Part I Context, Challenges, and Constraints, 1 The International Criminal Court (ICC) and Double Standards of International Justice

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(p. 3) 1 The International Criminal Court (ICC) and Double Standards of International Justice

1.1 Introduction

The ICC faces a profound challenge in applying its mandate worldwide. The landscape on which the Court works is uneven and marked by double standards of justice. In the Court's first decade, the equal application of law to all those who may be responsible for 'the most serious crimes of concern to the international community'[1] has not been possible. Those who represent the most powerful states are beyond its reach and are unlikely to find themselves the target of an ICC arrest warrant. These governments also protect states with whom they share close economic, political, or security interests.

One actor influencing the Court's reach to those in states that have not ratified the ICC Statute is the United Nations (UN) Security Council. It is authorized, acting according to Chapter VII of the UN Charter, to refer situations to the Court's Prosecutor.[2] The Council has used this 'referral' authority twice[3] and rejected it once.[4] The Council's practice has been deeply flawed. The referrals have prompted criticism that the resulting investigations and prosecutions are tainted by their genesis in a political body and diminish the Court.

(p. 4) Security Council practice has shown three distinct negative features: (i) selectivity, (ii) substantive shortcomings in the referral resolutions, and (iii) the lack of meaningful follow-up. The Council mandates Court investigations in some situations like Darfur and Libya, but has rejected a referral of Syria. It has not even considered referring Sri Lanka. As a result, the Court is depicted as a tool of the permanent members—especially the United States.[5] This permanent member advocates justice for the most serious international crimes in certain situations, but not others. Using the Council, it is seen as pursuing a political agenda against weaker actors.[6] Meanwhile, the Russians and the Chinese have protected allies in Damascus and Colombo. The referral resolutions have also contained disturbing concessions to the United States that exacerbate discrepancies in the equal application of the ICC Statute.[7] Furthermore, following its two referrals, the Council has done little to support the Court in implementing the very judicial mandate that it triggered. Linked to changed political circumstances on the ground[8] or lack of agreement among the permanent members,[9] this fickle support contributes to the perception that the ICC is an instrument to achieve political objectives desired by Council permanent members. This reality has given rise to intense debate.

1.2 Context

Accountability for the most serious crimes through international judicial mechanisms emerged for the first time after the Second World War with the Nuremberg and Tokyo tribunals.[10] The Nuremberg tribunal, more than the Tokyo tribunal, created a positive judicial legacy.[11] The trials in Nuremberg were unprecedented and represented a seismic shift towards accountability in the face of unspeakable crimes on an incomprehensible scale. For the first time ever, senior leaders were held to account in legal proceedings for massive crimes. The accused had legal counsel who were able to conduct a vigorous defence. While the tribunals undoubtedly prosecuted the most serious crimes committed, the allies' own wartime actions went unexamined.[12] There was no serious consideration of investigating potential criminal liability for the mass rape of German women, the fire-bombing of Hamburg and Dresden, and the nuclear (p. 5) devastation of Hiroshima and Nagasaki. While creating an invaluable precedent, international criminal justice for the most serious crimes was born with the mark of 'victor's justice'. The victors tried the vanquished and ignored the possible criminality of some of their own acts.[13] Along with

Nuremberg's enduring accomplishments, this provenance was frozen in place for 40 years amid the paralysis of the Cold War.

