States has more actively supported the ICC, but it has done so as a seemingly permanent nonmember. The Court has also struggled to achieve the goals it sets for itself. Of the roughly thirty-six indictments the ICC has issued publicly, less than one-third of those indicted have come before the ICC. By autumn of 2015, the ICC had convicted only two individuals.<sup>27</sup> In several cases, most notably Sudan, Libya, and Kenya, states had simply ignored requests to deliver indicted war criminals to The Hague.<sup>28</sup> Some of the bleakest but least surprising defeats have come from states that have blatantly rejected the ICC’s authority. After an arrest warrant for President al-Bashir of Sudan was issued, Sudan became one of the ICC’s most vocal critics. President Bashir openly flouted the ICC arrest warrant against him.<sup>29</sup> Human rights advocates had hoped that an arrest warrant would marginalize Bashir politically.<sup>30</sup> Instead, Bashir reconsidered his plans to step down and decided to extend his tenure as president.<sup>31</sup>

Despite this complicated record, defenders of the ICC point to the large number of states that have joined the ICC. In Africa, thirty-four states are members of the ICC. Even more strikingly, several African states have referred situations in their own territories to the ICC. Because states are under little material pressure to join the ICC, and are under even less pressure to refer a case to the Court, self-referrals are assumed to be a highly significant indicator of the ICC’s authority. In February 2014, Kenneth Roth, Executive Director of Human Rights Watch wrote in the *New York Review of Books* that the very fact that five of the eight situations under investigation before the ICC had been referred directly by state parties in Africa was an obvious indicator of the ICC’s support on the continent.<sup>32</sup>

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26. David Kaye, *America’s Honeymoon with the ICC*, FOREIGN AFFAIRS (Apr. 16, 2013), <https://www.foreignaffairs.com/articles/2013-04-16/americas-honeymoon-icc>.

27. Elizabeth Peet, *Why is the International Criminal Court so Bad at Prosecuting War Criminals*, WILSON QUARTERLY (June 15, 2015), <http://wilsonquarterly.com/stories/why-is-the-international-criminal-court-so-bad-at-prosecuting-war-criminals/>.

28. In December 2014, the pre-trial chamber of the ICC issued a noncompliance finding. Press Release, International Criminal Court, Saif Al-Islam Gaddafi Case: ICC Pre-Trial Chamber I Issues Non-Compliance Finding for Libyan Government and Refers Matter to UN Security Council, ICC Press Release, ICC-CPI-20141210-PR1074 (Dec. 10, 2014), [http://www.icc-cpi.int/en\\_menus/icc/press%20and%20media/press%20releases/Pages/PR1074.aspx](http://www.icc-cpi.int/en_menus/icc/press%20and%20media/press%20releases/Pages/PR1074.aspx).

29. Bashir has repeatedly denounced the ICC, referring to it as a “colonial court.” See, e.g., *Sudan President Bashir hails “Victory” over ICC Charges*, BBC NEWS (Dec. 13, 2014), <http://www.bbc.co.uk/news/world-africa-30467167>.

30. *Selling Justice Short: Why Accountability Matters for Peace*, HUMAN RIGHTS WATCH (July 7, 2009), <https://www.hrw.org/report/2009/07/07/selling-justice-short/why-accountability-matters-peace>.

31. SARAH M. H. NOUWEN, COMPLEMENTARITY IN THE LINE OF FIRE: THE CATALYSING EFFECT OF THE INTERNATIONAL CRIMINAL COURT IN UGANDA AND SUDAN (2013).

