

# THE INTERNATIONAL CRIMINAL COURT: WILL IT SUCCEED OR FAIL? DETERMINATIVE FACTORS AND CASE STUDY ON THIS QUESTION

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## I. Introduction

On July 1, 2010, the International Criminal Court (ICC) celebrated its seventh birthday. In its first eight years of existence the ICC has had to overcome many obstacles, some of which have stemmed from the very creation of the Court itself. Consequently, the ICC's new and unique rules and procedures have required its judges to fill in any gaps throughout each step of the process.<sup>1</sup> Other obstacles have been created by state actors, such as the United States, that view the ICC as a threat to their sovereignty and ability to engage in international matters with *carte blanche* authority.<sup>2</sup> Several states have criticized the ICC for appearing to focus its prosecutions solely on the African continent.<sup>3</sup>

The first ICC trial, concerning the matter of Thomas Lubanga Dyilo only began on January 26, 2009, after numerous delays, most of which arose due to the Prosecution's lack of disclosure of confidential information to the Defense.<sup>4</sup> Though the issue was finally resolved, the case illustrates the difficulty involved in prosecuting a foreign national for violating newly recognized international norms under the new, untested, International Criminal Court. In terms of the future success of the ICC, however, procedure is a rather minor issue. The aim

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<sup>1</sup> See, e.g., Prosecutor v. Thomas Lubanga Dyilo, Case No. ICC-01/04-01/06 OA 9 OA 1, Judgment on the appeals of The Prosecutor and The Defence against Trial Chamber I's Decision on Victims' Participation of 18 January 2008 (July 11, 2008), available at <http://www.icc-cpi.int/NR/exeres/C1033BFB-9FF9-4B9F-A54D-04D8F57B0F46.htm> (outlining the scope of victims participation before ICC proceedings); Prosecutor v. Thomas Lubanga Dyilo, Case No. ICC-01/04-01/06, Decision on the consequences of non-disclosure of exculpatory materials covered by Article 54(3)(e) agreements and the application to stay the prosecution of the accused, together with certain other issues raised at the Status Conference on 10 June 2008 (June 13, 2008), available at <http://www.icc-cpi.int/NR/exeres/E9A43552-9F36-4B0D-945F-67A15AC1F74A.htm> (issuing a stay in the Lubanga proceedings because the Prosecution had not disclosed to the Defense exculpatory evidence that it collected subject to Article 54(3)(e)).

<sup>2</sup> NATIONAL SECURITY STRATEGY OF THE UNITED STATES OF AMERICA 31 (2002), available at <http://merlin.ndu.edu/whitepapers/USnss2002.pdf> (rejecting the jurisdiction of the ICC).

<sup>3</sup> Kofi Annan, Op-Ed., *Africa and the International Court*, N.Y. TIMES, June 29, 2009, <http://www.nytimes.com/2009/06/30/opinion/30iht-edannan.html>.

<sup>4</sup> The conflict arose over the failure by the Prosecutor to disclose to the Defense all its evidence and the identities of witnesses testifying against Lubanga. Under the rules and regulations that govern the court, the prosecutor is supposed to pass over exculpatory evidence, which he finds in the course of his investigations, to defense lawyers and judges. Finally, on November 18, 2008, ICC judges lifted the formal "stay of proceedings" and set the Lubanga trial for January 26, 2009. Wairagala Wakabi, *Timeline: Lubanga's War Crimes Trial at the ICC*, Sept. 14, 2010, <http://www.lubangatrial.org/2010/09/14/timeline-lubanga's-war-crimes-trial-at-the-icc/>.

of this paper is to discuss two main challenges facing the ICC, the outcomes of which will help determine the future success or failure of the ICC. The first obstacle is the lack of involvement from major states, especially the United States. The second involves complementarity—the conflicts between national jurisdictions and the ICC’s jurisdiction. Within this legal conflict, there are certain social considerations as well, such as the balance between peace and justice. To illustrate their effect and importance, and the considerable disagreement that these issues have caused, this article will present a case study of the situation in Darfur, Sudan, specifically focusing on the ICC arrest warrant of Omar Al-Bashir, the current President of Sudan. In order to properly contextualize this discussion, however, it is essential to begin with some background on international criminal law and the creation of the ICC. Accordingly, Part II discusses the history of international criminal law. Part III outlines the history of the ICC. Part IV briefly details the basic structure and rules of the ICC. Part V discusses the lack of U.S. support for the ICC ranging from the administrations of Presidents Clinton to Obama. Part VI deals with the issue of complementarity between the ICC and national governments. Part VII is a case study of the situation in Darfur, Sudan. Finally, Part VIII concludes with this author’s opinion on the future of the ICC.

## II. History of International Criminal Law

The last 100 years of globalization have seen the proliferation and acceptance of international criminal law throughout the majority of nation states. The idea, however, had already been proposed in various forms by legal scholars centuries earlier. The first international criminal trial, in 1474, was that of Peter von Hagenbach who was convicted of rape, murder and perjury by an ad hoc international criminal tribunal made up of twenty-eight judges from throughout Europe.<sup>5</sup> The tribunal claimed his crimes were crimes that “trampled under foot the laws of God and man.”<sup>6</sup> From that point until the 19th Century, there was no progress in the field of international criminal law.<sup>7</sup>

By the 19th Century, the International Red Cross was one of several groups advocating for the creation and enforcement of international criminal law. In 1872, Switzerland’s Gustave Moynier, a founder of the International Committee of the Red Cross (ICRC), proposed a system whereby each party to a conflict would, after the cessation of hostilities, choose a judge to join three other neutral judges sitting on a panel.<sup>8</sup> This ad hoc panel would pass sentences, which would be implemented by the states themselves.<sup>9</sup> The idea, however, was largely op-

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<sup>5</sup> The prosecution of Peter von Hagenbach still presented issues. The trial was considered by some as victor’s justice: Did the judges really form an international panel? Who was the rightful prince of Breisach, the town where Peter von Hagenbach committed his actions? See MARLIES GLASIUS, *THE INTERNATIONAL CRIMINAL COURT: A GLOBAL CIVIL SOCIETY ACHIEVEMENT* 5 (Routledge 2006).

<sup>6</sup> *Id.*

<sup>7</sup> See *id.* at 5-6 (Marlies Glasius’ book, as well as others, fail to mention any developments in the field of international criminal law until the 19th Century).

<sup>8</sup> *Id.* at 6.

<sup>9</sup> *Id.*

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posed by both states and international lawyers and the notion of any international criminal prosecution was left at the wayside for many years.<sup>10</sup>

At the turn of the century, with the adoption of ‘The Hague Conventions’ in 1899 and 1907, a new movement began, aimed at the codification of the laws of war.<sup>11</sup> Unfortunately, although diplomats at these conferences were successful in codifying these legal norms, they were not able to establish a judicial institution with the power to enforce them. A convention establishing an international criminal court was proposed at the second Hague Conference of 1907 and signed by 39 states but was never ratified due to a failure to codify specific laws that the court could enforce.<sup>12</sup> Even after the horrors of World War I, an international criminal court never materialized.<sup>13</sup> While the Treaty of Versailles treaty provided for ad hoc tribunals, it afforded jurisdiction only over military officials.<sup>14</sup> Even then, Germany refused to hand anyone over for prosecution and the Allies were reluctant to press the matter.<sup>15</sup> During the 1920’s and 30’s many Nongovernmental Organizations (NGOs) promoted the creation of an international criminal court but with little success.<sup>16</sup> Benjamin Ferencz, who later became one of the prosecutors in the Nuremberg Tribunal stated, “despite the almost universal support of scholars all over the world. . .the powerful nations of the world were simply not ready for a Court with compulsory jurisdiction.”<sup>17</sup> This fear is still present today among several of the most powerful nations.<sup>18</sup>

After the Second World War there were two prominent ad hoc tribunals created for the prosecution of war criminals: the Nuremberg Tribunal<sup>19</sup> and Tokyo War Tribunal.<sup>20</sup> Not surprisingly however, these tribunals have, over the years, received mixed reactions. Some have hailed the trials as an example of justice at work,<sup>21</sup> while others have dubbed them mere show trials, imposed by the victors

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<sup>10</sup> *Id.*

<sup>11</sup> *Id.* at 7.

<sup>12</sup> This would be an appellate court that would review the decisions of national courts on the seizure of ships and cargo during times of war. MICHAEL J. STRUETT, *THE POLITICS OF CONSTRUCTING THE INTERNATIONAL CRIMINAL COURT: NGOs, DISCOURSE, AND AGENCY* 51 (Palgrave Macmillan 2008).

<sup>13</sup> YUSUF AKSAR, *IMPLEMENTING INTERNATIONAL HUMANITARIAN LAW: FROM AD-HOC TRIBUNALS TO A PERMANENT INTERNATIONAL CRIMINAL COURT* 44-45 (Routledge 2004).

<sup>14</sup> GLASIUS, *supra* note 5, at 7.

<sup>15</sup> *Id.*

<sup>16</sup> *Id.*

<sup>17</sup> *Id.* at 7-8.

<sup>18</sup> See, e.g., Eric A. Posner, *All Justice, Too, Is Local*, N.Y. TIMES, Dec. 30, 2004, [http://query.nytimes.com/gst/fullpage.html?res=9803E5D81739F933A05751C1A9629C8B63&sec=&spon=&page\\_wanted=all](http://query.nytimes.com/gst/fullpage.html?res=9803E5D81739F933A05751C1A9629C8B63&sec=&spon=&page_wanted=all).

<sup>19</sup> The Nuremberg Tribunal was created after the end of Second World War by the Allies to prosecute Nazi leaders for committing crimes against peace, war crimes, and crimes against humanity. See generally *THE INTERNATIONAL CRIMINAL COURT: GLOBAL POLITICS AND THE QUEST FOR JUSTICE* 11-12 (William Driscoll, et al. eds., 2004) [hereinafter *GLOBAL POLITICS*]

<sup>20</sup> *Id.* at 13. A similar tribunal, known as the Tokyo War Tribunal, was established after the Second World War to prosecute Japanese war criminals.

<sup>21</sup> David Tolbert, *International Criminal Law: Past and Future*, 30 U. PA. J. INT’L L. 1281, 1284 (2009).