In 1993 and 1994 the Security Council created two ad hoc tribunals for the former Yugoslavia and Rwanda.[14] This new application of Security Council authority to maintain international peace security through the creation of ad hoc tribunals triggered the revival of international criminal justice for genocide, crimes against humanity, and war crimes. These tribunals were a hoped-for step beyond the 'victor's justice' of the post-war international military tribunals. The International Criminal Tribunal for the former Yugoslavia (ICTY) was mandated, before the end of the Balkans conflict, to try those responsible regardless of ethnic or political association.[15] The tribunal, to its great credit, implemented that mandate. Unfortunately, the International Criminal Tribunal for Rwanda (ICTR) prosecuted only those from the Hutu side and failed to investigate crimes believed to have been committed by the Rwandan Patriotic Front.[16] The ICTY indicted Croats, Serbs, and Bosniaks.[17] Nevertheless, because of the ethnic polarization in the communities most affected by the crimes, the tribunal was disparaged by many in the countries of the accused, and because the majority of indictees were Serb, the ICTY was harshly criticized in Belgrade. As the tribunal's work progressed and senior Bosnian Serb and Serbians were indicted, Russia became increasingly critical of the tribunal. This contrasted sharply with Western pressure on Belgrade to arrest and surrender indictees.[18]

The back-to-back genocides in the former Yugoslavia and Rwanda and the creation of the two ad hoc tribunals prompted the recognition of the need for a permanent Court created by multilateral treaty negotiations, as opposed to Security Council resolution, that could respond to recurring mass atrocity crimes. In November 1994 the General Assembly's Sixth Committee decided to create an ad hoc committee to consider the draft text of a treaty for a permanent international criminal Court that had been finalized by the International Law Commission (ILC) that summer.[19] Negotiations on the ICC draft treaty got under way at UN Headquarters in April 1995.[20]

(p. 6) Significantly, these negotiations followed or coincided with the demise of repressive governments in several states in the Global South and the end of the Cold War. Dictatorial regimes in Argentina, Chile, South Africa, and South Korea were replaced by governments supportive of human rights and the rule of law. This shift had a profound positive impact on the negotiations finalizing an ICC treaty. Driven by their own recent and difficult transition from repression to the rule of law, government delegations and civil society groups from these states energetically participated in the ICC negotiations. They were at the core of the 'like-minded group' of states that emerged in 1996. These governments infused an intangible yet distinct dynamism into the ICC drafting process between 1996 and 2002 that helped break down a sense of north–south divide.[21]A broad multi-regional like-minded group emerged to drive the effort for a fair, effective, impartial, and independent Court. This group became a leading force in the negotiations. The commitment emanating from these newly transformed governments in Latin America, Africa, and East Asia was a game changer.

This input also contributed to a sense of possibility for a more universal justice. There was hope that the writ of the permanent Court would reach those in the most powerful states as well as those representing the least powerful. There was a feeling that the negotiations offered a unique historical opportunity in which many hoped to level the playing field so the rule of law would apply *more* equally to all. Unfortunately, the ICC has not been able to realize that potential to minimize the unevenness. The Court's critics condemn it harshly and unfairly for that failing.

1.3 Double Standards in ICC-Related Practice

The fundamental source of the unevenness that frames the ICC's application of its statute flows from the underlying disparity of wealth, power, and influence that marks the international system. While less pronounced, this disparity affects the application of international human rights standards. Even with the positive impact of a broad like- minded group, the Rome Statute, created in multilateral negotiations, was heavily influenced by the prevailing notions of state sovereignty and the views of the most powerful states. In fact, the negotiation process codified a limited jurisdictional regime for the Court. The ICC's exercise of jurisdiction, with some important exceptions,[22] requires the consent of the state where the crimes occurred or the state of the nationality of the accused.[23]

In addition to the systemic power disparities and the jurisdictional limitations in the Rome Statute, the double standards apparent in the UN Security Council's ICC referral practice exacerbate the limitations of the ICC's reach.[24] This highlights the tension between the norms of international criminal justice on the one hand, and the (p. 7) political imperatives that routinely drive the Security Council's decision-making on the other. The Council has referred situations twice to the ICC: the Darfur region of Sudan in March 2005, and later the deteriorating situation in Libya in February 2011. In May 2014 a resolution referring Syria to the ICC was blocked by a double veto.[25] The Council has failed to even consider referring many situations where grave international crimes have occurred.[26] There has been no coherence, let alone consistency, in the way the Council, a political body, refers to the ICC.

