
Knights of the Court

The State Coalition Behind the International Criminal Court

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I. Introduction

In June 2011, the Tunisia became the 116th State Party to the International Criminal Court (ICC).¹ The number of ICC members has steadily increased since 1998, and the Court has, consequently, increased

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¹ Tunisia deposited its instrument of accession with the United Nations on June 24, 2011. Press Release, Tunisia becomes the 116th State to join the ICC's governing treaty, the Rome Statute, ICC-CPI-20110624-PR688 (June 24, 2011).

both its caseload and its role in defining the parameters of international criminal law.²

Not all nations, however, have supported these trends. The United States, not a member of the Court, has traditionally taken particularly great efforts to minimize the ICC's influence in the international system. The U.S. has, in connection with its ICC protests, removed troops from UN peacekeeping missions; refused to fund international criminal trials; vetoed the renewal of UN peacekeeping operations; revoked military aid to states that have supported the ICC; and threatened to halt humanitarian aid to ICC members.³ These tactics have won the U.S. some victories in the form of exemptions from the Court's jurisdiction; however, despite the United States' remarkable use of resources towards limiting the Court's global role, such tactics have had limited effect, and the ICC has expanded its reach over U.S. objections.

While some of the ICC's increasing role can be attributed to the tribunal system itself and its fleet of non-governmental supporters, an often overlooked force is the coalition of states that has served as the ICC's guardian in its first years. During this period, State Parties to the ICC, and in particular a subset of member states, have been critical in protecting the ICC. The nascent Court has lived in a veritable political minefield, and its success and relevance are largely due to a *de facto* coalition that has championed a strong and independent international judiciary.

To date, the coalitional success has been entirely overlooked; instead, the success of the ICC has been more readily attributed to global movements and non-state forces of civil society. This article hopes to correct this oversight, largely by recounting the various political disputes over the ICC.⁴ Using

² See *Prosecutor v Anto Furundzija*, IT-95-17/IT, Judgment, (10 December 1998) at para 227 (International Criminal Tribunal for the Former Yugoslavia, Trial Chamber) (describing the ICC's role in developing customary international law).

³ See generally Marc Weller, "Undoing the Global Constitution: UN Security Council Action on the International Criminal Court" (2002) 78 Int'l Affairs 693 (discussing early U.S.-ICC disputes); Mohamed El Zeidy, "The United States Dropped the Atomic Bomb of Article 16 of the ICC Statute: Security Council Power Deferrals and Resolution 1422" (2002) 35 V and J Transnat'l L 1503 (discussing 2002 dispute over ICC in United Nations Security Council); Aly Mokhtar, "The Fine Art of Arm Twisting: The U.S., Resolution 1422 and Security Council deferral power under the Rome Statute" (2003) 3 Int'l Crim L Rev 295 (same); Corrina Heyder, "The U.N. Security Council's Referral of the Crimes in Darfur to the International Criminal Court in Light of U.S. Opposition to the Court: Implications for the International Criminal Court's Function and Status" (2006) 24 Berkeley J Int'l L 650 (discussing U.S. actions in opposition to ICC).

⁴ The study of the ICC's evolution is also an examination of how international law is forged through a combination of treaty and subsequent state practice. To date, however, studies of the ICC have maintained a relatively narrow focus, limiting themselves to only one or two events in the ICC's history. No paper that this author is aware of has examined the developments of the ICC as an evolutionary process, a common omission in academia. See Oran R Young, "Regime Dynamics: The Rise and fall of International Regimes," (1982) 36:2 Int'l Org 277 at 277-278 (noting that the complexity of international legal regimes "makes it tempting to approach them in static terms, abstracting them from the impact of time and social change," a strategy that "cannot provide the basis for any comprehensive analysis"). Given the important political disputes that took place over a period of years, however, the ICC begs to be studied as a process rather than a moment of agreement. For this reason, examining the ICC as an evolving institution appears a previously unexplored issue of interest.

United Nations documents, contemporaneous media accounts, statements by diplomats, and various secondary sources, this article revisits the major political incidents concerning the ICC during the Bush Administration. While it is hoped that this account, itself, will enrich our understanding of the ICC, this article also uses the case study to assess how international law is forged.

In addition to this article being a state-centric discussion of the ICC's development, this article explains how power has influenced the Court's form. In this way, the article accepts the recent challenge of Nicole Deitelhoff that "[p]ower-based approaches ... cannot account for ... the ICC's institutional design."⁵ Quite to the contrary, this article argues: the Court's jurisdiction and caseload cannot be explained without discussing the various sources of power at play during the negotiations.

Ultimately, this article offers one example of how power dictates form, even in cases where normative factors play a hugely influential role in state motivations. However, it diverges from traditional power politics accounts of international law in that it concludes that the ultimate outcome of international disputes over international law can be dictated by a coalition of smaller states and not by a hegemonic force. For many that have previously disdained the concept of power politics for merely consequentialist reasons (i.e. they thought power politics was the game of the strong), the ICC example may lead some to reconsider their position.