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of war against the defeated states (i.e. victor's justice).<sup>22</sup> As the philosopher Jean-Paul Sartre stated, "The Nuremberg Tribunal, an ambiguous body, was no doubt born of the right of the strongest, but at the same time it opened a perspective for the future by setting a precedent, the embryo of a tradition."<sup>23</sup>

The creation of the United Nations Organization (UN) was a major step toward the establishment of a permanent international criminal court. In Resolution 260, passed on December 9, 1948, the UN General Assembly adopted the Convention on the Prevention and Punishment of the Crime of Genocide.<sup>24</sup> The Convention characterizes genocide as a crime under international law.<sup>25</sup> More importantly, in the same resolution, the General Assembly invited the International Law Commission (ILC) "to study the desirability and possibility of establishing an international judicial organ to prosecute individuals charged with genocide."<sup>26</sup> Even with the passage of the convention, nothing materialized for forty years, mainly because powerful states feared the creation of an international judicial organ would usurp their role in the international arena.<sup>27</sup> The ILC ultimately advocated the creation of an international criminal court, prepared a draft statute in 1951,<sup>28</sup> and a revised draft statute in 1953,<sup>29</sup> but it was never passed by the UN General Assembly.<sup>30</sup> It was not until the 1990's that events occurred which helped sway public opinion in favor of the creation of a permanent international criminal court to try major war criminals.<sup>31</sup>

### III. History of the International Criminal Court

During the 1990's, a confluence of factors helped create enough momentum to overcome the obstacles that had impeded the creation of an international criminal court in the past. During this period, war broke out in Yugoslavia and Rwanda.<sup>32</sup> Both wars were extremely brutal, prompting accusations of several instances of rape, torture and genocide.<sup>33</sup> In response, the UN Security Council in 1993

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<sup>22</sup> *Id.*

<sup>23</sup> GLASIUS, *supra* note 5, at 8 (quoting Jean-Paul Sartre, a 20th-century French philosopher, novelist and political activist).

<sup>24</sup> GLOBAL POLITICS, *supra* note 19, at 24.

<sup>25</sup> *Id.*

<sup>26</sup> *Id.*

<sup>27</sup> See Patricia A. McKeon, *An International Criminal Court: Balancing the Principle of Sovereignty Against the Demands for International Justice*, 12 ST. JOHN'S J. LEGAL COMMENT 535, 538 (1997).

<sup>28</sup> International Law Commission, *Question of International Criminal Jurisdiction*, [http://untreaty.un.org/ilc/summaries/7\\_2.htm](http://untreaty.un.org/ilc/summaries/7_2.htm) (last visited Nov. 15, 2010).

<sup>29</sup> *Id.*

<sup>30</sup> *Id.* The General Assembly postponed consideration of the draft statute pending the adoption of a definition of aggression.

<sup>31</sup> Cassandra Jeu, *A Successful, Permanent International Criminal Court . . . "Isn't it Pretty to Think So?"*, 26 HOUS. J. INT'L L. 411, 421-24 (2004). There are several events; however, the most important ones are the end of the Cold War, and the wars that erupted in Yugoslavia and Rwanda.

<sup>32</sup> See Amy Palmer, *An Evolutionary Analysis of Gender-Based War Crimes and the Continued Tolerance of Forced Marriage*, 7 NW. U. J. INT'L HUM. RTS. 128, at \*17-20 (2009).

<sup>33</sup> *Id.*

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adopted a UN Resolution 827, which established an ad hoc tribunal to prosecute the perpetrators of atrocities committed in Yugoslavia.<sup>34</sup> This tribunal became known as the International Criminal Tribunal for Yugoslavia (ICTY).<sup>35</sup> In the winter of the following year, in response to the genocide that had occurred in Rwanda,<sup>36</sup> the UN Security Council adopted Resolution 955, which established another ad hoc tribunal with similar powers, which became known as the International Criminal Tribunal for Rwanda (ICTR).<sup>37</sup> These *ad hoc* tribunals were temporary entities that were created to deal with issues arising from specific conflicts.<sup>38</sup> The results of these tribunals have been mixed.<sup>39</sup> They would, however, prove useful as examples for the soon to be created ICC.

A second important factor which helped spur states into finally coming together to form an international criminal court, was the influence of NGOs. A group of NGOs first came together in 1995 to form a coalition, called the Coalition for the International Criminal Court (CICC), in an effort to coordinate their efforts to ensure the establishment of the ICC.<sup>40</sup> The CICC was able to use the resources and expertise (media, legal, etc.) of its members in order to engage in direct lobbying, produce position papers, and publish media editorials in the hope of informing states and the public at large about the need for an international criminal court.<sup>41</sup> The conference that resulted from these lobbying efforts, called the Rome Conference, was attended by 160 states, 33 intergovernmental organizations, and a coalition of 236 NGOs.<sup>42</sup> After the creation of the ICC, the CICC not only continued to exist, but expanded to include over 2,500 organizations worldwide. Today, its goal is to “ensure that the Court is fair, effective and independent.”<sup>43</sup>

In the early 1990's, at the request of the UN General Assembly, the ILC resumed its work of creating a draft statute for an international criminal court. Eventually, in 1994, it submitted a draft statute for an international criminal court

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<sup>34</sup> S.C. Res. 827, ¶ 3, U.N. Doc. S/RES/508 (May 25, 1993), [http://www.icty.org/x/file/Legal%20Library/Statute/statute\\_827\\_1993\\_en.pdf](http://www.icty.org/x/file/Legal%20Library/Statute/statute_827_1993_en.pdf).

<sup>35</sup> *Id.*

<sup>36</sup> PALMER, *supra* note 32, at 19. During a period of three months in 1994 genocide raged in Rwanda between the Hutu majority against the Tutsi minority which killed between 500,000 and one million Rwandan men, women and children.

<sup>37</sup> S.C. Res. 955, ¶ 10, U.N. Doc. S/RES/955 (Nov. 8, 1994), <http://www.un.org/ict/english/Resolutions/955e.htm>

<sup>38</sup> ROBERT S. LEE, *THE INTERNATIONAL CRIMINAL COURT – THE MAKINGS OF THE ROME STATUTE: ISSUES, NEGOTIATIONS, AND RESULTS* 6 (Springer 1999).

<sup>39</sup> GLASIUS, *supra* note 5, at 12-13. These courts have been hindered by lack of funds and diplomatic wrangling over appointments. However, they have been successful in bringing high-level war criminals to justice such as Milosevic and Karadzic.

<sup>40</sup> COALITION FOR THE INTERNATIONAL CRIMINAL COURT, *OUR HISTORY*, <http://www.iccnw.org/?mod=cicchistory> (last visited Nov. 15, 2010).

<sup>41</sup> STRUETT, *supra* note 12, at 71-81.

<sup>42</sup> Eric M. Meyer, *International Law: The Compatibility of the Rome Statute of the International Criminal Court with the U.S. Bilateral Immunity Agreements Included in the American Servicemembers' Protection Act*, 58 OKLA. L. REV. 97, 103 (2005).

<sup>43</sup> COALITION FOR THE INTERNATIONAL CRIMINAL COURT, *ABOUT THE COALITION*, <http://www.iccnw.org/?mod=coalition> (last visited Nov. 15, 2010).

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to the General Assembly.<sup>44</sup> The draft was very conservative in the scope and power that the Court could yield, especially in comparison to the ultimate structure of the ICC formed at the 1998 Rome Conference.<sup>45</sup> Before the 1998 Rome Conference, the General Assembly created a preparatory committee to complete the drafting of the text.<sup>46</sup> Further changes were made during the Rome Conference, which took place from June 15, 1998 to July 17, 1998. On July 17, 1998, 120 countries voted in favor of the Treaty containing the Statute for the ICC.<sup>47</sup> Twenty-one countries abstained, while the United States joined China, Libya, Iraq, Israel, Qatar, and Yemen as the only seven countries that voted in opposition to the Treaty.<sup>48</sup> The Court itself came into existence on July 1, 2002, when the 60th country ratified it.<sup>49</sup> Presently 114 states have ratified the Rome Statute thereby becoming state parties.<sup>50</sup> Another 39 have signed but not ratified the Treaty, including the United States.<sup>51</sup>

### IV. Basic Structure and Rules of the Court

Before reviewing the main obstacles standing in the way of the ICC's success, a brief description of some of the articles of the Rome Statute is needed to provide a context for later discussion.

Article 1 of the Rome Statute explains that the ICC is only a court of complementarity (complementary to national criminal jurisdictions) with jurisdiction over serious international crimes.<sup>52</sup> Article 5 of the Rome Statute lays out the crimes over which the ICC has jurisdiction over. These include: (a) the crime of genocide; (b) crimes against humanity; (c) war crimes; and, (d) the crime of

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<sup>44</sup> GLOBAL POLITICS, *supra* note 19, at 24-25.

<sup>45</sup> The ICL draft did not define or develop the definitions of what constitutes a crime under international law as compared to the final draft of the Rome Statute. The ICL draft permitted states to accept the court's jurisdiction with respect to some crimes and not others. The final draft of the Rome Statute does not allow the states such discretion. STRUETT, *supra* note 12, at 71-72.

<sup>46</sup> U.N. Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court, Report of the Preparatory Committee, U.N. Doc. A/CONF 183/2 (April 14, 1998), available at <http://www.un.org/icc/prepcom.htm>

<sup>47</sup> Michael P. Scharf, *ASIL Insights: Results of the Rome Conference for an International Criminal Court*, (Aug. 1998), available at <http://www.asil.org/insigh23.cfm>.

<sup>48</sup> *Id.*

<sup>49</sup> INTERNATIONAL CRIMINAL COURT, ABOUT THE COURT, <http://www.icc-cpi.int/Menus/ICC/About+the+Court/> (last visited Nov. 13, 2010).

<sup>50</sup> United Nations Treaty Collection, *Status of the Rome Statute of the International Criminal Court*, available at [http://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg\\_no=XVIII-10&chapter=18&lang=en](http://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=XVIII-10&chapter=18&lang=en). [Hereinafter *Status of the Rome Statute*]

<sup>51</sup> *Id.*

<sup>52</sup> Rome Statute of the International Criminal Court, adopted by the U.N. Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court on 17 July 1998, pmbl., U.N. Doc. A/CONF. 183/9, 37 I.L.M. 999 (1998) [hereinafter Rome Statute], available at [http://www.icc-cpi.int/NR/rdonlyres/EA9AEFF7-5752-4F84-BE940A655EB30E16/0/Rome\\_Statute\\_English.pdf](http://www.icc-cpi.int/NR/rdonlyres/EA9AEFF7-5752-4F84-BE940A655EB30E16/0/Rome_Statute_English.pdf).

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aggression.<sup>53</sup> The ICC's jurisdiction over these crimes does not apply retroactively.<sup>54</sup>

Unlike the ICTY or the ICTR, Article 11 states that the ICC only has jurisdiction with respect to crimes committed after the implementation of the Rome Statute, July 1, 2002.<sup>55</sup> Article 12 outlines the preconditions to the exercise of jurisdiction by the ICC, both with respect to states that are a party to the Rome Statute and to those that are not.<sup>56</sup> Article 13 lists the three instances when the court may exercise jurisdiction over the crimes mentioned in Article 5: (a) when a state party refers a case to the Prosecutor in accordance with Article 14; (b) when the security council refers a case to the Prosecutor by the Security Council acting under Chapter VII of the Charter of the United Nations; or (c) when the Prosecutor has initiated an investigation himself, in accordance with Article 15 (*proprio motu*).<sup>57</sup>

Article 16 grants the UN Security Council the power to suspend ICC investigations or prosecutions for a period of twelve months.<sup>58</sup> Article 17 addresses the issue of admissibility, stating most importantly, that a case is determined to be inadmissible if it is already being investigated or prosecuted by a state that has jurisdiction over it, unless that state is unwilling or unable to do so.<sup>59</sup> Article 17 lays out several determining factors as to whether a state is genuinely unwilling or unable to carry out an investigation or prosecution.<sup>60</sup> Article 86 explains that state parties must cooperate fully with the ICC in its investigation and prosecution of crimes within the ICC's jurisdiction.<sup>61</sup> Article 87 deals with request for cooperation by the ICC to both state parties and non-state parties.<sup>62</sup> Lastly, Article 98 explains that the ICC may not request the surrender of an individual if it would require the requested state to act inconsistently with: (a) its obligations under international law with respect to diplomatic immunity, or (b) its obligations under international agreements with a third-party state.<sup>63</sup>

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<sup>53</sup> *Id.* art. 5. The definition of what constitutes a crime of aggression has led to disputes between countries. Article 5 itself states that "the Court shall exercise jurisdiction over the crime of aggression once a provision is adopted. . ."