32. Kenneth Roth, *Africa Attacks the International Criminal Court*, N.Y. REV. OF BOOKS (Feb. 6, 2014), <http://www.nybooks.com/articles/archives/2014/feb/06/africa-attacks-international-criminal->

But to what extent are membership and self-referrals indicators of the authority of the ICC? Self-referrals underscore a state's recognition of the ICC's authority, while also advancing a state's strategic interests in a specific conflict situation. Governments in Uganda, the Democratic Republic of the Congo, and Mali have each referred situations in their own territory to the ICC. In all of these cases, the ICC has investigated rebel crimes rather than state crimes.<sup>33</sup> Despite the motivation for referring a situation to the ICC, arrest warrants have not necessarily furthered states' interests and have instead driven rebel groups further underground or across borders.<sup>34</sup>

Referrals and membership bear a complicated relationship to the ICC's authority. On the one hand, self-referrals reflect the relevance of the ICC as a focal point for international criminal justice. In a weak sense, both Security Council and self-referrals indicate recognition of ICC authority by state officials. The decisions by Uganda, the Democratic Republic of the Congo, Central African Republic, and Mali to refer situations in their own territories to the ICC suggest that these states recognize the ICC's authority.

By referring itself to the ICC, a state not only recognizes the authority of the Court; it also cedes control over the scale and content of investigations or trials, thereby accepting a degree of uncertainty. States take a calculated risk when they refer situations on their own territory to the ICC. Even if a state's political interests in a particular ICC situation change, members forego formal control over the Court yet remain responsible for supporting its efforts. Ugandan President Museveni's decision to refer Uganda to the ICC in 2005 was shaped by an ongoing conflict between his government and the Lord's Resistance Army (LRA). It may also have reflected a measured risk that the ICC would target the LRA rather than government officials.<sup>35</sup>

In reality, though, state support for the ICC's investigations and arrest warrants have continued to depend on politics even after formal referrals are made. By 2006, President Museveni, anxious to secure the LRA's cooperation at peace talks in Juba and fearful that arrest warrants would impede their success, urged the ICC to drop charges against the LRA. Despite this about-face and the government's new interest in ending the war through negotiation, its request fell on deaf ears. The ICC rejected the government's plea.<sup>36</sup> When the ICC denied this request, Museveni challenged the ICC's authority, referring to it as an imperial tool of the West. These challenges from the government of

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33. Phil Clark, *Law, Politics and Pragmatism: The ICC and Case Selection in the Democratic Republic of the Congo and Uganda*, in *COURTING CONFLICT? PEACE, JUSTICE AND THE ICC IN AFRICA* 42 (Nicholas Waddell & Phil Clark eds., 2008).

34. *LRA has safe havens in Sudan, Rights Group Says*, VOICE OF AMERICA (May 7, 2013), <http://www.voanews.com/content/human-rights-groups-say-lra-safe-havens-are-in-sudan/1656124.html>.

35. Clark, *supra* note 33, at 37-46

36. Miša Zgonec-Rozej, *Palestine's ICC Accession: Risks and Rewards*, CHATHAM HOUSE: ROYAL INSTITUTE OF INTERNATIONAL AFFAIRS (Jan. 8, 2015), <https://www.chathamhouse.org/expert/comment/16604>.

Uganda to the ICC's authority continue today.<sup>37</sup>

Backlash against the ICC by state parties has been even greater when the ICC has proceeded without an invitation, suggesting once again that, at least for states, the ICC's authority is contingent on what the ICC does, rather than on what it is. Kenya, a party to the Rome Statute, was no less active in contesting the ICC's authority over its elites than nonstate parties have been, adopting an array of tactics to obstruct the ICC's attempts to investigate the crimes of its political elites. Following the election violence in 2007 and 2008, civil society organizations in Kenya demanded accountability. When domestic elites failed to put perpetrators of post-election violence on trial, Kofi Annan passed an envelope containing the names of key perpetrators to the Chief Prosecutor of the ICC, who then opened a formal investigation.<sup>38</sup> But when arrest warrants were issued against a handful of elite Kenyan politicians, rather than accepting the ICC's authority, (then) Deputy Prime Minister Uhuru Kenyatta and (then) Minister of Education William Ruto combined forces and launched a campaign to bolster their domestic political power and delegitimize the ICC's authority. Kenyatta and Ruto formed an unlikely political coalition, the Jubilee alliance, combining forces to mobilize against the ICC and launching a bid for the presidency. Their political campaign framed the ICC as an instrument of Western imperialism. Kenyatta then used his newly won platform as President to mobilize the African Union against the ICC.<sup>39</sup> Kenyatta's success has created a climate in which ICC enthusiasts in Kenya have found it increasingly difficult to mobilize domestic support for the Court.<sup>40</sup>