Perceptions of Council selectivity and double standards referring—and more often not referring—are exacerbated by the prerogatives of the five permanent members. Three of these—China, Russia, and the United States—are not parties to the Rome Statute. Through their status as non-States Parties and veto power, they are insulated from the Court in that they have twice mandated to investigate alleged crimes on the territory of other non-States Parties. These three powerful states have also shielded some of their respective allies from the reach of the ICC, creating a virtual 'accountability free zone', most starkly in Syria, but also in Israel, Palestine, and Sri Lanka, to name a few. ICC officials did not create these circumstances, but the Court is certainly affected by them.

In addition to the selectivity characterizing referral decisions, there have also been serious shortcomings in the substance of the referral resolutions. Both successful referral resolutions (1593 and 1970) contained provisions that imposed the entire financial burden of investigation and prosecution on the Court and its States Parties.[27]

Moreover, all the referral resolutions have allowed exemptions for the nationals of non-States Parties should they be implicated in serious crimes committed in the country situation referred.[28] This exemption codifies a double standard in applying justice. Furthermore, in its referral resolutions, the Security Council has failed to require all UN Member States to cooperate with the Court.[29]

The sense of political instrumentalization of the Court has been exacerbated by Council inaction after referral. The Security Council has not adopted any subsequent resolutions to support the referrals. There has been one Presidential Statement on Darfur that recalls the language of Resolution 1593.[30] The Council has failed to respond to judicial findings of non-cooperation by a small number of UN Member States. This 'on again, off again' support makes the ICC seem like a tool of political interests at the Council rather than an expression of commitment to seeing justice done for serious crimes.

On 22 May 2014 the Council rejected, by a vote of 13–2, a French text referring the situation in Syria to the Court.[31] Russia, backed by China, vetoed the resolution to (p. 8) shield the Assad regime to which it had tied itself over decades and in the last years of civil war. With more than 160,000 dead and huge numbers of Syrians living as refugees or internally displaced persons, the conflict had been fuelled by a sense of impunity on all sides. The negotiation process and the vote reflected both new and familiar aspects. The rejection, the first ever by the Security Council, was emblematic of Council selectivity,[32] this time with Russia and China wielding selectivity.

By opening the draft resolution to co-sponsorship by all UN Member States, the separation between Council and non-Council members on referral resolutions was pierced.[33] In the negotiations over the text, as penholder, France, unlike in the 2005 Darfur Resolution, initially limited itself to bilateral negotiations with the United States. The latter insisted, as the price of its acceptance, the same exemption of nationals of non-States Parties that had appeared in Resolutions 1593 and 1970. When, after weeks of negotiations, the text was presented to Council members, it gave rise to strong principled objections.

One initiative aimed at changing these shortcomings was put forward at the Council in October 2012. At that time, Guatemala, which had recently acceded to the Rome Statute, decided to use its Council Presidency to convene an unprecedented Open Debate on the relationship between the Council and the ICC.[34] This provided like-minded ICC States Parties a high-profile forum from which to convey their views on the relationship. Previously, it seemed as if the Council was the exclusive stakeholder. In the Open Debate States Parties advocated several corrective measures to the Security Council practice of ICC referrals.[35] These included

i. A coherent approach for referrals to the Court to avoid double standards;

ii. UN funding for investigations and prosecutions resulting from Council referrals;

iii. Deletion of the exemptions shielding nationals of third non-States Parties from ICC jurisdiction;

iv. Creation of a subsidiary Council unit to deal with referrals to the ICC;

v. Support to the Court following a referral; and

vi. Response to judicial notifications from the Court highlighting the lack of cooperation by states.

Both before and after the October 2012 Open Debate there was constructive discussion at think tanks and academic institutions on the overall relationship between the Security Council and the ICC.[36] These meetings involved diplomats, former diplomats, (p. 9) academics, and representatives of civil society. The exchanges deepened understanding and heightened expectations of the prospects for *some* change.