<sup>54</sup> *Id.* art. 11.

<sup>55</sup> *Id.*

<sup>56</sup> *Id.* art. 12.

<sup>57</sup> *Id.* art. 13.

<sup>58</sup> *Id.* art. 16.

<sup>59</sup> *Id.* art. 17(1).

<sup>60</sup> *Id.* art. 17(2), (3).

<sup>61</sup> *Id.* art. 86.

<sup>62</sup> *Id.* art. 87.

<sup>63</sup> *Id.* art. 98.

## V. Lack of U.S. Support

### A. The United States' position on international criminal law, generally

Historically, the United States has been generally supportive of the international prosecution of war crimes.<sup>64</sup> In fact, after the end of WWII, the United States was the driving force behind the war tribunals at Nuremberg and Tokyo.<sup>65</sup> However, because of the United States' position today as the sole world power,<sup>66</sup> and with its military extended into conflicts around the world,<sup>67</sup> in states that are parties to the Rome Statute,<sup>68</sup> its exposure to the ICC's jurisdiction is much greater than any other country. Consequently, the U.S. consistently opposed to the idea of universal jurisdiction.<sup>69</sup> The United States' position is that the prosecution of its nationals for crimes committed outside of U.S. territory can only be carried out with its permission.<sup>70</sup>

Nevertheless, the United States' position on this issue has softened over the years. In *Demjanjuk v Petrovsky*, a U.S. Court of Appeals held that "some crimes are so universally condemned that the perpetrators are the enemies of all people. Therefore, any nation which has custody of the perpetrators may punish them according to its law."<sup>71</sup> Just last year in Miami, Florida, the United States convicted Chuckie Taylor (the son of former Liberian President Charles Taylor) for torture that he committed while serving as the head of the former Liberian President's Anti Terrorist Unit (ATU).<sup>72</sup> Taylor's indictment marked the first time that anyone had been charged under the Torture Victim Protection Act (TVPA) of 1994,<sup>73</sup> which grants U.S. federal courts universal jurisdiction to prosecute individuals found within the U.S. who are suspected of torture committed anywhere in the world.<sup>74</sup> While these examples may highlight the subtle change in U.S. policy toward recognizing universal jurisdiction, the U.S. has been reluctant to completely shed its fears and concerns of having its citizens prosecuted abroad under the doctrine of universal jurisdiction.<sup>75</sup>

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<sup>64</sup> William A. Schabas, *United States Hostility to the International Criminal Court: It's all About the Security Council*, 15 EUR. J. INT'L L. 701, 702 (2004).

<sup>65</sup> *Id.*

<sup>66</sup> *Id.* at 720.

<sup>67</sup> See, e.g., DEPARTMENT OF DEFENSE, ACTIVE DUTY MILITARY PERSONNEL STRENGTHS BY REGIONAL AREA AND BY COUNTRY, (Dec. 31, 2007), <http://siadapp.dmdc.osd.mil/personnel/MILITARY/history/hst0712.pdf> (last visited Nov. 15, 2010).

<sup>68</sup> INTERNATIONAL CRIMINAL COURT, THE STATE PARTIES TO THE ROME STATUTE, <http://www.icc-cpi.int/Menus/ASP/states+parties/> (last visited Nov. 15, 2010).

<sup>69</sup> Meyer, *supra* note 42, at 98.

<sup>70</sup> Leila Nadya Sadat, *Summer in Rome, Spring in the Hague, Winter in Washington? U.S. Policy Towards the International Criminal Court*, 21 WIS. INT'L L.J. 557, 585 (2003).

<sup>71</sup> 776 F.2d 571, 582 (6th Cir. 1985).

<sup>72</sup> World Organization of Human Rights, *Victims of Chuckie Taylor*, [http://www.humanrightssusa.org/index.php?option=com\\_content&task=view&id=167&Itemid=150](http://www.humanrightssusa.org/index.php?option=com_content&task=view&id=167&Itemid=150) (last visited Nov. 15, 2010).

<sup>73</sup> Amnesty Int'l, *Liberia/USA: Indictment of Chuckie Taylor for Torture*, <http://www.amnesty.org.au/news/comments/646/> (last visited Nov. 15, 2010).

<sup>74</sup> *Id.*

<sup>75</sup> See Schabas, *supra* note 64, at 706-07.



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### B. The Clinton Era (1993-2001)

Even though the U.S. historically was supportive of international criminal prosecutions of war criminals, it was one of seven nations to vote against the creation of the ICC at the Rome Conference in 1998.<sup>76</sup> In truth, the U.S. was originally supportive of the ILC's final draft of the ICC statute submitted to the UN General Assembly in 1994, which included a section that recommended that the ICC be subordinate to the UN Security Council.<sup>77</sup> That provision would have given the Security Council a final say over any ICC prosecution, barring the ICC Prosecutor from initiating a case without the Security Council's approval.<sup>78</sup> Bill Richardson, the former U.S. Ambassador to the United Nations, echoed the United States' desire that the Security Council must play an important role in the work of the ICC.<sup>79</sup>

The provision was not included in the final version of the Rome Statute, however, and in response, the U.S. delegation, lead by Ambassador David Scheffer, expressed several concerns including: the risk that U.S. peacekeepers might be subject to ICC prosecution; the power of the ICC Prosecutor to initiate investigations unilaterally; the inclusion of the crime of aggression; and, the inability of signatory parties to ratify with reservations.<sup>80</sup>

However, several of the concerns expressed by the United States were merely half-hearted arguments in justification of its vote against the adoption of the Rome Statute. While the Statute does impose some control over the ICC Prosecutor's discretion to prosecute individuals, these are only judicial constraints, not political.<sup>81</sup> Under Article 16 of the Rome Statute, the Security Council may not halt ICC prosecutions, but may defer them for a period of twelve months, renewable upon request.<sup>82</sup>

In addition, one must remember that the ICC is a court of complementarity. As such, it would be unable to prosecute U.S. nationals for crimes committed in a foreign state, as that state would have jurisdiction over the matter – unless they are unwilling or unable to prosecute the U.S. nationals.<sup>83</sup> The U.S. could also halt an ICC investigation by opening up one of its own, though the United States' record on prosecuting American servicemen for crimes committed abroad has

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<sup>76</sup> Meyer, *supra* note 42, at 98.

<sup>77</sup> See Schabas, *supra* note 64, at 712-13.

<sup>78</sup> *Id.* at 713.

<sup>79</sup> *Id.* at 713-14.

<sup>80</sup> *Is a U.N. International Criminal Court in the U.S. National Interest? Hearing before the Subcommittee on International Operations of the S. Comm. on Foreign Relations*, 105 Cong. 10-5 (1998) (Statement of David J. Scheffer, US Ambassador-At-Large for War Crimes Issues) available at [http://frwebgate.access.gpo.gov/cgi-bin/getdoc.cgi?dbname=105\\_senate\\_hearings&docid=f:50976.pdf](http://frwebgate.access.gpo.gov/cgi-bin/getdoc.cgi?dbname=105_senate_hearings&docid=f:50976.pdf) (These are just some of the examples cited by Ambassador Scheffer during his statement.)

<sup>81</sup> Sharf, *supra* note 47. Article 15 of the Rome Statute guards against the ICC prosecutor's power by requiring the approval of a three-judge pre-trial chamber before the prosecution can launch an investigation. In addition, the decision of the chamber is subject to interlocutory appeal to the Appeals Chamber.

<sup>82</sup> Rome Statute, *supra* note 52, art. 16.

<sup>83</sup> *Id.* art. 17(1).

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been underwhelming. From the My Lai Massacre in 1972 in Vietnam to the 2004 Abu Ghraib torture and prison abuse in Iraq, the U.S. government regularly failed to properly prosecute those responsible and instead focused on the soldiers on the ground,<sup>84</sup> and even when a soldier is convicted the U.S. government reduces the sentence.<sup>85</sup>

Although Ambassador Scheffer outlined the United States' concerns about the Rome Statute, he remarked that the experience with the tribunals for the former Yugoslavia and Rwanda has "convinced us of the merit of creating a permanent court that could be more quickly available for investigations and prosecutions and more cost efficient in its operation."<sup>86</sup> On December 31, 2000, in his last day in office, President Clinton signed the Rome Statute; that day also marked the deadline for states to be able to sign the Statute without having ratified it.<sup>87</sup> After January 1, 2001, any state could only sign the Statute if it had already been formally ratified.<sup>88</sup>

In signing the Rome Statute, President Clinton expressed his support for the creation of an international criminal court and maintained the United States' long history of commitment to the principal of accountability and tradition of moral leadership.<sup>89</sup> President Clinton made clear, however, that even though he was signing the Rome Statute he still had concerns and reservations about certain aspects of it.<sup>90</sup> Therefore, he maintained that he would not submit the statute to the U.S. Senate for ratification, and urged his successor to take the same position.<sup>91</sup>

### C. The Bush Era (2001-2009)

While the "Clinton policy towards the International Criminal Court can be described as an attitude of cautious engagement, meaning that the U.S. would stay committed to the Court in principle, but work aggressively to protect American national interests during the negotiating process, the U.S. policy under the Bush administration [was] to 'isolate and ignore' the ICC as well as to punish countries ratifying the Court's Statute."<sup>92</sup> After the events of September 11, 2001, the U.S. wanted the ability to use its military force to act unilaterally, when necessary around the world and without any reservations or fears of prosecution for its

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<sup>84</sup> Major Deon M. Green, *The Vietnam War on Trial: The My Lai Massacre and the Court-Martial of Lieutenant Calley*, 184 MIL. L. REV. 202, 210 (2005).

<sup>85</sup> Laura Szumanski Steel, Michael R. Belknap, *The Vietnam War on Trial: The My Lai Massacre and the Court-Martial of Lieutenant Calley*, 46 AM. J. LEGAL HIST. 344, 344 (2004).

<sup>86</sup> Meyer, *supra* note 42, at 102 (quoting Ambassador David J. Scheffer at a hearing before the Subcommittee on International Operations of the Committee on Foreign Relations).

<sup>87</sup> GLOBAL POLITICS, *supra* note 19, at 20.

<sup>88</sup> *Id.*

<sup>89</sup> President's Statement on Signing the Rome Treaty on the International Criminal Court, 37 WEEKLY COMP. PRES. DOC. 4 (Dec. 30, 2001), available at <http://frwebgate2.access.gpo.gov/cgi-bin/PDFgate.cgi?WAISdocID=lpjcr/0/2/0&WAISaction=retrieve>.