#### IV

#### GREAT POWERS AND THE POLITICS OF ICC AUTHORITY

Politics have also shaped the propensity of major powers to acknowledge and support the ICC. In Libya, this initially meant something very different than it did for Syria. In 2011, there was widespread support for targeted sanctions against Libya's officials and also for referring it to the ICC. Security

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37. *Uganda's President Museveni Calls for Africa to Review its Ties with ICC*, DAILY NATION (Oct. 9, 2015), <http://www.nation.co.ke/news/Africa-should-review-ties-with-ICC--Museveni/-/1056/2480492/-/138otwdz/-/index.html>.

38. ICC Press Release, *CC - ICC Prosecutor receives Sealed Envelope from Kofi Annan on Post-Election Violence in Kenya* (July 9, 2009), [https://www.icc-cpi.int/en\\_menus/icc/situations%20and%20cases/situations/situation%20icc%200109/press%20releases/Pages/pr436.aspx](https://www.icc-cpi.int/en_menus/icc/situations%20and%20cases/situations/situation%20icc%200109/press%20releases/Pages/pr436.aspx).

39. *Kenya Commits \$1mn to 'Unstoppable' African Court of Justice*, CAPITAL NEWS (Jan. 31, 2015), <http://www.capitalfm.co.ke/news/2015/01/kenya-commits-1mn-to-unstoppable-african-court-of-justice/>.

40. *Is the International Criminal Court a Tool of Western Imperialism? No.*, CHRISTIAN SCIENCE MONITOR (Oct. 15, 2013), <http://www.csmonitor.com/World/Africa/Africa-Monitor/2013/1015/Is-the-International-Criminal-Court-a-tool-of-Western-imperialism-No>; Walter Menya, *State Targeting Us Over Support for Hague Cases, Civil Society Protests*, DAILY NATION (Oct. 25, 2014), <http://www.nation.co.ke/news/politics/Civil-Society-ICC-Hague-Cases-Jubilee-Government/-/1064/2499628/-/kylkb4z/-/index.html>.

Council Resolution 1970 passed easily.<sup>41</sup> A second Security Council Resolution authorized all necessary means to halt Qaddafi's imminent attack on Benghazi. ICC Chief Prosecutor Ocampo moved swiftly to issue an arrest warrant against Colonel Qaddafi. The arrest warrant was issued independently from NATO's military campaign but was broadly compatible with the strategic objectives of the United States, the United Kingdom, and France. As the intervention continued, though, and NATO's intervention appeared to many to move beyond one of protecting civilians and toward a strategy of regime change, support for the intervention dissipated and fractures occurred among members of the Security Council. South Africa's preferences also quickly diverged from NATO's. Under the auspices of the African Union, President Zuma of South Africa attempted to negotiate an end to the war with Libya's leader, Qaddafi.<sup>42</sup> The African Union rejected the ICC's arrest warrant against Qaddafi and sought a negotiated solution.

If things moved quickly in Libya, they moved very slowly in Syria. The United States was slow to support European efforts to raise the profile of accountability for Assad's crimes in Syria. For nearly a year, it resisted calls to sign a letter as part of a European-led initiative to press the Security Council to refer Syria to the ICC.<sup>43</sup> Within a year, though, the U.S. position had changed. This policy change reflected the new facts on the ground in Syria. Failed peace negotiations at the Geneva II peace talks cast a shadow over the United States aspiration for a negotiated settlement.<sup>44</sup> Photos amassed by a Syrian military police photographer who defected, known only as Caesar, were presented to Security Council members.<sup>45</sup> The United States, under the leadership of Ambassador-at-large Rapp, joined a tidal wave of support from other states and signed off on Security Council Resolution 1970, referring Libya to the ICC.<sup>46</sup>

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41. *Security Council Imposes Sanctions on Libyan Authorities in Bid to Stem Violent Repression*, UN NEWS CENTRE (Feb. 26, 2011), <http://www.un.org/apps/news/story.asp?NewsID=37633&Cr=Libya&Cr1=#.VkTHdHv1-KI>.