In 2013, however, the situation at the Council became much less favourable for Court-related initiatives. This was due to several factors. First, events in Libya: three weeks after the unanimous adoption of Council Resolution 1970 that referred the situation in Libya to the ICC, the Council adopted Resolution 1973 authorizing a no-flight zone over the country.[37] As a result, the Court became associated with the ‘regime change’ agenda of the powerful Western permanent members. However unfair this imputation was to the Court, it was convenient for opponents of the Court on and off the Security Council.

The situation in the Council became further polarized over the situation in Syria. The Russians and Chinese vetoed financial and travel sanctions against Syrian leaders on three different occasions.[38] In January 2013, 58 UN Member States sent a letter to the Security

Council calling for a referral of the situation in Syria to the ICC.[39] Following that initiative, there was no Council action for nearly 18 months.

On 1 January 2013 Rwanda joined the Council as an elected member. Because of Kigali's intense opposition,[40] references to the ICC in both thematic and country-specific resolutions, even previously agreed upon language, became more difficult to obtain in 2013.[41] In the second half of 2013, the terrain at the Security Council regarding the ICC became even more highly charged. A few African states mounted an unprecedented drive against the Court. Some in the African Union (AU) had initiated opposition against the arrest warrants for Sudanese President Omar Al-Bashir in 2009,[42] but even more virulent opposition to the Court arose around the case of Kenyan President Uhuru Kenyatta.[43] In October 2013 the African Union convened an Extraordinary Session of the Assembly of Heads of States and Governments that (p. 10) focused squarely on the ICC.[44] The session's final declaration called for, among other steps, a Security Council deferral of the cases against Kenyan President Kenyatta and Deputy President Ruto.[45] It created a Contact Group to press the Security Council to suspend both cases.[46] It requested the ICC to postpone the trial of President Uhuru Kenyatta and called on the Court to suspend the proceedings against Deputy President William Samoei Ruto.[47]

Among other lines of argument, proponents cited double standards in Security Council practice as a means to delegitimize the ICC.[48] The Contact Group rooted its arguments in the staunch defence of national sovereignty augmented by an appeal to regional solidarity that drew on the rightful resentment over the ravages of colonial rule in Africa. This was a rejection of the fight against impunity that used history, the unevenness of the terrain on which the Court works, and the hypocrisy of states that ignore the double standards in their own espousal of justice.

At that Extraordinary Session, President Kenyatta elaborated on these themes. Citing the spectacle of Western decline, he stated 'they abuse whatever power remains in their control'.[49] He furthermore said that 'the most active global powers… declined to ratify the Treaty, or withdrew along the way, citing several compelling grounds'.[50] Those same world powers 'were hesitant to commit to a process that might make them accountable for such spectacularly criminal adventures as the wars in Iraq, Syria, Libya, Afghanistan… and such hideous enterprises as renditions and torture'.[51] He contrasted this stance with those states of good faith that had hoped 'the ICC would administer and secure justice in a fair, impartial and independent manner and, as an international Court, could bring accountability to situations and perpetrators everywhere in the world'.[52]

The challenge driven by the Extraordinary Summit to 'terminate' the Kenya cases[53] ultimately reached the Security Council in November 2013. The AU leadership's objective was to use the Council to suspend the ICC's judicial proceedings and more broadly roll back the fight against the most serious crimes under international law. After a number of closed consultations with the Contact Group in New York, it was clear that the nine votes necessary to gain passage were lacking. Nevertheless, Rwanda on behalf of the Contact Group pushed its resolution to a vote. On 15 November 2013 eight Council members decided to abstain and seven voted in favour of the Rwandan (p. 11) Resolution seeking to defer the Kenyan cases.[54] This unfolded amidst heated exchanges in the Council chamber.