<sup>90</sup> *Id.*

<sup>91</sup> *Id.*

<sup>92</sup> Sadat, *supra* note 70, at 590.

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soldiers engaged in foreign conflicts.<sup>93</sup> Therefore, in keeping with the stated policies of the Bush administration, the U.S. attempted to “unsign” the Rome Statute.<sup>94</sup>

In May 2002, John R. Bolton, then the Under Secretary of State for Arms Control and International Security, sent a letter to U.N. Secretary General Kofi Annan stating that “the United States does not intend to become a party to the [Rome Statute]. Accordingly, the United States has no legal obligations arising from its signature on December 31, 2000.”<sup>95</sup> Later that year, the Bush administration went one-step further when it signed the American Servicemembers’ Protection Act (ASPA).<sup>96</sup> This legislation is also known by its nickname, the “The Hague Invasion Act” because it authorizes the use of military force to rescue any members of the armed forces of the United States detained by or on behalf of the ICC.<sup>97</sup> The Bush administration adopted many of the same concerns as the Clinton administration, but they cast them in an extreme ideological manner, arguing that the existence of the ICC itself undermined the United States’ sovereignty.<sup>98</sup>

As part of the ASPA, the United States government began applying pressure on other states to sign bilateral immunity agreements (BIAs).<sup>99</sup> The Bush administration argued that these BIAs had the effect of being Article 98(2) waivers.<sup>100</sup> Article 98(2) of the Rome Statute specifies that the Court may not order a state to surrender an individual of a third state if, in so doing, the sending state would be violating its obligations under international agreements with the third state.<sup>101</sup> The U.S. threatened to withdraw military aid to states that were parties to the ICC unless they signed a BIA, which would prohibit these countries from handing over U.S. citizens to the ICC.<sup>102</sup> Senator Jesse Helms, in a hearing discussing the effect of the creation of the ICC on America’s national interests, explained succinctly the majority opinion of the U.S. government at the time by stating that, “if other nations are going to insist on placing Americans under the ICC’s jurisdiction against their will, then Congress has a right and responsibility to place a cost on their obstinacy, and to ensure our men and women in uniform are pro-

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<sup>93</sup> *Id.* at 591 (stating that in a September 2002, National Security Strategy document, the ICC was viewed a constraint on the use of US military force).

<sup>94</sup> Press Statement, U.S. Department of State, Richard Boucher, Spokesman, 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>. The term “unsigning” refers to the procedure by which President Bush attempted to reverse or undo the effects of a prior treaty signature, in this case the signing of the Rome Statute by President Clinton.

<sup>95</sup> Press Statement, U.S. Department of State, International Criminal Court: Letter to UN Secretary General Kofi Annan from Under Secretary of State for Arms Control and International Security, John R. Bolton (May 6, 2002), *available at* <http://www.state.gov/r/pa/prs/ps/2002/9968.htm>.

<sup>96</sup> *Id.* at 99 (Congress passed the American Servicemembers’ Protection Act on August 2, 2002).

<sup>97</sup> Sadat, *supra* note 70, at 557-58.

<sup>98</sup> *See id.* at 593.

<sup>99</sup> Meyer, *supra* note 42, at 132-33.

<sup>100</sup> *Id.* at 110.

<sup>101</sup> Rome Statute, *supra* note 52, art. 98(2).

<sup>102</sup> Lilian V. Faulhaber, *American Servicemembers’ Protection Act of 2002*, 40 HARV. J. ON LEGIS. 537, 554-55 (2003).

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tected.<sup>103</sup> By the end of 2004, the U.S. had signed BIAs with over 90 states, both state parties and non-state parties.<sup>104</sup>

These BIAs have proven to be the most contentious part of the ASPA. The Bush administration's position was that BIAs fall neatly under the definition of other international treaty obligations specified in Article 98(2).<sup>105</sup> Opponents of the Bush administration have argued that the use of BIAs undermine the ICC.<sup>106</sup> Others have cited the use of BIA's as evidence of the United States' trend toward unilateralism and non-cooperation.<sup>107</sup> In addition, critics argued that BIAs were not the types of international agreements contemplated by the drafters of the Rome Statute.<sup>108</sup> The drafters realized that by the time of the Rome Conference in the summer of 1998, many states had already signed international agreements with each other that governed the duties that each state owed to the other's nationals, such as extradition treaties or Status of Force Agreements (SOFAs).<sup>109</sup> While SOFAs are limited to armed military personnel, the scopes of BIAs are much broader.<sup>110</sup> This difference has been cited as a reason why BIAs do not fall under the intended "international agreements" provided for in Article 98(2).<sup>111</sup> In addition, the fact that BIAs do not provide any guarantee that the U.S. would prosecute their own nationals once handed over to U.S. authorities suggests that the sole purpose of BIAs are to grant impunity to Americans abroad.<sup>112</sup>

Opponents of the ASPA and its accompanying BIAs often point to the Vienna Convention on the Law of Treaties (VCLT) for support.<sup>113</sup> Article 18, of the VCLT provides that "A State is obliged to refrain from acts which would defeat the object and purpose of a treaty when: (a) it has signed the treaty or has exchanged instruments constituting the treaty subject to ratification, acceptance or approval, until it shall have made its intention clear not to become a party to the treaty; or (b) it has expressed its consent to be bound by the treaty, pending the entry into force of the treaty and provided that such entry into force is not unduly delayed."<sup>114</sup> The U.S. signed the VCLT in 1970, but because the U.S. Senate has not yet given its advice and consent, the U.S. is not yet a party.<sup>115</sup> The U.S. State

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<sup>103</sup> Meyer, *supra* note 42, at 112.

<sup>104</sup> *Id.* at 99.

<sup>105</sup> *Id.* at 110.

<sup>106</sup> *Id.* at 99.

<sup>107</sup> Faulhaber, *supra* note 102, at 554.

<sup>108</sup> Meyer, *supra* note 42, at 111.

<sup>109</sup> *Id.* at 110 (A SOFA is "a treaty governing the legal status of members of armed forces of one state (the sending state) stationed in another state (the receiving state) pursuant to that agreement.").

<sup>110</sup> *Id.* at 111.

<sup>111</sup> *Id.*

<sup>112</sup> *Id.* at 127.

<sup>113</sup> *Id.* at 117.

<sup>114</sup> See Vienna Convention on the Law of Treaties art. 18 (May 23, 1969), available at [http://untreaty.un.org/ilc/texts/instruments/english/conventions/1\\_1\\_1969.pdf](http://untreaty.un.org/ilc/texts/instruments/english/conventions/1_1_1969.pdf). [Hereinafter Vienna Convention].

<sup>115</sup> United Nations Treaty Collection, *Status of the Vienna Convention on the Law of Treaties*, [http://treaties.un.org/Pages/ViewDetailsIII.aspx?&src=TREATY&mtdsg\\_no=XXIII~1&chapter=23&Temp=mtdsg3&lang=en](http://treaties.un.org/Pages/ViewDetailsIII.aspx?&src=TREATY&mtdsg_no=XXIII~1&chapter=23&Temp=mtdsg3&lang=en) (last visited Nov. 15, 2010).

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Department has stated, however, that “[t]he United States considers many of the provisions of the Vienna Convention on the Law of Treaties to constitute customary international law on the law of treaties.”<sup>116</sup> Article 18, as noted earlier, does not require that the interim obligation only be observed “until [the signatory] shall have made its intention clear not to become a party to the treaty.” The problem is that there is no guidance on how this intention should be manifested.<sup>117</sup> The obligation not to defeat the object and purpose of a treaty imposed by Article 18, resulted in the U.S. submitting its letter of May 2002, in which it stated that it was withdrawing from its obligations under the Rome Statute.<sup>118</sup> However, the pressure placed on states by the U.S. to sign BIAs effectively forces these state, if they decide to sign a BIA with the US, to violate their international obligations under the Rome Statute.<sup>119</sup>

The Bush administration’s hostility toward the ICC did soften in Bush’s second term of office. One clear example of this subtle shift was in 2005 when the situation in Darfur came before the UN Security Council.<sup>120</sup> As a permanent member of the Security Council, the U.S. was in a position to veto the resolution that would refer alleged atrocities in Darfur to the ICC Prosecutor.<sup>121</sup> But, the U.S. abstained in the vote, thereby allowing the resolution to pass.<sup>122</sup> Despite U.S. concerns about the power of the Court to exert its jurisdiction over non-state parties – in this case Sudan – it allowed the exertion of jurisdiction even though such approval ran counter to their previous opposition of the Court.<sup>123</sup>

### D. The Obama Era (2009 - Present)

The election of Barack Obama has created great excitement among legal scholars, politicians, and human rights activists, both within the United States and abroad.<sup>124</sup> Many NGOs have called on the Obama administration to engage in a

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<sup>116</sup> U.S. DEPARTMENT OF STATE, FREQUENTLY ASKED QUESTIONS ON THE VIENNA CONVENTION ON THE LAW OF TREATIES, <http://www.state.gov/s/l/treaty/faqs/70139.htm> (last visited Nov. 15, 2010).

<sup>117</sup> Edward T. Swaine, *Unsigning*, 55 STAN. L. REV. 2061, 2082 (2003).

<sup>118</sup> US officials cited a desire for “flexibility” to pursue alternative judicial mechanisms that may be different to the object and purpose the Rome Statute. Citizens for Global Solutions, Pierre-Richard Prosper, *U.S. Has No Legal Obligation to the International Criminal Court* (May 6, 2002), [http://archive1.globalsolutions.org/programs/law\\_justice/icc/resources/prosper\\_unsigning.html](http://archive1.globalsolutions.org/programs/law_justice/icc/resources/prosper_unsigning.html) (last visited Nov. 15, 2010).

<sup>119</sup> Meyer, *supra* note 42, at 133.

<sup>120</sup> Nsongurua J. Udombana, *Pay Back Time in Sudan? Darfur in the International Criminal Court*, 13 TULSA J. COMP. & INT’L L. 1, 9-10 (2005).

<sup>121</sup> *Id.*

<sup>122</sup> Resolution 1593 was adopted in 2005 with 11 votes in favor and 4 votes abstaining. The resolution referred the situation in Darfur to the ICC Prosecutor. 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).

<sup>123</sup> Udombana, *supra* note 120, at 9-10.

<sup>124</sup> Interview with Archbishop Desmond Tutu, Nobel Prize winner, *available at* <http://www.usatoday.com/news/opinion/personal-reflections.htm> (last visited Nov. 15, 2010) (Archbishop Tutu expressed the hope that President Obama will ratify the Rome Statute.)