42. Priscilla Hayner, *Libya: The ICC Enters During War*, EUROPEAN COUNCIL ON FOREIGN RELATIONS: INTERNATIONAL JUSTICE AND THE PREVENTION OF ATROCITIES PROJECT (2013), <http://www.ecfr.eu/ijp/case/libya>.

43. *Switzerland and 57 Countries Call on Security Council to Refer Syria to ICC*, UN REPORT (Jan. 11, 2013), <http://un-report.blogspot.co.uk/2013/01/switzerland-52-countries-call-on.html>.

44. In mid-February 2014, the Geneva II peace talks ended with no solution to the war in Syria. See Anne Barnard & Nick Cumming-Bruce, *After Second Round of Syria Talks, No Agreement Even on How to Negotiate*, N.Y. TIMES (Feb. 15, 2014), <http://www.nytimes.com/2014/02/16/world/middleeast/after-second-round-of-syria-talks-no-agreement-even-on-how-to-negotiate.html>. The United States decided to support a referral of Syria to the ICC in May 2014. Colum Lynch, *Exclusive: US to Support ICC War Crimes Prosecution in Syria*, FOREIGN POL'Y (May 7, 2014), <http://foreignpolicy.com/2014/05/07/exclusive-u-s-to-support-icc-war-crimes-prosecution-in-syria/>.

45. *Syria Crisis: 'Torture' Photos Shown to UN Security Council*, BBC NEWS (Apr. 15, 2014), <http://www.bbc.co.uk/news/world-middle-east-27044203>.

46. United Nations, Meetings Coverage and Press Releases, In Swift, Decisive Action, Security Council Imposes Tough Measures on Libyan Regime, Adopting Resolution 1970 in Wake of Crackdown on Protesters, U.N. Press Release SC/10187/Rev.1 (Feb. 26, 2011), <http://www.un.org/press/en/2011/sc10187.doc.htm>; *US Shift on ICC and Syria Gives Hope but Sceptics Right to be Wary*, THE CONVERSATION (May 19, 2014), <http://theconversation.com/us-shift-on-icc-and>

The Resolution was vetoed by China and Russia and thus failed to pass.<sup>47</sup>

Despite this apparent failure, within months, the U.S. backing of efforts to investigate atrocities in Syria had changed. The dramatic rise of a strategic threat from the Islamic State in Iraq and Syria led the U.S. government to recalibrate its strong statements against the government of Syria and to pursue a more tentative line. Funding for investigations of Assad's crimes came to an end and was not renewed. Instead, the United States decided to fund an investigation of Islamic State crimes.<sup>48</sup>

In some cases, politics have created an opportunity for human rights advocates to push accountability forward. Following the breakdown of nuclear talks on North Korea, a bipartisan consensus emerged in the United States to support human rights accountability for North Korea. In February 2014, a Commission of Inquiry that had been set up to investigate human rights abuses in North Korea released its report. After successful mobilization by a coalition of advocates working in partnership with Michael Kirby, who spearheaded the report, the United States voted to support a UN General Assembly resolution condemning North Korea for its human rights abuses. The GA Resolution requested that the Security Council refer it to the ICC.<sup>49</sup> This vote was made possible in the United States by the political reality that movement on nuclear talks on the Korean Peninsula had been stalled for some time. This created the space for bipartisan consensus on placing North Korea under pressure for its appalling human rights record.

In some cases, membership in the ICC has become a source of contestation. In January 2015, following a decision by the UN General Assembly to grant Palestine nonstate observer status, the ICC indicated that it would accept a request by Palestine for ICC membership. It then confirmed a request under Article 12(3) of the Rome Statute to open a preliminary examination dating back to June 2014.<sup>50</sup> The United States and Israel protested vigorously, naming and shaming the PA and challenging the decision by the ICC.<sup>51</sup> The United

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syria-gives-hope-but-sceptics-right-to-be-wary-26503.