1.4 Beyond the *Status Quo*

It is not only Court opponents who have taken the field in this confrontation. The multiple challenges facing the ICC at the Security Council have generated different responses from Court supporters.[55] To increase chances for a referral in the intractable Syrian situation, the Court's former prosecutor, Luis Moreno-Ocampo, suggested a 'conditional referral' to the Court.[56] He highlighted the flexibility the Council has in setting temporal limits on an ICC referral and recommended that the Council 'establish a deadline in the near future that would trigger the jurisdiction of the Court'.[57] He argued that a future deadline 'could

provide an incentive to begin a different style of negotiations to end a conflict'.[58] This approach, however, distinctly ties the Court and its judicial mandate to a political goal, however worthy. Such linkage would explicitly merge the ICC's role with political negotiations. The former prosecutor further stated that 'should the conflict effectively stop before the deadline the national leadership could discuss adequate ways to promote justice for the past'.[59] This proposal, were it to be adopted, would have the effect of making justice through the ICC a bargaining chip in negotiations for peace. This would play directly into the arguments of Court opponents and diminish the ICC's judicial mandate.

Other justice supporters have taken an even more draconian approach on referrals. This view argues that Security Council referrals are inherently too problematic to be worth the cost. It concludes that the two referrals have brought few real results for justice and at the same time exposed the ICC to charges of politicization that taint its independence as a judicial body.[60] In the run-up to the proposed referral of Syria to the Court, that critique grew more vehement. Louise Arbour was quoted in *The New York Times* as saying, 'The only question in my mind is, "Will it belong to the cemetery of good intentions or the museum of political scoring?" This is, in a sense, an exercise in using the ICC and accountability for posturing.'[61]

This approach posed the alternatives starkly: abandon referrals which extend the potential reach of justice to victims where it would otherwise be unavailable, or strive to make them more effective. The former amounts to abandoning referrals on the basis of the limited, albeit flawed, practice to date.

(p. 12) Encouragingly, some UN Member States have taken a proactive approach.[62] A group of UN Member States that called themselves the Accountability, Coherence, and Transparency Group (ACT) was launched on 2 May 2013. The ACT group consists of 22 small and medium-sized states.[63] ACT is aimed at enhancing the effectiveness of the Council through the improvement of its working methods. It includes a sub-group on accountability. The accountability cluster looks at: (i) obtaining a commitment by permanent Council members to forgo the use of the veto in situations where genocide and crimes against humanity are involved and (ii) Security Council referrals to the ICC.

A prerequisite in changing Council practice may be engaging UN Member States to press the Security Council and, in particular, its permanent members to adopt a different approach. This is an uphill prospect. A consistent voice for accountability that represents a multi-regional membership could pose a credible alternative to the Council's political imperatives. While not leading to any quick change in practice, asserting a principled approach could also, over time, raise the political price for wilful inaction where the most serious crimes have been committed. This should happen in the three areas of Council practice where shortcomings have been pronounced. Equal application of the ICC Statute may be facilitated through (i) greater coherence and less selectivity in Council decisions on referrals; (ii) changing and strengthening the substantive text of referring resolutions; and (iii) more follow-up on future referral resolutions to maximize chances for effective justice.

A key challenge may be to achieve a few intermediate goals to build a sense of momentum. While meaningful change in the Council's approach will be difficult to achieve, adopting short-sighted solutions, simply abandoning referrals, or denigrating the Court for shortcomings beyond its power, is hardly the path to obtain justice in those situations where victims would have no other access to redress.

There is an inherent flaw in the ICC's not being able to render justice equally wherever the most serious crimes occur. This tension is exacerbated by the approach of the Security Council, as a political body. The Court is not responsible for the latter, but it is certainly affected by it. There is no easy solution to remedy these problems, but addressing them in

the Court's second decade will be crucial to the ICC's ability to fulfil its mission and mandate.

Footnotes:

* Director, International Justice Program, Human Rights Watch.

1 Preamble Rome Statute of the International Criminal Court (signed 17 July 1998, entered into force on 1 July 2002) 2187 UNTS 3 ('ICC Statute').