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policy of positive engagement with the ICC.<sup>125</sup> By involving itself with the ICC, the U.S. would get a seat at the table and have the ability to shape and influence the Court in ways that meet its concerns.<sup>126</sup> These NGOs have also called on the Obama administration to repeal, or at least amend, the ASPA because the law hinders any discussions with the ICC and states parties.<sup>127</sup> On the other hand, some have called for the Obama administration to adopt a more cautious approach toward the ICC, claiming that the Court has yet to complete its first trial, thereby making it premature to view the ICC as a success.<sup>128</sup>

Although in his time as President, Obama has not yet ratified the Rome Statute, he has taken major steps in international human rights and criminal law which are very different from his predecessor.<sup>129</sup> In May 2010 the White House produced The National Security Strategy of the United States of America, in which it stated that although the U.S. is not at present a party to the Rome Statute it is “engaging with State Parties to the Rome Statute on issues of concern and are supporting the ICC’s prosecution of those cases that advance U.S. interests and values, consistent with the requirements of U.S. law.”<sup>130</sup> In addition, as a senator, Mr. Obama did respond in the affirmative when asked whether the United States should ratify the Rome Statute of the International Criminal Court.<sup>131</sup>

In addition to President Obama, other members of the Obama administration have commented on the issue of U.S. involvement with the ICC, showing so far, a willingness to engage in discussion.<sup>132</sup> On January 29, 2009, U.S. Ambassador to the UN Susan Rice, in her first appearance in the Security Council, spoke about the importance of the ICC as an instrument to prosecute those responsible for committing atrocities, winning her the praise of many of the other envoys

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<sup>125</sup> Bruce Zagaris, *Obama Administration Signals Engagement with the ICC*, 25 INT’L ENFORCEMENT L. REP. 157 (2009).

<sup>126</sup> Roseann M. Latore, *Escape out the Back Door or Charge in the Front Door: U.S. Reactions to the International Criminal Court*, 25 B.C. INT’L & COMP. L. REV. 159, 174-75 (2002).

<sup>127</sup> Zagaris, *supra* note 125.

<sup>128</sup> According to Stephen Rademaker, former assistant secretary of state in the Republican Bush administration, President Obama should move cautiously toward full support of the ICC. Bill Varner, *Obama’s Envoy Voices Support for International Court*, BLOOMBERG NEWS, Jan. 29, 2009, [http://www.bloomberg.com/apps/news?pid=20601103&sid=AYK\\_ULgi3Ix0&refer=us](http://www.bloomberg.com/apps/news?pid=20601103&sid=AYK_ULgi3Ix0&refer=us).

<sup>129</sup> In President Obama’s address on national security at the National Archives in Washington: “Rather than keep us safer, the prison at Guantanamo has weakened American national security.” Ed Henry et al., *Obama defends plan to close Gitmo*, CNN, May 21, 2009, <http://www.cnn.com/2009/POLITICS/05/21/obama.speech/index.html>.

<sup>130</sup> The National Security Strategy of the United States of America is a document prepared periodically by the White House which addresses the major national security concerns facing the U.S. and how the administration plans to deal with these concerns. THE WHITE HOUSE, NATIONAL SECURITY STRATEGY 48 (May 2010), available at [http://www.whitehouse.gov/sites/default/files/rss\\_viewer/national\\_security\\_strategy.pdf](http://www.whitehouse.gov/sites/default/files/rss_viewer/national_security_strategy.pdf).

<sup>131</sup> Citizens for Global Issues, *Elections and Candidates: Responses from Barack Obama (D-IL)*, [http://archive2.globalsolutions.org/politics/elections\\_and\\_candidates/questionnaire/2004?id=20](http://archive2.globalsolutions.org/politics/elections_and_candidates/questionnaire/2004?id=20) (last visited Nov. 15, 2010).

<sup>132</sup> Zagaris, *supra* note 125.

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who were present that day.<sup>133</sup> At her confirmation, Secretary of State Hilary Clinton also spoke very highly of the ICC as well, stating, “we will end hostility towards the ICC, and look for opportunities to encourage effective ICC action in ways that promote U.S. interests by bringing war criminals to justice.”<sup>134</sup> Later, in the fall of 2009 US envoy for war crimes Stephen Rapp announced that his country will for the first time attend, as an observer, the annual ICC meeting in The Hague from 18 to 26 November 2009.<sup>135</sup> Recently, the Administration sent a U.S. delegation to participate at the first-ever Review Conference on the Rome Statute of the International Criminal Court (ICC) in Kampala, Uganda from 31 May to 11 June 2010.<sup>136</sup>

### VI. Complementarity

#### A. What is Complementarity?

The principal of complementarity in international criminal law seeks to strike a balance between the ability to prosecute individuals for international crimes while safeguarding the sovereignty of states.<sup>137</sup>

One of the major points of contention at the Rome Conference in 1998 surrounded the issue of complementarity.<sup>138</sup> Previous international criminal tribunals such as the ICTY and the ICTR were only ad hoc tribunals created by and under the authority of the UN Security Council, with the sole task of investigating and prosecuting those responsible for mass atrocities committed during those specific conflicts in the former Yugoslavia<sup>139</sup> and Rwanda.<sup>140</sup> The ICC, by contrast, is a permanent criminal court with worldwide jurisdiction over any person, provided that the crime in question is one mentioned in Article 5 of the Rome Statute, and that the Court exercises its jurisdiction in one of the methods enumerated in Article 13.<sup>141</sup> Consequently, as a result of the ICC’s broad jurisdiction, the question arose as to when the ICC should defer to national courts in the prosecutions of war criminals.<sup>142</sup>

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<sup>133</sup> The list of envoys who praised Ambassador Rice include French Ambassador Jean-Maurice Ripert, Croatian Ambassador Neven Jurica, and Costa Rican Ambassador Jorge Urbina. Varner, *supra* note 128.

<sup>134</sup> Zagaris, *supra* note 125.

<sup>135</sup> *U.S. to Resume Engagement with ICC*, BBC NEWS, <http://news.bbc.co.uk/2/hi/8363282.stm> (last visited Nov. 15, 2010).

<sup>136</sup> State Department Press Conference with Legal Advisor Harold Koh and Ambassador-at-Large for War Crime Issues Stephen Rapp (June 15, 2010), *available at* [http://www.state.gov/s/wci/us\\_releases/remarks/143178.htm](http://www.state.gov/s/wci/us_releases/remarks/143178.htm) [Hereinafter State Department Press Conference]

<sup>137</sup> Jo Stigen, *THE RELATIONSHIP BETWEEN THE INTERNATIONAL CRIMINAL COURT AND NATIONAL JURISDICTIONS: THE PRINCIPLE OF COMPLEMENTARITY* 17 (Martinus Nijhoff Publishers 2008).

<sup>138</sup> See MOHAMED M. EL ZEIDY, *THE PRINCIPLE OF COMPLEMENTARITY IN INTERNATIONAL CRIMINAL LAW: ORIGIN, DEVELOPMENT AND PRACTICE* 131-32 (Brill 2008).

<sup>139</sup> S.C. Res. 827, *supra* note 34; *see also* LEE, *supra* note 38, at 6.

<sup>140</sup> S.C. Res. 955, *supra* note 37; *see also* LEE, *supra* note 38, at 6.

<sup>141</sup> Rome Statute, *supra* note 52, art. 13.

<sup>142</sup> ZEIDY, *supra* note 138, at 131-32.

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To determine whether the ICC's jurisdiction should supersede that of national courts, there are several considerations that must be taken into account. For example, national courts in the territorial state where the incident occurred would have greater access to evidence and witnesses.<sup>143</sup> These national courts would also have a greater interest in the prosecution because the crimes occurred in their territory.<sup>144</sup> However, this greater interest can lead to questions of impartiality and fairness.<sup>145</sup> The ICC is a nonpartisan court made up of judges from around the world, with rules and procedures that ensure fairness and impartiality.<sup>146</sup> Since the Second World War it has been common practice of national courts prosecuting serious human rights violations committed anywhere in the world.<sup>147</sup> However, the idea of a permanent international criminal court with broad jurisdiction caused concern among at the Rome Conference in 1998.<sup>148</sup> Therefore, the representatives in attendance at the Rome Conference came to an agreement on a system of complementarity.<sup>149</sup> Under this system the role of the ICC is to complement national courts and function solely as a court of last resort.<sup>150</sup> The ICC is intended to supplement, rather than supplant, the domestic punishment of international violations.<sup>151</sup> ICC Prosecutor Luis Moreno-Ocampo has stated that "[a]s a consequence of complementarity, the number of cases that reach the Court should not be a measure of efficiency. On the contrary, the absence of trials before this Court, as a consequence of the regular functioning of national institutions, would be a major success."<sup>152</sup>

Several articles in the Rome Statute lay out this system of complementarity. Article 1 of the Rome Statute maintains that the ICC only compliments national criminal jurisdictions; it does not take their place.<sup>153</sup> Article 17, which deals with admissibility, states that a case is inadmissible if the case is being investigated by a state that has jurisdiction over it (i.e. where the incident occurred, where the defendant is from, etc.), unless the state is unwilling or unable to investigate or

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<sup>143</sup> William W. Burke-White, *Proactive Complementarity: The International Criminal Court and National Courts in the Rome System of International Justice*, 49 HARV. INT'L L. J. 53, 68 (2008).

<sup>144</sup> See Louise Arbour, *Will the ICC have an Impact on Universal Jurisdiction?*, 1 J. INT'L CRIM. JUST. 585, 586 (2003).

<sup>145</sup> Rome Statute, *supra* note 52, art. 17(2)(c); see also Mba Chidi Nmaju, *Violence in Kenya: Any Role for the ICC in the Quest for Accountability?*, 3 AFR. J. LEGAL STUD. 78, 92 (2009).

<sup>146</sup> See Rome Statute, *supra* note 52, art. 36.

<sup>147</sup> AMNESTY INTERNATIONAL, UNIVERSAL JURISDICTION, <http://www.amnesty.org/en/international-justice/issues/universal-jurisdiction> (last visited Nov. 15, 2010).

<sup>148</sup> ZEIDY, *supra* note 138, at 131-32.

<sup>149</sup> See Rome Statute, *supra* note 52, art. 17.

<sup>150</sup> Nsongurua J. Udombana, *Pay Back Time in Sudan? Darfur in the International Criminal Court*, 13 TULSA J. COMP. & INT'L L. 1, 30 (2005).

<sup>151</sup> Michael A. Newton, *The Complementarity Conundrum: Are We Watching Evolution or Evisceration?*, 8 SANTA CLARA J. INT'L L. 115, 116 (2010).

<sup>152</sup> Luis Moreno-Ocampo, Prosecutor of the ICC, Statement Made at the Ceremony After Election as the Chief Prosecutor of the International Criminal Court (June 16, 2003), available at <http://www.icc-cpi.int/Menus/ICC/Structure+of+the+Court/Office+of+the+Prosecutor/Reports+and+Statements/Press+Releases/Press+Releases+2003/>.

<sup>153</sup> Rome Statute, *supra* note 52, art. 1.