The article proceeds as follows. Section I briefly offers a power-centric model of the forces behind international law, drawing in particular from the field of International Relations (IR).⁶ The effort here is not to cover *all forms* of power that influence international law, but rather to identify the different forms of power that influenced the Court in its infant years. Section II contains this article's case study: the early history of the ICC and the role of the state coalition that supported it. After reviewing the coalition's origins, it turns to the coalition's behavior during the first years of the Court's operation, focusing on two particular disputes between the coalition and the United States. First, the article examines the coalition's role in limiting the U.S. campaign to exempt itself from the Court's jurisdiction. Second, the article examines the 2005 Security Council referral of Sudan to the ICC, which took place over U.S. objections. In Section III, the article returns to explanations of how states exercise power during international disputes. It highlights two facets of the ICC coalition—size and diversity—that were critical to its success in negotiations. The article concludes by considering the

⁵ Nicole Deitelhoff, "The Discursive Process of Legalization: Charting Islands of Persuasion in the ICC Case" (2009) 63 *Int'l Org* 33 at 40.

⁶ As others have previously noted, this type of interdisciplinary inquiry can help legal scholars better understand what the underpinnings of international law. Kenneth W Abbot, "International Relations Theory, International Law, and the Regime Governing Atrocities in Internal Conflicts" (1999) 93 *Am J Int'l L* 361 at 362 (arguing IR has descriptive, explanatory, and prescriptive functions in assessing law); Anne-Marie Slaughter, Andrew S Tulumello & Stepan Wood, "International Law and International Relations Theory: A New Generation of Interdisciplinary Scholarship" (1998) 92 *Am J Int'l Law* 367 at 375.

importance of recognizing that power influences international law by examining how the ICC's attitude towards the prospect of power politics had a measurable effect on the outcome of certain smaller disputes. Put simply, refusing to acknowledge power politics does not reduce power's influence; indeed, an overly principled approach to these disputes merely affords opponents the opportunity to flex their own muscles unopposed.

II. Power, Inside and Out

As explained above, the story told here is one about power. In recent years, the academy's interest in power has been renewed and proposed power taxonomies—categorizations of the different types of power at play in the international system—have emerged with some frequency. This paper does not aim to add unnecessary ink to that debate and instead elects to employ the frameworks offered by others. Specifically, this paper begins within the four-faced taxonomy of power offered by Michael Barnett and Raymond Duvall⁷ and then incorporates the insights of others along the way.

In their recent article, Barnett and Duvall argued that international relations had failed to develop adequate conceptualizations of power, which “limits the ability of international relations scholars to understand how global outcomes are produced and how actors are differentially enabled and constrained to determine their fates.”⁸ The fault, in their opinion, was two-fold. Certain schools had run from discussions of power, and as a result their paradigms lacked considerable explanatory force for some of the most common types of interaction in the international system.⁹ At the same type, groups that had engaged in “power studies” had defined power too narrowly, thereby excluding obvious examples of power from their analyses.¹⁰ Barnett and Duvall's solution was to offer a single framework that accounted for the most important forms of power at play in the international system and would incorporate the insights of disparate schools; their result was a structure that categorized power along two dimensions, giving a four-fold taxonomy of power.¹¹

Though Barnett and Duvall offer four types of power that affect the international system, this article's focus is mainly trained on two: compulsory power and institutional power. These two types of powers constitute the types of power involved during the “interaction of specific actors,” in this case states.¹² Non-interactive forms of power, in contrast, are relatively less influential in the ICC story.¹³

⁷ Michael Barnett & Raymond Duvall, “Power in International Politics” (2005) 59 *Int'l Org* 39.

⁸ *Ibid* at 41.

⁹ *Ibid*.

¹⁰ *Ibid* at 41-42.

¹¹ *Ibid* at 48.

¹² *Ibid* at 45-47.

¹³ This article also uses a rather conservative notion of what power is, a definition analogous to Dahl's definition that “A has the power over B to the extent that [A] can get B to do something that B would not otherwise do.” Robert A Dahl, “The Concept of Power,” (1957) 2:3 *Behavioural Sci* 202 at 202-03. Dahl's definition of power has been the traditional definition used in

Finally, the line between compulsory power and institutional power is not clean. Barnett and Duvall themselves acknowledge that the distinction is sometimes difficult to draw.¹⁴ Because the focus here is simply on emphasizing the role of power in general, and not overly concerned on identifying the precise type of power that was most influential during the formation of the ICC, this article does not spend a lot of time worrying about where to draw the line. In general, the analysis simplifies Barnett and Duvall's model so that exercises of power that come through multilateral organizations, particularly during negotiations within the Security Council, are considered examples of institutional power; examples of power exercised outside the organization are deemed compulsory power. Finer line-drawing is unnecessary for the purpose of this paper and would unnecessarily complicate the explanation offered here about the Court's first years.

1. *Compulsory Power*

Barnett and Duvall describe compulsory power as the "direct control of one actor over the conditions of existence and/or the actions of another."¹⁵ Compulsion has been the traditional focus of international relations' focus on power, led primarily by the realist school.

Barnett and Duvall define compulsory power broadly enough to include normative forces like the shaming campaigns commonly led by transnational non-government organizations,¹⁶ and this article similarly adopts this categorization. However, the general focus of this article remains on the traditional sources of compulsory power, namely economic and military capabilities. Realists, for instance, ignore the force of norms and categorize compulsory power as either "military" or "latent," the latter defined as "the socio-economic ingredients that go into building military power... largely based on a state's wealth and the overall size of its population."¹⁷

While latent resources and military capabilities are reservoirs of power, a different issue is the manner in which states utilize these resources to influence regime negotiations. Since reservoirs of power alone are not enough to exercise influence, if a theory fails to explain how sources of compulsory power are operationalized it sheds very little light on particular

international relations for years. See e.g. John J. Mearsheimer, "The False Promise of International Institutions", (1994) *Int'l Security* 9 at 57. Constitutive and non-interactive forms of power can also effect the decisions of a state, but since they cannot be as strategically deployed by states, they do not fit within Dahl's vision of power as well.