47. UN Security Council: Veto Betrays Syrian Victims. In Face of Mounting Pressure, Russia, China Block ICC Referral, HUMAN RIGHTS WATCH (May 22, 2014), <http://www.hrw.org/news/2014/05/22/un-security-council-vetoes-betray-syrian-victims>; United Nations Meetings Coverage and Press Releases, Referral of Syria to International Criminal Court Fails as Negative Votes Prevent Security Council from Adopting Draft Resolution (May 22 2014), <http://www.un.org/press/en/2014/sc11407.doc.htm>.

48. Colum Lynch, *Exclusive: Washington Cuts Funds for Investigating Bashar al-Assad's War Crimes*, FOREIGN POL'Y (Nov. 3, 2014), <http://foreignpolicy.com/2014/11/03/exclusive-washington-cuts-funds-for-investigating-bashar-al-assads-war-crimes/>.

49. *UN Assembly Votes to Refer North Korea to IC: UNGA Also Urges Security Council to Consider sanctions Against Pyongyang Over Alleged Crimes Against Humanity*, ALJAZEERA (Dec. 19 2014), <http://www.aljazeera.com/news/asia-pacific/2014/12/un-north-korea-icc-human-rights-2014121823436300711.html>.

50. *See Palestine*, INTERNATIONAL CRIMINAL COURT, [https://www.icc-cpi.int/en\\_menus/icc/structure%20of%20the%20court/office%20of%20the%20prosecutor/comm%20and%20ref/pe-ongoing/palestine/Pages/palestine.aspx](https://www.icc-cpi.int/en_menus/icc/structure%20of%20the%20court/office%20of%20the%20prosecutor/comm%20and%20ref/pe-ongoing/palestine/Pages/palestine.aspx) (last visited Dec. 19, 2015).

51. John Hudson, *Israel, US Slam Palestinian Bid to Join International Criminal Court*, FOREIGN

States argued that the situation in Israel and Palestine should be resolved through careful negotiation. Instead, the move to join the ICC represented an “escalation” on the part of the PA, it claimed. Israel threatened to withhold valuable tax revenues from the PA.

Even where states have succeeded in crossing the referral barrier, this has often marked the end rather than the beginning of support for the ICC. Once the Security Council referred Sudan and Libya to the ICC, the Security Council’s five permanent members (the P5), did little to ensure the success of these efforts. The overthrow of the Qaddafi regime brought an end to concerted U.S. and NATO engagement in Libya.<sup>52</sup>

## V

### THE PARADOX OF AUTHORITY

In his book, *Rough Justice*, Bosco argues that the ICC has accommodated powerful Western states, and especially the United States.<sup>53</sup> This accommodation tendency threatens to undermine the ICC’s authority among many of its most steadfast proponents. The ICC’s proximity to state power, and especially to the Security Council, is directly at odds with those among its constituents who value the neutrality and impartiality of international justice norms in theory as well as in practice. The challenge of balancing power and independence was most palpable in the aftermath of NATO’s war in Libya, where the proximity between the Security Council, state interests, and international criminal justice seemed uncomfortably close for many of the ICC’s proponents. Allegations that the ICC had become too closely associated with a Western policy of regime change quickly surfaced. In February 2011, the Security Council referred Libya to the ICC. Within days, then Chief Prosecutor Luis Ocampo opened a formal investigation and by June, Ocampo issued an arrest warrant for the leader of Libya, Qaddafi, his son Saif, and the intelligence minister, Al-Senussi.<sup>54</sup> The speed with which the ICC moved in Libya intensified perceptions that power and justice were too closely aligned.

In the aftermath of NATO’s intervention in Libya, ardent supporters of the ICC openly questioned and even challenged the role of the Security Council in referring cases to the ICC. Louise Arbour, one of the most prominent

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POL’Y, (Dec. 31, 2014), <http://foreignpolicy.com/2014/12/31/israel-u-s-slam-palestinian-bid-to-join-international-criminal-court/>.