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prosecute.<sup>154</sup> A failure to prosecute may stem, for example, from political instability in the national jurisdiction or from a non-independent judiciary.<sup>155</sup> As the party asserting jurisdiction, the ICC Prosecutor bears the burden of proving that the state is unwilling or unable to carry out the investigation or prosecution.<sup>156</sup> The Court considers several factors in determining whether a state is unwilling or unable to prosecute. These include; (1) whether the national proceedings undertaken are or were for the purpose of shielding the accused from ICC criminal prosecution; (2) whether there is an unjustifiable delay in the proceedings; and (3) whether the proceedings were being conducted independently or impartially.<sup>157</sup>

In the case of *The Prosecutor v. Thomas Lubanga Dyilo*, the ICC was confronted with the issue of complementarity.<sup>158</sup> The Court determined that a case before the ICC will only be declared inadmissible under the complementarity principle when the “[concurrent] national proceeding encompass both the person and the conduct which is subject of the case before the Court.”<sup>159</sup> That means that the national proceeding must be charging the same person, pursuing the same charges, and involving the same criminal conduct, as the ICC proceeding. The problem is that the Court’s ruling on complementarity is much narrower than the definition found in Article 17 of the Rome Statute. The ruling interpretation on complementarity is very stringent and favors prosecution by the ICC over national courts.<sup>160</sup>

States that have signed and ratified the Rome Statute have tried to bring their domestic laws into harmony with the ICC provisions by passing legislation. However, every state has done so differently. In Australia, there can be no prosecution without the consent of the Attorney General.<sup>161</sup> In Denmark, it is the Minister of Justice that decides the matter upon a request from the ICC for the extradition of an individual.<sup>162</sup> Portugal can prosecute any perpetrators of ICC crimes, but only within the provisions of the Portuguese criminal legislature.<sup>163</sup> Even though each of these states passed its own unique implementing legislation,

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<sup>154</sup> *Id.* art. 17(1)(a).

<sup>155</sup> *Id.* art. 17(2), (3); see also Christopher D. Totten & Nicholas Tyler, *Arguing for an Integrated Approach to Resolving the Crisis in Darfur: The Challenges of Complementarity, Enforcement, and Related Issues in the International Criminal Court*, 98 J. CRIM. L. & CRIMINOLOGY 1069, 1080-81 (2008).

<sup>156</sup> Megan A. Fairlie, *Establishing Admissibility at the International Criminal Court: Does the Buck Stop with the Prosecutor, Full Stop?*, 39 INT’L LAW. 817, 823-24 (2005).

<sup>157</sup> Rome Statute, *supra* note 52, art. 17(2).

<sup>158</sup> Decision Concerning Pre-Trial Chamber I’s Decision of 10 February 2006 and the Incorporation of Documents in to the Record of the Case Against Mr. Thomas Lubanga Dyilo, Situation in the Democratic Republic of the Congo, Case No. ICC-01/04-01/06, ¶ 31 (Feb. 24, 2006).

<sup>159</sup> *Id.*

<sup>160</sup> See ROBERT CRYER, HAKAN FRIMAN, DARRYL ROBINSON, ELIZABETH WILMSHURST, AN INTRODUCTION TO INTERNATIONAL CRIMINAL LAW AND PROCEDURE 155 (Cambridge Univ. Press 2007).

<sup>161</sup> Dragana Radosavljevic, *An Overview of the ICC Complementarity Regime*, J. TURKISH WEEKLY, Sept. 12, 2007, <http://www.turkishweekly.net/article/235/an-overview-of-the-icc-complementarity-regime.html>.

<sup>162</sup> *Id.*

<sup>163</sup> *Id.*

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they all share a common concern; not wanting their own sovereignty compromised by the ICC.<sup>164</sup> With the exception of a Security Council resolution (e.g. Resolution 1593 referring the situation in Darfur, Sudan, to the ICC), national courts maintain a great deal of power under the complementarity principle.<sup>165</sup>

### B. Balance Between Peace and Justice

In the summer of 2008, Judge Mauro Politi of the ICC, speaking at the International Criminal Law Network Lecture on the 10th anniversary of the adoption of the Rome Statute, stated that one of the major challenges facing the ICC is the issue of trying to balance the sometimes dueling interests of peace and justice.<sup>166</sup>

The Rome Statute was established on the conviction that the most serious crimes of concern to the whole international community as a whole threaten the peace, security, and well-being of the world<sup>167</sup> and that their effective prosecution contributes to the prevention of such crimes.<sup>168</sup> In other words, one of the founding principles of the Rome Statute is that justice ensures, reinforces, and paves the way for long lasting peace.

Accordingly, the effective prosecution of atrocities not only enables the rehabilitation, reintegration, and resocialization of victims and the affected communities, but also greatly contributes to the deterrence of similar crimes in the future by ending impunity for perpetrators.<sup>169</sup> Thus, according to this line of reasoning, “there can be no peace without justice, no justice without law and no meaningful law without a Court to decide what is just and lawful under any given circumstance.”<sup>170</sup>

Others disagree, however, and argue that ICC’s investigations and prosecutions will actually harm local populations in conflict territories.<sup>171</sup> By prosecuting militia leaders or central political figures that are actively engaged in ongoing conflicts, the Court’s actions can drive a wedge into peace negotiations.<sup>172</sup> The tension between peace and justice during reconciliation talks is most apparent when militia leaders and government heads claim that they will not agree to any peace settlement until they are granted impunity from ICC prosecution,<sup>173</sup> which

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<sup>164</sup> *Id.*

<sup>165</sup> *Id.*

<sup>166</sup> Mauro Politi, Former Judge of the International Criminal Court, address at the ICLN Conference in the Hague, Netherlands (June 25, 2008).

<sup>167</sup> Rome Statute, *supra* note 52, pmbl. ¶ 3.

<sup>168</sup> *Id.* ¶ 5.

<sup>169</sup> See M. Cherif Bassiouni, *Combating Impunity for International Crimes*, 71 U. COLO. L. REV. 409, 410 (2000).

<sup>170</sup> GLOBAL POLITICS, *supra* note 19, at 27 (quoting Benjamin B. Ferencz, a former Nuremberg prosecutor).

<sup>171</sup> Daniel Wallis, *Rwanda Genocide Court Poses Questions on Justice*, REUTERS, Aug. 7, 2008, <http://www.reuters.com/article/idUSL768889220080807?pageNumber=1>.

<sup>172</sup> *Id.*

<sup>173</sup> Council on Foreign Relations, Stephanie Hanson, *In Uganda, Peace Versus Justice* (Nov. 17, 2006), [http://www.cfr.org/publication/12049/in\\_uganda\\_peace\\_versus\\_justice.html?breadcrumb=%2findex](http://www.cfr.org/publication/12049/in_uganda_peace_versus_justice.html?breadcrumb=%2findex).

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is something the ICC has not shown a willingness to do so far.<sup>174</sup> Since the ICC only has jurisdiction over crimes occurring after July 2002, it is often dealing with crimes that are associated with ongoing conflicts, thus creating a conflict between peace and justice.<sup>175</sup>

The fear that prosecutions may do more harm than good and destabilize the state has caused some states, like Argentina, Chile, El Salvador, South Africa, and even Sierra Leone, to form Truth Commissions and grant amnesties in order to ensure peace and stability.<sup>176</sup> A discussion of the relationship between peace and justice is relevant today in light of the situation in several states where ICC arrest warrants have been handed down. The two regions where this issue has taken center stage are Northern Uganda and most recently Darfur, Sudan. For over 20 years, in Northern Uganda, the Ugandan government has been fighting a civil war in Northern Uganda against the Lord's Resistance Movement (LRA), led by Joseph Kony.<sup>177</sup> Recently peace talks have taken place between the LRA and the Ugandan government, hosted by the government of Southern Sudan in Juba.<sup>178</sup> However, these peace talks have not run smoothly because Mr. Kony has indicated that he is not prepared to sign an agreement until the ICC's arrest warrant against him is lifted.<sup>179</sup> Similarly, the ICC arrest warrant of Sudanese President Al-Bashir has caused debate among analysts about whether the issuance of this arrest warrant will only further destabilize the situation in Darfur causing more suffering for the people in the region.<sup>180</sup> President Al-Bashir, Mr. Kony, and even President Robert Mugabe of Zimbabwe have been reluctant to agree to any sort of amnesty after watching the former President of Liberia, Charles Taylor, end up being tried for war crimes at the Special Court of Sierra Leone after agreeing to an amnesty in exchange for peace.<sup>181</sup> Legal experts have stated that war crimes charges supersede any amnesty.<sup>182</sup>

The Rome Statute gives the ICC Prosecutor the discretion not to pursue investigations if, after taking into account all the circumstances, he or she determines that it is not in the interest of justice.<sup>183</sup> However, weighing the interests of peace against those of justice puts the Prosecutor in a difficult position. U.N.

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<sup>174</sup> Louis Charbonneau, *ICC Prosecutor won't back down on Sudan's Bashir*, REUTERS, July 18, 2008, <http://www.reuters.com/article/idUSN1639809920080718?pageNumber=2>.

<sup>175</sup> George H. Norris, *Closer to Justice: Transferring Cases from the International Criminal Court*, 19 MINN. J. INT'L L. 201, 202 (2010).

<sup>176</sup> Some Truth and Reconciliation Commissions have functioned well (e.g. South Africa), others have had mixed results (e.g. Argentina) and yet others have been usurped by criminal prosecutions (e.g. Sierra Leone). Milena Sterio, *Rethinking Amnesty*, 34 DENV. J. INT'L L. & POL'Y 373, 380-85 (2006).

<sup>177</sup> Katie Glassbrow, *Peace Versus Justice in Uganda*, INST. FOR PEACE REPORTING, Feb. 15, 2010, <http://iwpr.net/report-news/peace-versus-justice-uganda>.

<sup>178</sup> *Id.*

<sup>179</sup> *Id.*

<sup>180</sup> Tsegaye Tadesse, *Sudan expects African support on ICC warrant*, REUTERS, July 21, 2008, <http://www.reuters.com/article/idUSMCD135937>.

<sup>181</sup> Simon Robinson, *Choosing Justice over Peace in Darfur*, TIME, July 14, 2008, <http://www.time.com/time/world/article/0,8599,1822529,00.html>.

<sup>182</sup> Hanson, *supra* note 173.

<sup>183</sup> Rome Statute, *supra* note 52, art. 53.

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Secretary-General Ban Ki-Moon has himself spoken about the relationship between peace and justice, “We must seek to strike the correct balance between the duty of justice and the pursuit of peace.”<sup>184</sup> The Security Council has not yet used Article 16 of the Rome Statute to suspend prosecutions, but there might be situations in the future, where international pressure for peace may one day persuade the Security Council to suspend the prosecution of certain individuals; however that seems unlikely at the moment, even in the case of Sudanese president Omar al-Bashir.<sup>185</sup> Balancing the relationship between peace and justice has also received a lot of attention from NGOs who work in these conflict zones. Some NGOs fear that their work on peace initiatives will be damaged by these investigations,<sup>186</sup> while others feel that the ICC arrest warrants have actually had a positive effect on conflicts by putting pressure on the parties to come to a peace agreement.<sup>187</sup>

The ICC has found itself placed in a delicate and difficult situation with the need to balance peace and justice. Its investigations may lead to the destabilization of conflict zones because those with arrest warrants against them may become reluctant to agree to any sort of peace agreement unless they are granted immunity from prosecution. If the ICC relents and grants immunity to those individuals then the ICC’s work will be perceived as negotiable, which will undermine its role as a deterrent against future crimes.<sup>188</sup>

### VII. Case Study: Darfur, Sudan

#### A. Background of the Situation in Darfur

The situation in Darfur addresses the issues of complementarity and the relationship between peace and justice. The resolution of these issues as applied to the situation in Darfur will bear serious implications for the Court’s future effectiveness and legitimacy.<sup>189</sup>

The conflict in Sudan involves two main groups: (a) the government of Sudan and the Popular Defense Forces (PDF), a militia called the ‘Janjaweed’ that the government employs to supplement its forces; and (b) the resistance forces, including the Sudan Liberation Movement/Army (SLM/A) and the Justice and Equality Movement (JEM).<sup>190</sup> In response to attacks by resistance forces in 2003, the Sudanese army, with the help of the Janjaweed, launched a counter

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<sup>184</sup> Charbonneau, *supra* note 174.