¹⁴ Barnett & Duvall, *supra* note 7 at 51 (noting that it is "possible that a dominant actor maintains total control over an institution," which would be an example of compulsory power).

¹⁵ *Ibid* at 48.

¹⁶ *Ibid* at 50.

¹⁷ John J. Mearshimer, *The Tragedy of Great Power Politics* (New York: W. W. Norton & Company, 2001) at 55; see also Stephen M. Walt, *The Origins of Alliances* (Ithaca, NY: Cornell University Press, 1987). The most common source of latent power is economic capabilities, such as "control over raw materials, control over sources of capital, control over markets, and competitive advantages in the production of highly valued goods." Robert O. Keohane, *After Hegemony: Cooperation and Discord in the World Political Economy* (Princeton: Princeton University Press, 1984).

interactions between states.¹⁸ Commentators on compulsory power have therefore proposed a variety of mechanisms by which power is operationalized. Robert Gilpin, for instance, notes that one common tactic is the “use of side payments (bribes), sanctions, and/or other means.”¹⁹ Such carrot-and-stick approaches can include access to markets, offers of technology, offers of military support, and foreign direct investment. A second way for great nations to control regime content, realists argue, is through the offer of public good provision. This mechanism is central to realist variants of the hegemonic stability theory (HST), in which a hegemon offers a public good in exchange for a regime system (trade, financial, etc.) that it views as stable and in its interest.²⁰ The public goods offered by a hegemon can also be varied, ranging from a system of stabilized currencies to the maintenance of an open trading system.²¹ These goods, while non-excludable, are still offered by a larger power as a way to sweeten the large power’s proposal.

While scholars agree public good provision and side payments are common methods of influence in international relations, other schools have attacked realism’s singular focus on these mechanisms of influence as insufficient to explain a large number of agreements among nations.²² Some authors suggest that latent power may not be equally fungible for all issue areas and in some cases has simply no purchase.²³ The structure of certain negotiations—particularly those involving the formation of regimes and international organizations—can also limit the amount of economic pressure that can be placed by one actor on others. In some circumstances, states may be blocked procedurally from using bribes and threats by parliamentary procedure and other rules governing negotiating conventions. In the limited time span during which regime negotiations often take place, sometimes little opportunity presents itself to influence negotiations via latent mechanisms.²⁴ Still others argue there is also a lack of evidence that states use

¹⁸ Barnett & Duvall, *supra* note 7 at 50-51; see also *infra* notes 23-25 and accompanying text.

¹⁹ Robert Gilpin, “The Politics of Transnational Economic Relations,” in Robert O. Keohane & Joseph S. Nye, Jr., eds., *Transnational Relations and World Politics* (Cambridge: Harvard University Press, 1972) at 97; see also Robert Gilpin, *The Political Economy of International Relations* (Princeton: Princeton University Press, 1987) at c. 3.

²⁰ Stephen D. Krasner, “State Power and the Structure of International Trade” (1970) 28 *World Politics* 317; Gilpin, “The Politics of Transnational Economic Relations,” *ibid.* at 93-102; see also Duncan Snidal, “The Limits of Hegemonic Stability Theory” (1985) 39 *Int’l Org.* 579; Joanne Gowa, “Rational Hegemons, Excludable Goods, and Small Groups: An Epitaph for Hegemonic Stability Theory?” (1989) 41 *World Politics* 377.

²¹ See Krasner, *supra* note 20; Charles Kindleberger, *The World in Depression, 1929-1939* (Berkeley, CA: University of California Press, 1977) (theorizing hegemonic stability theory).

²² See e.g. Barry Eichengreen, “Hegemonic Stability Theories of the International Monetary System” in Jeffrey A. Frieden & David A. Lake, eds., *International Political Economy: Perspectives on Global Power and Wealth*, 4th ed. (New York: Routledge, 2000) 220 at 221 (arguing there is still “ambiguity about the instruments with which the hegemon makes its influence felt” during the course of negotiations); Oran R. Young, *International Governance: Protecting the Environment in a Stateless Society* (Ithaca: Cornell University Press, 1994) at c. 5.

²³ Young, *supra* note 22 at 119-120.

²⁴ G. John Ikenberry, “A World Economy Restored: Expert Consensus and the Anglo-American Postwar Settlement” (1992) 46 *Int’l Org.* 289.

economic penalties to punish states that oppose larger powers' efforts to introduce a new regime into the system, which leads to questions about whether sticks are used as often as realists suggest.²⁵ These criticisms, while not fully denying the role of compulsory power, suggest that a second form of interactive power influences the interaction of states during negotiations, one which Barnett and Duvall refer to as "institutional power."

2. Institutional Power

"Institutional power exists in actors' indirect control over the conditions of action of socially distant others," Barnett and Duvall explain.²⁶ The indirectness of institutional power, they elaborate, is a result of the fact that a single actor does not "control" an institution in the way that an actor controls a missile or an aid package.²⁷ Generally, an "institution has some independence from specific resource-laden actors," forcing actors that exercise power through institutions to do so through an agent they cannot perfectly manipulate.²⁸

The independence of international institutions has been discussed extensively in recent literature and a variety of explanations about the source of institutional independence have been offered.²⁹ Some have emphasized the "stickiness" or "frozen" nature of international organizations;³⁰ because reform of institutions requires significant resources, actors simply accept playing by old rules, even if those rules put them at a small advantage.³¹ Others have noted that the uncertainty of the international system sometimes makes it rational for states to favour independent organizations.³² And some scholars, particularly neoliberal institutionalists, have discussed how states can consciously elect to create independent tribunals in order foster international cooperation that leads to mutual gains.³³

Compared to discussions of compulsory power, the literature examining

²⁵ See e.g. Keohane, *supra* note 17 at 38. Carrots, like *ex ante* bribes, are much more common.