2 Arts 12 and 13 ICC Statute. See generally L Condorelli and S Villalpando, 'Referral and Deferral by the Security Council' in A Cassese et al. (eds), *The Rome Statute of the International Criminal Court: A Commentary* (Oxford: Oxford University Press 2002) 627–56 ; D Akande, 'The Legal Nature of Security Council Referrals to the ICC and its Impact on Al Bashir's Immunities' (2009) 7 *Journal of International Criminal Justice* 333–52 ; J Trahan, 'The Relationship between the International Criminal Court and the UN Security Council: Parameters and Best Practices' (2013) 24 *Criminal Law Forum* 417–73 ; The Relationship between the ICC and the Security Council: Challenges and Opportunities, International Peace Institute (2013) <http://www.regierung.li/files/medienarchiv/icc/IPI_E-Pub-Relationship_Bet__ICC_and_SC__2__01.pdf?t=635522210891596707> accessed 11 September 2014. See also D Ruiz Verduzco, Chapter 3, in this volume.

3 UNSC Res 1593 (31 March 2005) UN Doc S/RES/1593; UNSC Res 1970 (26 February 2011) UN Doc S/RES/1970. On the Sudan referral, see R Cryer, 'Sudan, Resolution 1593, and International Criminal Justice' (2006) 19 *Leiden Journal of International Law* 195. On the Libya referral, see C Stahn, 'Libya, the ICC and Complementarity: A Test for "Shared Responsibility"' (2012) 10 *Journal of International Criminal Justice* 325–51. See also D Ruiz Verduzco, Chapter 3 in this volume.

4 'Russia, China Block Security Council Referral of Syria to International Criminal Court', *UN News Centre*, 22 May 2014.

5 See generally W Schabas, 'The Banality of International Justice' (2013) 11 *Journal of International Criminal Justice* 545–51.

6 See e.g. 'Sudan Reiterates Rejection of ICC Proceedings', *Sudan Vision*, 18 June 2014.

7 See UNSC Resolutions 1593 (2005) and 1970 (2011) (n 3), operative para. 6.

8 Three years after referral, the Security Council has yet to make any statements about Libya's obligation to cooperate with the ICC arrest warrants.

9 Differences between the Council's permanent members have precluded any statement on Sudan's failure to cooperate with Security Council Resolution 1593 (n 3).

10 T Taylor, *The Anatomy of the Nuremberg Trials: A Personal Memoir* (New York: Alfred A Knopf 1992) ; A Neier, *The International Human Rights Movement: A History* (Princeton: Princeton University Press 2012), 127.

11 The IMTFE was established by a Proclamation issued by Allied Supreme Commander General Douglas MacArthur. MacArthur made the decision not to try Japanese Emperor Hirohito. The presiding judge was appointed by General MacArthur. See P Maguire, *Law and War: An American Story* (New York: Columbia University Press 2000).

12 See G Mettraux, *Perspectives on the Nuremberg Trial* (Oxford: Oxford University Press 2008).

13 Maguire (n 11) 151 ; G Bass, *Stay the Hand of Vengeance* (Princeton: Princeton University Press 2000), 203.

[14] Statute of the International Criminal Tribunal for the former Yugoslavia, UNSC Res 827 (25 May 1993) UN Doc S/RES/827, Annex ('ICTY Statute'); Statute of the International Criminal Tribunal for Rwanda, UNSC Res 955 (8 November 1944) UN Doc S/RES/955, Annex ('ICTR Statute').

[15] See generally W Schabas, *The UN International Criminal Tribunals: The Former Yugoslavia, Rwanda and Sierra Leone* (Cambridge: Cambridge University Press 2006) ; B Swart et al., *The Legacy of the International Criminal Tribunal for the Former Yugoslavia* (Oxford: Oxford University Press 2011).

[16] The ICTR indicted no members of the victorious Rwandan Peoples' Front.

[17] The ICTY also indicted Macedonians and Kosovar Albanians.