<sup>185</sup> Zachary Manfredi, ICC Observers Commentary: The Perils of an Article 16 Deferral, ICC OBSERVERS (Mar. 6, 2009), <http://iccobservers.org/2009/03/06/icc-observers-commentary-the-perils-of-an-article-16-deferral/>.

<sup>186</sup> Tadesse, *supra* note 180.

<sup>187</sup> International Crisis Group, *Sudan: Justice, Peace, and the ICC* (July 17, 2009), <http://www.crisisgroup.org/en/regions/africa/horn-of-africa/sudan/152-sudan-justice-peace-and-the-icc.aspx>.

<sup>188</sup> INTERNATIONAL CRISIS GROUP, GETTING THE UN INTO DARFUR (Oct. 12, 2006), [http://news.bbc.co.uk/2/shared/bsp/hi/pdfs/un\\_darfur11\\_10\\_06.pdf](http://news.bbc.co.uk/2/shared/bsp/hi/pdfs/un_darfur11_10_06.pdf).

<sup>189</sup> Totten & Tyler, *supra* note 155, at 1071.

<sup>190</sup> *Id.* at 1083.

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insurgency campaign to wipe out the resistance forces.<sup>191</sup> In September 2004, after the death and displacement of hundreds of thousands of people, the UN Security Council mandated a commission to investigate and report on the situation in Sudan.<sup>192</sup> The Darfur Commission found that the governmental forces and the Janjaweed, who were financially and militarily supported by the government, had committed several crimes such as rape, looting, and massacres.<sup>193</sup> Their actions led to the death of thousands of civilians and to the mass displacement of the population.<sup>194</sup>

On March 31, 2005, in response to the Darfur Commission findings, the UN Security Council passed Resolution 1593 referring the Darfur case to the ICC Prosecutor.<sup>195</sup> The Security Council's referral was historic; it was the first time that the Security Council referred a case to the ICC.<sup>196</sup> After analyzing the evidence, the ICC Prosecutor determined that sufficient evidence existed to initiate a full investigation.<sup>197</sup> On February 27, 2007, ICC Prosecutor Luis Moreno-Ocampo filed an application for an arrest warrant with the Court against two Sudanese nationals; Ahmed Harun, the Minister of Interior, and Ali Kushayb, the leader of the Janjaweed militia in West Darfur.<sup>198</sup> On April 27, 2007, the Pre-Trial Chamber issued warrants for the arrest of both men.<sup>199</sup> Neither of them have, as of yet, been handed over to the Court.<sup>200</sup>

On July 18, 2008, the Prosecutor filed another application for an arrest warrant involving the conflict in the Sudan. On March 3, 2009, the Pre-Trial Chamber issued the arrest warrant for President Al-Bashir, which listed seven counts; five counts of crimes against humanity and two counts of war crimes.<sup>201</sup> This marked the first time that the ICC had issued an arrest warrant for a sitting head of state.<sup>202</sup> The Prosecutor had also sought three counts of genocide, but the Court

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<sup>191</sup> *Id.* at 1086.

<sup>192</sup> *Id.* at 1083.

<sup>193</sup> *Id.* at 1086.

<sup>194</sup> *Id.*

<sup>195</sup> S.C. Res. 1593, U.N. Doc. S/RES/1593 (Mar. 31, 2005), available at <http://daccess-dds-ny.un.org/doc/UNDOC/GEN/N05/292/73/PDF/N0529273.pdf?OpenElement>.

<sup>196</sup> Totten & Tyler, *supra* note 155, at 1072.

<sup>197</sup> *Id.* at 1088-89.

<sup>198</sup> *Id.* at 1090-91.

<sup>199</sup> See generally Warrant of Arrest for Ali Kushayb, Situation in Darfur, Sudan In the Case of the Prosecutor v. Ahmad Muhammad Harun and Al Muhammad Al Abd-Al-Rahman, Case No. ICC-02/05-01/07 (Apr. 27, 2007); Warrant of Arrest for Ahmad Harun, Situation in Darfur, Sudan In the Case of the Prosecutor v. Ahmad Muhammad Harun and Al Muhammad Al Abd-Al-Rahman, Case No. ICC-02/05-01/07-2 (Apr. 27, 2007).

<sup>200</sup> The International Criminal Court, The Prosecutor v. Ahmad Muhammad Harun ("Ahmad Harun") and Ali Muhammad Ali Abd-Al-Rahman ("Ali Kushayb"), [http://www.iccpi.int/menus/icc/situations%20and%20cases/situations/situation%20icc%200205/related%20cases/icc%200205%200107/darfur\\_%20sudan?lan=en-GB](http://www.iccpi.int/menus/icc/situations%20and%20cases/situations/situation%20icc%200205/related%20cases/icc%200205%200107/darfur_%20sudan?lan=en-GB).

<sup>201</sup> See generally Warrant of Arrest for Omar Hassan Ahmad Al Bashir, Situation in Darfur, Sudan In the Case of the Prosecutor v. Omar Hassan Ahmad Al Bashir, Case No. ICC-02/05-01/09 (Mar. 4, 2009) [hereinafter Bashir Arrest Warrant].

<sup>202</sup> Tom Ginsburg, *The Clash of Commitments at the International Criminal Court*, 9 CHI. J. INT'L L. 499, 503 (2009).

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found that the Prosecutor had failed to prove that the government of Sudan had acted with the intent (*dolus specialis*) to destroy the Fur, Masalit, and Zaghawa tribes.<sup>203</sup> The issuance of the arrest warrant of Harun, Kushayb, and especially Al-Bashir, has caused significant discussion as to whether the arrest warrants serve a higher purpose of holding even heads of states accountable for their actions, or whether, in issuing these arrest warrants, the ICC has only inflamed and destabilized an already precarious situation.<sup>204</sup>

### B. Issues

One important issue raised by the proceedings is whether the ICC may legally enforce its jurisdiction upon Sudan and President Al-Bashir taking into account complementarity. Part IX of the Rome Statute, entitled “International cooperation and judicial assistance,” addresses issues of cooperation of state parties and non-state parties.<sup>205</sup> State parties must cooperate fully with the Court in its investigation and prosecution of crimes within the jurisdiction of the Court.<sup>206</sup> The fact that Sudan is a non-state party to the ICC creates a problem of enforcement.<sup>207</sup> The Rome Statute does mention that, in situations that involve a non-state party, the Court may invite the state to cooperate with the terms of an ad hoc agreement.<sup>208</sup> After an agreement has been reached and the state does not comply then the Court can inform the UN Security Council, but only if it was the Security Council that first referred the situation to the ICC.<sup>209</sup> So far Sudan has refused to cooperate with the ICC’s arrest warrants.<sup>210</sup> Even though Sudan is a non-state party, it is a signatory to the Rome Statute,<sup>211</sup> and as such had certain obligations to refrain from “acts which would defeat the object and purpose” of the Rome Statute<sup>212</sup> up until the time that made its intention clear that it did not want to become a party to the Rome Statute.<sup>213</sup> Therefore, an argument could be made that by committing acts of war crimes and crimes against humanity Sudan has violated its obligations.<sup>214</sup>

After the arrest warrants for Harun and Kushayb were issued, the government of Sudan did take certain steps. For example, President Al-Bashir established a National Commission of Inquiry (NCOI) to investigate the Darfur crimes.<sup>215</sup> The

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<sup>203</sup> Bashir Arrest Warrant, *supra* note 201.

<sup>204</sup> Robinson, *supra* note 181.

<sup>205</sup> Rome Statute, *supra* note 52, art. 86-102.

<sup>206</sup> *Id.* art. 86.

<sup>207</sup> Totten & Tyler, *supra* note 155, at 1070.

<sup>208</sup> Rome Statute, *supra* note 52, art. 87(5)(a).

<sup>209</sup> *Id.* art. 87(5)(b).

<sup>210</sup> Totten & Tyler, *supra* note 155, at 1107.

<sup>211</sup> *Status of the Rome Statute*, *supra* note 50.

<sup>212</sup> Vienna Convention, *supra* note 114, art. 18.

<sup>213</sup> On Aug. 26, 2008, the Government of Sudan informed the Secretary-General that Sudan no longer intended to become a party to the Rome Statute. *Status of the Rome Statute*, *supra* note 50.

<sup>214</sup> Totten & Tyler, *supra* note 155, at 1085.

<sup>215</sup> *Id.* at 1095.

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commission did acknowledge acts of killings and bombings of civilians by government forces, but underemphasized their magnitude and severity.<sup>216</sup> A Special Court of Darfur was established, though it was later replaced by three regional special courts, and completed several criminal cases.<sup>217</sup> However, the prosecutions only involved low-level suspects on charges that were not nearly as severe as those that Harun and Kushayb were accused of.<sup>218</sup> Kushayb was eventually arrested by local authorities, then released,<sup>219</sup> then re-arrested.<sup>220</sup> Harun has never been arrested, but rather now serves as the Minister of State for Humanitarian Affairs.<sup>221</sup> Many human rights groups were, and still are, questioning whether Sudan's national courts will ever prosecute senior government officials for violations of war crimes, crimes against humanity, and genocide.<sup>222</sup>

In December 2007, the ICC Prosecutor submitted to the Security Council that Sudan had not complied with its obligations stemming from UN Security Council Resolution 1593.<sup>223</sup> In May 2008, the ICC Prosecutor informed the Pre-Trial Chamber that Sudan had failed to cooperate in response to the arrest warrants.<sup>224</sup> In response, in June 2008, the Security Council sent a mission to Africa where it met with President Al-Bashir.<sup>225</sup> "The Security Council members urged the government of Sudan to cooperate with the ICC's investigations of Ahmad Harun and Ali Kushayb."<sup>226</sup> However, the Sudanese government refused to hand over both individuals on the grounds that Sudan is not a state party and thus is not bound by any ICC decisions.<sup>227</sup> President Al-Bashir could escape indictment if he handed over Harun and Kushayb.<sup>228</sup> But, Sudan rejected any deal that would send any Sudanese citizen to the ICC.<sup>229</sup>

In a report on the Sudan, the Security Council stated, "[t]here may indeed be instances where a domestic system operates in an effective manner and is able to deal appropriately with atrocities committed within its jurisdiction. However, the

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<sup>216</sup> *Id.* at 1096.

<sup>217</sup> *Id.*

<sup>218</sup> *Id.*

<sup>219</sup> Wasil Ali, *Sudan releases Darfur war crime suspect wanted by ICC*, SUDAN TRIB., Oct. 2, 2007, <http://www.sudantribune.com/spip.php?article24036>.