²⁶ Barnett & Duvall, *supra* note 7 at 48.

²⁷ *Ibid* at 51.

²⁸ *Ibid*.

²⁹ For a very useful overview of different theories of international organizational independence, see Michael N. Barnett & Martha Finnemore, "The Power, Politics, and Pathologies of International Organizations" (1999) 53 *Int'l Org* 699 at 707-10. See also José E. Alvarez, *International Organizations as Law-makers* (Oxford: Oxford University Press, 2006) at 585-620.

³⁰ G. John Ikenberry, "State Power and the Institutional Bargain: America's Ambivalent Economic and Security Multilateralism," in Rosemary Foot, S. Neil MacFarlane, & Michael Mastanduno, eds, *US Hegemony and International Organizations: The United States and Multilateral Institutions* (Oxford: Oxford University Press, 2003) 49 at 52; Robert O. Keohane, "International Institutions: Two Approaches" (1988) 32 *Int'l Stud Q* 379 at 384.

³¹ See Patrick Holden, *In Search of Structural Power: EU Aid Policy as a Global Political Instrument* (Burlington, VT: Ashgate, 2009).

³² Eric A. Posner & John C. Yoo, "Judicial Independence in International Tribunals" (2005) 93 *Cal L Rev* 1 at 17-18.

³³ Kenneth W. Abbott & Duncan Snidal, "Why States Act Through International Organizations" (1998) 42 *J Conflict Res* 3 at 16-23 (providing a variety of functions that independent international organizations serve to foster cooperation); Barnett & Finnemore, *supra* note 29 at 704-06.

how states exercise institutional power is rather undeveloped.³⁴ Barnett and Duvall are short on details when discussing institutional power, and neoliberal institutionalists—the most obvious candidate to discuss institutional power—largely have eschewed the subject.³⁵ But at least some scholars have discussed the exercise of power through international organizations. Susan Strange, for instance, discussed the notion of “political power,” which she described as control over the machinery of any institution, such that a state could use the machinery to compel obedience or conformity to their wishes and preferences from others.³⁶ Stephen Krasner has offered a more general notion of institutional power that focuses on the ability to affect the conditions of a negotiation, via strategies that employ pre-existing regimes and organizations.³⁷ According to Krasner, an actor can affect the conditions of negotiation in a variety of ways, including (1) determining the actors who are involved in the issue resolution, (2) dictating the rules of negotiations (e.g. who makes the first move, the scope of negotiations, etc.), and (3) changing the relative payoffs of competing proposals during the course of the negotiations.³⁸ An exercise of institutional power, therefore, can be as nominal as the selection of one negotiating forum over another, as intricate as the use of procedural rules to filibuster negotiations, or as devious as vote swapping and issue linkage.³⁹

The exercise of institutional power often has advantages compared to other mechanisms of coercion. One, where sticks and carrots are impossible because of time or resource constraints, political mechanisms may still be available. Two, institutional power can reduce the moments in which fights over regime form would end in mutually destructive behaviour like, for instance, the application of reciprocal sanctions between otherwise stable allies.⁴⁰ Third, a state may employ institutional power because the party

³⁴ To date, the most popular example of institutional power given by discussants of the Barnett and Duvall's framework is the creation of an international organization. The use of pre-existing organizations has gone almost entirely overlooked. One exception to this general rule can be found in Soo Yeon Kim, *Power and the Governance of Global Trade: From the GATT to the WTO* (Cambridge: Cambridge University Press, 2010) at 13-18 & 56-57 (outlining the exercise of institutional and compulsory power by the United States in the trade regime, particularly in the formation of the GATT).

³⁵ Barnett & Duvall, *supra* note 7 at 41.

³⁶ Susan Strange, *States and Markets* (New York: Pinter Publishers, 1994) at 25. Strange used the term “political power” to describe this type of power, but she describes essentially the same form of power that Barnett and Duvall classify as “institutional.”

³⁷ Stephen D Krasner, “Global Communications and National Power: Life on the Pareto Frontier” (1991) 43 *World Politics* 336 at 340.

³⁸ *Ibid* at 340.

³⁹ See Robert Jervis, “Realism, Game Theory, and Cooperation,” (1988) 40 *World Politics* 317 at 322; Ofer Eldar, “Vote-Trading in International Institutions” (2008) 19 *Eur J Int'l L* 3; David Leebron, “Linkages,” (2002) 96 *Am J Int'l L* 5 (discussing the increasing importance of issue linkage in international forums); see also Giulioio M Gallarotti, “Soft Power: What it is, Why it's Important, and the Conditions Under Which it Can Be Effectively Used” (2011) Wesleyan Division II Working Paper 57, online: <<http://wescholar.wesleyan.edu/div2facpubs/57>> (noting agenda control as form of institutional power).