[18] The European Union and the United States used economic and diplomatic pressure on Serbia to arrest and surrender ICTY indictees. See V Peskin, *International Justice in Rwanda and the Balkans: Virtual Trials and the Struggle for State Cooperation* (Cambridge: Cambridge University Press 2008).

[19] Report of the International Law Commission on the work of its 46th session, 2 May–22 July 1994, UN Doc A/CN.4/SER.A/1994/Add.l (Part 2) in (1994) 2 *Yearbook of the International Law Commission* 15.

[20] Report of the Ad Hoc Committee on the Establishment of an International Criminal Court, 50th Session, Supp. No. 11, UN Doc A/50/22, 6 September 1995. See M Bassiouni (ed.), *The Legislative History of the International Criminal Court: Introduction, Analysis and Integrated Text* (Ardsley: Transnational Publishers 2005).

[21] Between 1997 and 2000 governments convened regional conferences for an effective, impartial, and independent Court in Pretoria, Dakar, Port-Au-Spain, Guatemala City, and Budapest.

[22] Arts 12(2)(a) and 13(b) ICC Statute.

[23] Art 12 ICC Statute.

[24] On limitations, see D Akande, 'The Jurisdiction of the International Criminal Court over Nationals of Non-Parties: Legal Basis and Limits' (2003) *1 Journal of International Criminal Justice* 618–50.

[25] See Russia, China Block Security Council Referral of Syria to International Criminal Court (n 4).

[26] The Council has never been seized with a resolution to refer the situation in Sri Lanka, Democratic People's Republic of Korea (DPRK), or Lebanon to the ICC.

[27] See UNSC Resolution 1593 (n 3) operative para. 7; UNSC Resolution 1970 (n 3) operative para. 8.

[28] Ibid., para. 6.

[29] Ibid., para. 2.

[30] Statement by the President of the Security Council, UN Doc S/PRST/2008/21, 16 June 2008.

[31] For an account, see Security Council 7180th Meeting, 'Referral of Syria to International Criminal Court Fails as Negative Votes Prevent Security Council from Adopting Draft Resolution', UN Doc SC/11407, 22 May 2014 <http://www.un.org/News/Press/docs/2014/sc11407.doc.htm> accessed 11 September 2014.

[32] Ibid. , see statement by Syria, invoking double standards in the UN system.

[33] The draft resolution was backed by 100 non-governmental organizations, 65 co-sponsors, and 13 Council members. See also Letter dated 19 May 2014 from the Permanent Representative of Switzerland to the UN addressed to the Secretary-General, A/68/884–S/2014/361, 21 May 2014.

[34] See Security Council, Open Debate on 'Promotion and Strengthening of the Rule of Law in the Maintenance of International Peace and Security', UN Doc S/PV.6849 (Resumption 1), 17 October 2012.

[35] Ibid.

[36] For example, an event at Chatham House, 'The UN Security Council and the International Criminal Court', 15 March 2012 ; Panel Discussion at the International Peace Institute, 8 November 2012; and the Laguna Beach Workshop convened by the University of California, Irvine, 28–30 November 2012.

[37] See UNSC Res 1973 (17 March 2011) UN Doc S/RES/1973.The implementation of that no-flight mandate, however, became the focus of intense controversy, as the NATO powers implemented it very broadly in their effort to topple the Gaddafi regime. Those states that felt misled by the application of UNSC Resolution 1973 tended to conflate the two very different Council resolutions on Libya into one.

[38] 'Security Council Fails to Adopt Draft Resolution Condemning Syria's Crackdown on Anti-government Protestors, Owing to the Veto by Russian Federation, China', *Security Council*, UN Doc SC/10403, 4 October 2011 <http://www.un.org/News/Press/docs/2011/sc10403.doc.htm> accessed 11 September 2014 ; 'Security Council Fails to Adopt Draft Resolution on Syria that would have Threatened Sanctions, Due to Negative Votes of China, Russian Federation', *Security Council*, UN Doc SC/10714, 19 July 2012 <http://www.un.org/News/Press/docs/2012/sc10714.doc.htm> accessed 11 September 2014 . 'Security Council Fails to Adopt Resolution on Syria', *UN News Centre*, 19 July 2012 <http://www.un.org/apps/news/story.asp?NewsID=42513> accessed 11 September 2014 .