<sup>220</sup> Jeffrey Gettleman, *Sudan Arrests Militia Chief Facing Trial*, N.Y. TIMES, Oct. 13, 2008, [http://www.nytimes.com/2008/10/14/world/africa/14darfur.html?\\_r=1](http://www.nytimes.com/2008/10/14/world/africa/14darfur.html?_r=1).

<sup>221</sup> Council on Foreign Relations, *Session Three: The Darfur Case*, Oct. 17, 2008, [http://www.cfr.org/publication/17580/session\\_three.html](http://www.cfr.org/publication/17580/session_three.html).

<sup>222</sup> Totten & Tyler, *supra* note 155, at 1098.

<sup>223</sup> Göran Sluiter, *Obtaining Cooperation from Sudan – Where is the Law?*, 6 J. INT'L CRIM. JUST. 871, 872-73 (2008).

<sup>224</sup> *Id.* at 873.

<sup>225</sup> Ginsburg, *supra* note 202, at 504.

<sup>226</sup> *Id.*

<sup>227</sup> *Id.*

<sup>228</sup> Louis Charbonneau, *Sudan's Bashir could escape ICC Indictment*, REUTERS, July 16, 2008, <http://www.reuters.com/article/idUSN1639809920080716?pageNumber=1>.

<sup>229</sup> Opheera McDoom, *Sudan Rules out Deal with ICC Over Bashir Warrant*, REUTERS, July 17, 2008, [hereinafter McDoom – Sudan Rules out Deal], available at <http://www.alertnet.org/thenews/newsdesk/L1735882.htm>.

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very nature of most international crimes implies, as a general rule, that they are committed by State officials or with their complicity; often their prosecution is therefore better left to other mechanisms.”<sup>230</sup>

In summary, it appears that the ICC can lawfully exercise its jurisdiction over Sudan and its president. Even though Sudan is not a state party, the fact that it is a signatory to the Rome Statute<sup>231</sup> and that the situation was referred to the ICC by a Chapter VII Security Council Resolution<sup>232</sup> lends supports to ICC having jurisdiction over the conflict in Darfur as long as the complementarity principle is followed.<sup>233</sup> First, Sudan has not complied with Security Council Resolution 1593, nor with ICC arrest warrants of Harun, Kushayb, and Al-Bashir.<sup>234</sup> Therefore, under the principle of complementarity, a core principle of the Rome Statute, the ICC can enforce its jurisdiction over these individuals because Sudan is “unwilling” to prosecute.<sup>235</sup> Although the ICC exercised its jurisdiction in accordance with the Rome Statute,<sup>236</sup> a more compelling question is whether its issuance is desirable given the current situation.

The ICC is sometimes confronted with prosecuting criminals engaged in ongoing conflicts. In so doing, the Court is confronted with weighing the interests of peace and justice in determining whether to proceed with a prosecution.<sup>237</sup> The prosecution of Omar Al-Bashir, the President of Sudan, showcases the tension that exists between peace and justice.<sup>238</sup>

In response to the ICC arrest warrant, Al-Bashir argued that the ICC’s case was a western ploy to target Sudan’s oil and gas resources.<sup>239</sup> Al-Bashir stated, “we have refused to kneel to colonialism, that is why Sudan has been targeted . . . because we only kneel to God.”<sup>240</sup> He then expelled ten of the largest international aid agencies from Darfur,<sup>241</sup> drawing criticism from foreign states and the

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<sup>230</sup> Report of the International Commission of Inquiry on Darfur to the United Nations Secretary-General, 144, ¶ 568 (Jan. 25, 2005), available at [http://www.un.org/News/dh/sudan/com\\_inq\\_darfur.pdf](http://www.un.org/News/dh/sudan/com_inq_darfur.pdf).

<sup>231</sup> Status of the Rome Statute, *supra* note 50.

<sup>232</sup> S.C. Res. 1593, *supra* note 195.

<sup>233</sup> Article 53 of the Rome Statute limits the exclusive powers granted to the Security Council acting under its Chapter VII powers by making the Security Council’s assessment contingent on the Prosecutor deciding to pursue the case. In addition, Article 19 confirms the application of complementarity to referrals by the Security Council by providing an opportunity to States, even non-party States, to stop a prosecution by challenging the admissibility on the grounds set out in Article 17, even when a situation is referred by the Security Council. See Mohamed M. El Zeidy, *The Principle of Complementarity: A New Machinery to Implement International Criminal Law*, 23 MICH. J. INT’L L. 869, 959-60 (2002).

<sup>234</sup> McDoom – Sudan Rules out Deal, *supra* note 229.

<sup>235</sup> Rome Statute, *supra* note 52, art. 17.

<sup>236</sup> *Id.* art. 13(b).

<sup>237</sup> Politi, *supra* note 166.

<sup>238</sup> See Robinson, *supra* note 181.

<sup>239</sup> Mike Pflanz, *Bashir calls ICC arrest warrant a ‘conspiracy’*, TELEGRAPH, Mar. 5, 2009, <http://www.telegraph.co.uk/news/worldnews/africaandindianocan/sudan/4942470/Sudan-President-Omar-al-Bashir-calls-ICC-arrest-warrant-a-conspiracy.html>.

<sup>240</sup> *Id.*

<sup>241</sup> *Id.*



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UN.<sup>242</sup> Supporters of Al-Bashir marched in the city streets chanting his name and criticizing the ICC.<sup>243</sup> Others, who have suffered as a result of the conflict, support his arrest but ultimately want peace above all else.<sup>244</sup> The situation has resulted in mixed opinions from governments as to the prudence of the ICC's arrest warrant.<sup>245</sup>

While there is support among many states for an investigation into the crimes that were being committed in Sudan, other states, such as South Africa and China, have been critical of the ICC indictment of President Al-Bashir, fearing the indictment could damage the peace talks.<sup>246</sup> Jakaya Kikwete, the President of Tanzania and the current head of the African Union, recently announced that "justice has to be done. Justice must be seen to be done. What the AU is simply saying is that what is critical, what is the priority, is peace. That is priority number one now."<sup>247</sup> Even the government of Southern Sudan which was originally in favor of the ICC, is now concerned that Al-Bashir's arrest warrant will curtail the peace process.<sup>248</sup> Security Council Resolution 1828 (2008) mentioned that several members had expressed concern regarding potential developments that have subsequently occurred after the ICC Prosecutor submitted an application for an arrest warrant of Al-Bashir.<sup>249</sup>

American support has been mixed. Former U.S. envoy to Sudan, Andrew Natsios, stated that the ICC arrest warrant of President Al-Bashir will damage peace negotiations because leaders will be reluctant to compromise for fear that they will face trial at the ICC.<sup>250</sup> However, it appears that the Obama administration will be more supportive of the arrest warrant. For example, U.S. Ambassador to the UN Susan Rice and State Department Spokesman Robert Wood have both spoken in support of ICC's investigation and prosecution of those responsible for the atrocities committed in Sudan.<sup>251</sup>

ICC Prosecutor Ocampo faced the dilemma of weighing the interests of peace against that of justice when he submitted a request for an arrest warrant for Presi-

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<sup>242</sup> *US, France unhappy about Arab & African support to Sudan's Bashir: report*, SUDAN TRIB., Apr. 5, 2009, available at <http://www.sudantribune.com/spip.php?article30763>.

<sup>243</sup> McDoom – Sudan Rules out Deal, *supra* note 229.

<sup>244</sup> *Sudanese want peace more than indictment*, SUDAN TRIB., July 20, 2008, <http://www.sudantribune.com/spip.php?article27938>.

<sup>245</sup> "A number of governments including France, the United Kingdom, Norway, Denmark, Canada, and the United States expressed support for the ICC's warrant decision. . . In contrast to these statements, reactions by the Arab League, African Union, Russia, and China were characteristically critical of the court's decision." Golzar Kheiltash, *ICC Issues Historic Arrest Warrant for Sudanese President Over Darfur*, 5 INT'L ENFORCEMENT L. REP. 213 (2009).

<sup>246</sup> McDoom – Sudan Rules out Deal, *supra* note 229.

<sup>247</sup> Christopher Gosnell, *The Request for an Arrest Warrant in Al Bashir; Idealistic Posturing or Calculated Plan?*, 6 J. INT'L CRIM. JUST. 841, 845-46 (2008).

<sup>248</sup> Opheera McDoom, *Justice clashes with peace on Dafur Bashir warrant*, REUTERS, July 14, 2008, available at <http://www.reuters.com/article/topNews/idUSMCD42464620080714> [hereinafter McDoom – Justice clashes with peace].

<sup>249</sup> Sluiter, *supra* note 223, at 871.

<sup>250</sup> McDoom – Justice clashes with peace, *supra* note 248.

<sup>251</sup> Kheiltash, *supra* note 245.

dent Al-Bashir.<sup>252</sup> Mr. Ocampo explained how the evidence collected clearly shows the guilt of President Al-Bashir and that justice must be done for the victims of the conflict.<sup>253</sup> He expressed concern for the situation of the peace talks in Sudan but explained that he has to perform his judicial duties regardless of any political factors.<sup>254</sup>

### VIII. Conclusion

As to the situation of Al-Bashir it will probably be many years before Al-Bashir will ever be tried by the ICC, when considering the delicate balance of peace versus justice within Darfur and the fact that he is the current head of state of Sudan. However, speed in the area of criminal prosecution under international law has never been very fast. Radovan Karadzic evaded custody for 13 years, without causing serious damage to the ICTY's credibility. Since the ICC does not have a police force, it will be up to the states to act. The ICC should not rescind the arrest warrant nor negotiate an amnesty. The Court must stay true to its mandate and prosecute major war criminals or it risks becoming irrelevant. The risk of granting impunity for a major war criminal would undermine the effectiveness and need of the ICC.

While the U.S. still has many concerns about the ICC, its participation at the 2010 Review Conference and the recent statements and actions of the Obama administration suggests a shift in U.S. policy toward the ICC. Since the days of the Second World War, the U.S. has proclaimed its position as a supporter and leader in humanitarian law and in the prosecution of war criminals. The U.S. has finally realized that by sitting down at the table they gained the ability to shape and influence the Court in ways that meet their concerns. However, there is still a long to go before U.S. support for the Court is complete and unconditional.

While the Court has yet to complete one trial, and has failed to garner the support of several of the most powerful states, especially the U.S., it is still in operation, pursuing heads of states for war crimes, while continually adding more state parties as the years go by. Harold Hongju Koh, Legal Advisor at the U.S. Department of State, stated at a State Department Press Conference on June 15, 2010, "There are now 111 states parties. It's [Rome Statute] not going to go away."<sup>255</sup>

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<sup>252</sup> Charbonneau, *supra* note 174.

<sup>253</sup> Luis Moreno-Ocampo, *Now end this Darfur denial*, GUARDIAN, July 15, 2010, <http://www.guardian.co.uk/commentisfree/libertycentral/2010/jul/15/world-cannot-ignore-darfur>.

<sup>254</sup> Charbonneau, *supra* note 174.

<sup>255</sup> State Department Press Conference, *supra* note 136.