⁴⁰ Since regime formation is a process, states can invest resources in efforts to establish a regime that is never codified.

wants to develop a regime with multiple partners simultaneously. In these circumstances, established regimes may be the most expedient forum for multiparty talks, but to effectively use these forums states must follow the established procedural rules (many of which eliminate the chance for bribery and similar strategies). In this way, political institutions have a catalytic effect, reducing the transaction and bargaining costs.⁴¹ These reasons are not exhaustive, but they do explain why a state could favour institutional mechanisms over other strategies to employ its latent power.⁴²

The exercise of institutional power is particularly predominant in legal regime negotiations, in part because pre-existing regimes are often used as the forums for new negotiations.⁴³ Negotiations for the formation of the World Trade Organization (WTO) and the new trade regimes that accompanied it all took place in the context of its predecessor, the General Agreement on Trade and Tariffs (GATT). The UN is another common focal point for regime negotiations, itself being entwined with many regimes.⁴⁴ But it is worth reiterating that institutional power only refers to state actions done for coercive purposes, namely to induce states to agree to a regime, rule or collective action that it otherwise would not desire. Power here does not involve any form of socialization resulting from membership in an organization;⁴⁵ when a state changes course as a result of institutional power, it does so begrudgingly, and not because its interests have changed.⁴⁶

Having laid out the traditional explanation of how power underpins international legal regimes and some of the procedural mechanisms by which power is exercised, the article now turns to the recent evolution of

⁴¹ Like chemical catalysts, the presence or absence of international institutions can also be determinative as to whether or not a certain outcome is achieved. Where transaction costs are potentially prohibitively high, international institutions can be critical.

⁴² Institutional power, like other mechanisms, has its limitations. Actors normally can only use pre-established regimes and organizations that have at least a *prima facie* relation to the issue area of the new regime. Nations would have great difficulty using the machinery of the WTO for negotiations on collective security. Actors also keep in mind that the use of institutional power in the negotiations of one issue area draws capital that could be used in other issue areas. This is not limited to political mechanisms of coercion. If state A threatens sanctions S against state B over issue X, then the rational state B will bow to the pressure of state A if $S > X$. However, if state A again threatens state B with sanctions S, but this time issue Y is in dispute, then state B will only acquiesce if $S > (X + Y)$. Similarly, if political pressure is placed on one issue area, a state must be aware that capital is lost for other current and future issues. Particularly in an era where many regimes are being simultaneously discussed and outright hegemony is not as clear-cut as it was even the most powerful nation is hard-pressed to use all of its potential institutional power on one issue, unless that regime was perceived as absolutely critical to its survival.

⁴³ James D Morrow, "Modeling the Forms of International Cooperation: Distribution versus Information" (1994) 48:3 *Int'l Org* 387 at 408-411.

⁴⁴ This is not always the case, of course. The Dumbarton Oaks negotiations outlining the United Nations, for instance, were conducted independent of the League of Nations or any other pre-existing regime. When negotiations are completed outside an established institutional framework, political mechanisms of coercion are largely absent from the negotiations; in these cases, coercion comes from other currencies.

⁴⁵ See also Barnett & Duvall, *supra* note 7 at 42 (excluding "persuasion" from their concept of power).

⁴⁶ This is not to preclude the possibility that established regimes may in fact change state interests; this question, however, is beyond the purview of the paper.

arguably the most important international legal institution to emerge in the last decade—the International Criminal Court. The analysis which follows seeks to examine the forces that shaped ICC’s formal rules and its less formal practices, and what tactics were so successful for the ICC coalition.

III. The Coalition Behind the ICC

This Section lays out the recent disputes between the United States and ICC supporters, focusing predominantly on disputes after the Court came into existence in 2002.⁴⁷ To give appropriate context, however, the discussion begins before negotiations over the Court commenced, in order to understand the origins of the coalition. After describing the dynamics of the coalition, the Section focuses on two different disputes between the United States and the coalition: (1) the effort of the U.S. to exempt itself from the ICC’s jurisdiction and (2) the 2005 debate in the United Nations Security Council over whether to refer Sudan to the ICC in connection with the atrocities in Darfur.

1. Overview of the ICC Coalition

A. Origins of the ICC Coalition

While the ICC coalition was not formally formed until 2002, the origins of today’s ICC coalition predate the Court itself. As early as 1995, states began to ally and join in a campaign for a permanent international criminal tribunal.⁴⁸ By 1996 these states had agreed to “create a permanent international court as soon as possible.”⁴⁹ The number of committed nations also began to grow significantly, forming a bloc that, between 1995 and June 1998, grew to approximately forty-two states.⁵⁰ This group referred to itself as the “Like-Minded Group” (LMG) and had collectively agreed to support a “strong,” independent judiciary charged with prosecuting the most grave international crimes.⁵¹ In 1997, the LMG informally agreed to four “cornerstone positions” that would dictate their principle foci for the court:

[One], inherent jurisdiction over war crimes, genocide, crimes against humanity and aggression...; [second,] a defined and constructive relationship with the UN Security Council...; [third,] an independent prosecutor able to initiate proceedings in addition to ICC cases being

⁴⁷ Because much of the material presented here is original research, this Part gives a large narrative of the events in question.

⁴⁸ Marlies Glasius, *The International Criminal Court: A global civil society achievement* (London: Routledge, 2006) at 22 (noting that the original coalition included Argentina, Canada, Norway, and Netherlands).

⁴⁹ Fanny Benedetti & John L Washburn, “Drafting the International Criminal Court Treaty” (1999) 5 *Global Governance* 1 at 20.