[39] Letter dated 14 January 2013 from the Chargé d'affaires a.i. of the Permanent Mission of Switzerland to the UN addressed to the Secretary-General, A/67/694–S/2013/19, 16 January 2013. The letter called upon 'the Security Council to refer the situation in the Syrian Arab Republic as of March 2011 to the International Criminal Court'.

[40] Rwanda was elected to a two-year term on the Security Council and took its seat on 1 January 2013.

[41] Kigali was concerned over potential liability for crimes in eastern Congo.

[42] African Union (Assembly), Decision on the Meeting of African States Parties to the Rome Statute of the International Criminal Court, Thirteenth Ordinary Session, 1–3 July 2009 (Sirte, Great Socialist People's Libyan Arab Jamahiriya), Doc Assembly/AU/Dec 243–67 (XIII) Rev1 Assembly/AU/Decl 1–5 (XIII). On the relationship between the ICC and the AU, see also Maunganidze and Du Plessis, Chapter 4, this volume.

[43] *Prosecutor* v *Uhuru Muigai Kenyatta, Situation in the Republic of Kenya*, ICC-01/09-02/11.

[44] African Union (Assembly), Decision on Africa's Relationship with the International Criminal Court, Extraordinary Session of the Assembly of the African Union, 12 October 2013, Doc Ext/Assembly/AU/Decl. 1–2 (October 2013) Ext/Assembly/AU/Decl.1–4.

[45] Ibid., para. 10.

[46] Ibid.

47 Ibid.

48 Ibid., para. 4 (AU's concern on the politicization and misuse of indictments against African leaders by ICC).

49 See President Uhuru Kenyatta's Speech at the Extraordinary Session of the Assembly of Heads of States and Governments of the African Union, 12 October 2012 <http://www.newvision.co.ug/news/648328-uhuru-blasts-us-uk-in-his-au-speech-full-speech-below.html> accessed 11 September 2014 .

50 Ibid.

51 Ibid.

52 Ibid.

53 Note verbale dated 2 May 2014 from the Permanent Mission of Kenya to the UN Security Council <www.kenyastockholm.files.wordpress.com/2013/05/secret-letter-to-un.pdf> accessed 11 September 2014.

54 'Security Council: Bid to Defer International Criminal Court Cases of Kenyan Leaders Fails', *UN News Centre*, 15 November 2013 <http://www.un.org/apps/news/story.asp?NewsID=46499> accessed 11 September 2014 .

55 For a discussion, see also C Stahn, 'Syria and the Semantics of Intervention, Aggression and Punishment: On "Red Lines" and "Blurred Lines"' (2013) 11 *Journal of International Criminal Justice* 955, 976.

56 L Moreno-Ocampo, 'Between Bombing or Doing Nothing', *The Huffington Post*, 4 September 2013.

57 Ibid.

58 Ibid.

59 Ibid.

60 See L Arbour, 'Doctrines Derailed?: Internationalism's Uncertain Future', 28 October 2013 <http://www.crisisgroup.org/en/publication-type/speeches/2013/arbour-doctrines-derailed- internationalism-s-uncertain-future.aspx> accessed 11 September 2014.

61 S Sengupta, 'UN Will Weigh Asking Court to Investigate War Crimes in Syria', *The New York Times*, 21 May 2014.

62 V Lehmann, Reforming the Working Methods of the UN Security Council—The Next ACT, Friedrich-Ebert-Stiftung (2013) <http://library.fes.de/pdf-files/iez/global/10180.pdf> accessed 11 September 2014.

63 For a survey, see <https://www.globalpolicy.org/component/content/article/200-reform/52474- reforming-the-working-methods-of-the-un-security-council-the-act-initiative.html> accessed 11 September 2014.