52. BOSCO, *supra* note 11; Arbour, *supra* note 13, at 200–01; Louise Arbour, President & CEO, Int’l Crisis Group, Address at the Inaugural Roland Berger Lecture on Human Rights and Human Dignity: Are Freedom, Peace and Justice incompatible agendas? (Feb. 17, 2014), <http://www.crisisgroup.org/en/publication-type/speeches/2014/arbour-are-freedom-peace-and-justice-incompatible-agendas.aspx>; Louise Arbour, President & CEO, International Crisis Group, Opening Speech at the Global Briefing 2013: Doctrines Derailed?: Internationalism’s Uncertain Future (Oct. 28, 2013), <http://www.crisisgroup.org/en/publication-type/speeches/2013/arbour-doctrines-derailed-internationalism-s-uncertain-future.aspx> [hereinafter *Doctrines Derailed*].

53. BOSCO, *supra* note 11, at 11–22.

54. *Libya: Muammar Gaddafi Subject to ICC Arrest Warrant*, BBC NEWS (June 27, 2011), <http://www.bbc.co.uk/news/world-africa-13927208>.

supporters of international justice, argued that international justice and international politics must be kept on “separate tracks.”<sup>55</sup> In Mali also, events gave the impression, possibly unfairly, that the ICC had failed to keep a healthy distance from policies of western military intervention. The government of Mali referred itself to the ICC in 2012. In January, France intervened with military force. Five days later, the ICC announced its decision to open a situation in Mali.<sup>56</sup>

In the aftermath of Libya, Russia, and China have also become more assertive in their critiques of the ICC.<sup>57</sup> Each of these powers vetoed the Resolution calling for Syria to be referred to the ICC.<sup>58</sup> When North Korea came before the General Assembly for its record of human rights abuses, Russia and China once again voiced their opposition to an ICC referral.<sup>59</sup>

The ICC’s authority paradox may not be unique. Many international institutions recognize the realities of power by granting special privileges to a small number of powerful states. This creates an obvious tension with a sovereignty norm that prescribes equal status to all states. It is also not unusual for this in-built hypocrisy to create tensions in civil society. In the domain of international criminal justice, civil society has embraced pragmatic compromises. The ad hoc tribunals for the former Yugoslavia and Rwanda were products of Security Council Resolutions that directly linked justice to peace and security. This proximity between the Security Council and international justice was secured in Rome when it was agreed that the Security Council could not only refer cases to the ICC, but also defer them. Still, ICC authority depends crucially on the pretense, supported by practice, that justice will remain free from political interference.

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55. *Doctrines Derailed*, *supra* note 52.

56. *The ICC’s Investigation Into Alleged War Crimes in Mali*, AMERICAN NONGOVERNMENTAL ORGANIZATIONS COALITION FOR THE INTERNATIONAL CRIMINAL COURT, [http://amicc.org/docs/Mali\\_Investigation.pdf](http://amicc.org/docs/Mali_Investigation.pdf); Leslie Vinjamuri, *Is the International Criminal Court Following the Flag in Mali*, POLITICAL VIOLENCE AT A GLANCE (Jan. 22, 2013), <http://politicalviolenceataglance.org/2013/01/22/is-the-international-criminal-court-following-the-flag-in-mali/>.

57. ANDREW NOVAK, *THE INTERNATIONAL CRIMINAL COURT: AN INTRODUCTION*, 33–35 (2015).

58. *UN Security Council: Veto Betrays Syrian Victims. In Face of Mounting Pressure, Russia, China Block ICC Referral*, HUMAN RIGHTS WATCH (May 22, 2014), <http://www.hrw.org/news/2014/05/22/un-security-council-vetoes-betray-syrian-victims>.

59. *UN General Assembly Urges North Korea Referral to ICC*, DW (Dec. 18, 2014), <http://www.dw.com/en/un-general-assembly-urges-north-korea-referral-to-icc/a-18140492>.