⁵⁰ Leila Nadya Sadat, “The Establishment of the International Criminal Court: From the Hague to Rome and Back Again” in Sarah B. Sewall & Carl Kaysen, eds, *The United States and the International Criminal Court: National Security and International Law* (Lanham, Maryland: Rowan & Littlefield Publishers, 2000) 31 at 43 n11.

⁵¹ For a list of the LMG states, see William A Schabas, *An Introduction to the International Criminal Court*, 2nd ed (Cambridge: Cambridge University Press, 2004) at 16 n54.

'triggered' by State complaints and/or referrals by the Security Council; and [fourth,] a recognition of the experiences of victims, particularly women and children, in armed conflict and the criminal law process.⁵²

The LMG would become the chaperone for proposals of an international court and worked closely with non-governmental organizations in spearheading a "strong court" movement as negotiators headed to Rome in the summer of 1998 for the final negotiations over a proposed international criminal court.⁵³

Though the LMG was vocal about the virtues of this general framework, history tends to forget that the LMG proposal was not the only serious design for the court developed at the time.⁵⁴ The LMG proposal, for instance, supported certain propositions that remained at odds with the proposal submitted by the International Law Commission.⁵⁵ In addition, the LMG initially found little support among the permanent members of the Security Council. States such as France and the United Kingdom, which would become critical supporters of the ICC in its first years of operation, were ambivalent about the LMG proposal at the start of the Rome negotiations.⁵⁶ Proposals for an independent and empowered Court similarly received opposition from many militarily active nations,⁵⁷ who feared that security externalities of an autonomous Court might jeopardize their military strength.⁵⁸ U.S. military leaders believed the ICC might hamstring U.S. hegemonic military capabilities by questioning the legitimacy of some military decisions and tactics.⁵⁹ In particular, the broad jurisdiction proposed for the ICC worried states because it abandoned the traditional requirement

⁵² Glasius, *supra* note 48 at 23.

⁵³ The Rome Conference's official name was the United Nations Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court.

⁵⁴ The LMG "framework" was in fact more of a guiding set of principles than a single, detailed proposal. Glasius notes that this loose agreement also helped keep the coalition cohesive by allowing single states to pursue minor policies. Glasius, *supra* note 48 at 23.

⁵⁵ Schabas, *supra* note 51 at 15.

⁵⁶ Glasius, *supra* note 48 at 24. The United Kingdom would effectively join the LMG position in late 1997 when it agreed to oppose proposals for Security Council oversight of the ICC. France never joined the LMG but would become a major participant in the later ICC coalition after it ratified the treaty in June 2000.

⁵⁷ For instance, China, the United States, Russia, India, and North Korea—the five largest military powers, as measured by number of active troops—are all not party to the ICC. For troop size information, see Center for Strategic & International Studies, online: CSIS <<http://www.iiss.org/publications/military-balance/>>.

⁵⁸ The term "security externalities" here is adopted from the work of Gowa and others who have examined levels of interstate trading and the security concerns of the states in question. Joanne Gowa, "Bipolarity Multipolarity, and Free Trade" (1989) 83 Am Pol Sci Rev 1245 at 1245-46. The concept simply notes that an international regime's secondary effects on state security can dictate state interest in that particular regime. One other nuance is that externalities are often state-specific, depending on the state's relative position in the international system.

⁵⁹ Sarah B Sewall, Carl Kaysen & Micheal P Scharf, "The United States and the International Criminal Court: An Overview" in Sarah B. Sewall & Carl Kaysen, eds, *The United States and the International Criminal Court: National Security and International Law* (Lanham, Maryland: Rowan & Littlefield Publishers, 2000) 1 at 16; Bruce Broomhall, *International Justice and the International Criminal Court: Between Sovereignty and the Rule of Law* (Oxford: Oxford University Press, 2003) at 166.

of sovereign consent before starting an investigation, effectively eliminating the traditional state check on international institutions.

Despite the concerns of the U.S. and others, the LMG's "strong court" movement gained momentum at the Rome drafting conference in June and July 1998.⁶⁰ The forty-odd state bloc entering Rome expanded to sixty-one members by the final days of negotiation.⁶¹ In addition, the bloc reached agreements with other non-LMG states through further negotiations.⁶² Given the overlap between the LMG and the later ICC coalition, the LMG's success offers the first opportunity to understand the later coalition and its strengths.

B. The ICC Coalition after Rome

For matters of simplicity, when this article refers to the "ICC coalition," it is referring to all states party to the court, the 116 nations that have now ratified the convention.⁶³ Some have rightfully noted that this body is not homogenous and that member states have often disagreed on key issues involving the Court.⁶⁴ That said, treating the membership as a coalition is reasonable on both a theoretical and empirical level.

Abstractly, while the different member states do not have identical interests, there is significant overlap in their preferences. Generally, the ICC's security externalities are significantly less for states parties than non-parties; while ICC opponents have described the Court as a force that undermines their individual security, various state members have explicitly linked a strong Court with particular security goals.⁶⁵ Many ICC state parties,

⁶⁰ See e.g. O Triffterer, ed, *Commentary on the Rome Statute of the International Criminal Court: Observers' Notes, Article by Article*, 1st ed, (Baden-Baden: Nomos Verlag, 1999) (describing debate and negotiation of each article at Rome); MC Bassiouni, *The Legislative History of the International Criminal Court* (New York: Ardsley, 2005) (recounting negotiation at Rome); A Cassese, P Gaeta & JWD Jones, eds, *The Rome Statute of the International Criminal Court* (Oxford: Oxford University Press, 2002); Schabas, *supra* note 51 (discussing Rome conference).

⁶¹ Schabas, *supra* note 51 at 15; Deitelhoff, *supra* note 5 at 50.

⁶² Fen Olser Hampson & Holly Reid, "Coalition Diversity and Normative Legitimacy in Human Security Negotiations" (2003) 8 Int'l Negotiation 7 at 35.

⁶³ An updated list of Member States can be found at: International Criminal Court, "The States Parties to the Rome Statute," online: ICC <<http://www.icc-cpi.int/Menu/ASP/states+parties/>>.

⁶⁴ See e.g. Daniel C Thomas, "Rejecting the U.S. Challenge to the International Criminal Court: Normative Entrapment and Compromise in EU policy-making" (2009) 46 Int'l Politics 376 at 382-83 (discussing diverging interests among European members of the ICC).

⁶⁵ The EU's pro-ICC stance became integrated into efforts to build a common foreign and security policy for Europe. Other states, like South Africa and Senegal, related their support of a strong ICC to their respective efforts to become regional leaders. Eastern European nations thought their support of the ICC would help them obtain EU membership and the corresponding economic benefits. These differing views about the ICC's "security externalities" became the critical wedge between nations and largely accounts for the different positions taken by states during the ICC's drafting sessions and afterwards. See Lawrence R Atkinson, "Global Use of the International Criminal Court: Jostling on the Pareto Frontier" (Paper presented to the Annual Convention of the International Studies Association, March 2008) online: at <http://www.allacademic.com/meta/p250991_index.html> (discussing externalities of the ICC); Mieczysław P Boduszyński & Kristina Balalovska, "Between a Rock and a Hard Place: How the U.S.-EU Battle over Article 98 played out in Croatia and Macedonia" (September 2003) 71 East European Studies Occasional Paper Series Woodrow Wilson International Center for Scholars online: <<http://www.wilsoncenter.org/topics/pubs/>>

therefore, share the view that the ICC has positive security effects.

The act of joining the Court only increases the overlap of interests between state members. Under Article 12 of the Rome Statute, the Court exercises automatic jurisdiction over crimes committed on the territory of a state party as well as over all suspects that are nationals of a state party. In contrast, jurisdiction over non-members is generally limited to cases where (1) a non-member consents to jurisdiction, (2) the non-member commits a crime on a member's territory, or (3) the matter is referred to the ICC by the Security Council. Because the Court's jurisdiction over a state imposes a cost, ICC members share an interest not shared by non-members: increasing the ICC's jurisdiction over non-parties, particularly through Security Council referrals, so that non-members are forced to bear the same costs.⁶⁶

The empirical evidence supports treating the ICC's state membership as a coalition. Between 2002 and 2005, these states' voting records on matters impacting the ICC was remarkably cohesive. In general, members of the ICC voted as a single bloc in the Security Council and General Assembly votes.⁶⁷ This voting pattern is not random but rather the result of member states negotiating among themselves before critical votes and reaching common positions.⁶⁸ Such behaviour is clearly coalitional and has minimized the United States' ability to fracture this bloc at critical moments.

Not all state parties to the ICC have played the same role, of course. Within this body, a smaller core group of states has taken the lead in promoting an active role for the Court.⁶⁹ Leadership has come in a couple of

71BalalovskaBoduszynskifinal.doc> (discussing EU and U.S. divergent interests on ICC and political pressure accordingly placed on Eastern European countries).

⁶⁶ This interest is particularly poignant if one accepts that states "are positional, not atomistic, in character," and therefore care about relative gains and costs. Joseph M Grieco, "Anarchy and the Limits of Cooperation: A Realist Critique of the Newest Liberal Constitutionalism" (1988) 42 Int'l Org 485 at 486; see also Robert Jervis, "Realism, Game Theory, and Cooperation" (1988) 40 World Politics 317 at 334-35.

⁶⁷ The most notable exceptions to this trend were Brazil's vote against the Darfur resolution in 2005 and Germany's abstention from the Security Council's extension of the ICC exemption in 2003; neither vote was decisive, however, and bloc voting by other ICC members in those cases proved decisive in both cases. See *Security Council resolution 1487 (2003) [on extension for 12 months of suspension of investigation or prosecution cases involving personnel from States not parties to the Rome Statute of the International Criminal Court]*, SC Res 1487, UN SCOR, 58th Sess, 4722nd Mtg, UN Doc S/RES/1487(2003) (12 June 2003) ["Resolution 1487"]; *Security Council resolution 1593 (2005) [on referring the situation in Darfur since 1 July 2002 to the Prosecutor of the International Criminal Court]*, SC Res 1593, UN SCOR, 60th Sess, 5158th Mtg, UN Doc S/RES/1593(2005) (31 March 2005) at para 1 ["Resolution 1593"]; see also *infra* note 149 and accompanying text (discussing Brazil's vote). France also abstained from the vote to extend the Security Council's year-long ICC exemption in 2003, while Spain, Bulgaria, and the United Kingdom voted for the extension. France's decision not to exercise its veto, however, was the more profound decision in that vote, and that decision was made after discussions with other ICC members.

⁶⁸ For examples of discussions among ICC members, see Thomas, *supra* note 64.

⁶⁹ Many of these countries are the same states that held leadership roles at Rome, but the group is not identical to that of the LMG. France, for instance, was not a member of the LMG; since its ratification of the ICC Statute in 2000, however, it has been one of the Court's strongest proponents. Circumstances have varied the roles of certain other states. Changes in national priorities (and in individual governments) have affected the state leadership behind the ICC. Canada's decreasing participation in the ICC movement, for example, seems partially attributable to the ascendancy of Paul Martin as prime minister in 2003, and the resignation of

forms. Strong supporters of the ICC, such as members of the EU and Canada, were among the first to ratify the ICC Statute. Such actions had an important 'snowballing' effect for the ICC coalition, causing various smaller states to accelerate their processes of ratification.⁷⁰

On the other hand, the member states that played critical roles varied greatly during the ICC's first nascent years. The change in the forum in which the international negotiations concerning the Court took place had a notable effect on the relative roles within the coalition. Canada and Germany have remained vocal supporters of the Court but their role in negotiations has been limited by their absence from the Security Council, where many of the negotiations related to the Court have taken place.⁷¹ Conversely, other smaller members' presence on the Security Council at opportune times has made them critical to the coalition's unified strategy. Benin, Romania, Tanzania, Argentina, and Chile are examples of smaller states that played a critical role in Security Council debates over the ICC because they occupied rotating Council seats when a debate implicating the Court arose. These states stood alongside France and the United Kingdom, both permanent members of the Council, and other Western states who supported the ICC, forming a unique opposition to the U.S.⁷² The ICC coalition, therefore, is greater than just the EU and Canada, and the ICC's growth would not have been the same without the support of the Court's other members.

2. *Exemptions to the ICC*

By April 2002, 66 nations had ratified the ICC Statute, enough to bring it into force.⁷³ By the time the ICC officially came into operation in July 2002, however, the role of the ICC coalition had changed dramatically. Starting in May 2002, the U.S. began an "active" campaign to limit the role and reach of the ICC, beginning with the well-known "unsigned" of the Rome treaty.⁷⁴

UN Ambassador Paul Heinbecker in 2004.

⁷⁰ Broomhall, *supra* note 59 at 169 (noting early ratification by these parties generated "political support and financial viability... that other States [particularly sub-Saharan African and Central and Eastern Europe] needed as a precondition for their own support").

⁷¹ Germany served a term on the Security Council in 2003 and 2004, but it was neither present at the initial Security Council debates on the ICC in 2002 nor at the Council negotiations on the Darfur referral in 2005.

⁷² While a largely distrusted member of the LMG at Rome, the United Kingdom has played a particularly important role in facilitating negotiations between the ICC coalition and the U.S. There was the constant worry that the U.K., in part due to its broader alliance with the U.S., would defect from the group. "Italy and Britain May Exempt U.S. From ICC," Associated Press (31 August 2005); Nicholas Kravov, "London Agrees to Keep Darfur Trials Out of ICC," *Washington Times* (5 February 2005) at A6. However, the U.K. has still ultimately stayed within the ICC coalition in the resolution of all major disputes and used its middle position to referee some disputes.

⁷³ See *Rome Statute of the International Criminal Court*, 17 July 1998, 2187 UNTS 90 at art 126 ["*Rome Statute*"] ("[The ICC] Statute shall enter into force on the first day of the month after the 60th day following the date of the deposit of the 60th instrument of ratification, acceptance, approval or accession with the Secretary-General of the United Nations."). The Statute officially entered into force on 1 July 2002.

⁷⁴ On 6 May 2002, Undersecretary of State John Bolton delivered a letter to the UN stating the asserted that despite signing the ICC Statute in late 2000, the U.S. "does not intend to become a

Off the record, at least one U.S. official confided at the time of the unsigning that it was the United States' "firm intention to do a lot of things to undercut the court."⁷⁵ This change in U.S. tactics forced the coalition to initiate a stand against the U.S. campaign, one that largely took place over the next three years.⁷⁶

Though unable to stop the ICC's founding, the U.S. has successfully secured a variety of jurisdictional exemptions for its nationals and service members, much to the chagrin of Court supporters. These exemptions have come via two methods. On four occasions, the U.S. has obtained language in Security Council resolutions that limited the ICC's jurisdiction over U.S. peacekeepers. In addition, the U.S. has signed numerous bilateral treaties termed "Article 98 agreements." Under these agreements, the signing state agrees not to turn any U.S. national over to the ICC.⁷⁷ Given that the ICC may not try any suspect in absentia (Article 63 of the ICC Statute), Article 98 agreements also effectively provide the nationals of any state that exercises its rights under these agreements with an exemption to the ICC. In April 2007, the U.S. reported that it had signed an Article 98 agreement with Montenegro, bringing the total number of Article 98 agreements to at least 106.⁷⁸

Accounts of U.S.-secured exemptions generally describe them as a success for the U.S. and a blow to the ICC movement. These accounts, however, overlook the successes of the ICC coalition in limiting the concessions the U.S. has obtained. Using a variety of tactics capitalizing on the coalition's size and diversity, pro-ICC states have limited both Security

party to the [Rome Statute of the ICC]" and that therefore "has no legal obligations arising from its signature [to the treaty] on December 31, 2000." Letter from John Bolton to Kofi Annan (6 May 2002) online: CNN <http://articles.cnn.com/2002-05-06/us/court.letter.text_1_letter-treaty-rome-statute>.

⁷⁵ Jess Bravin, "U.S. to Pull Out of World Court on War Crimes," *Wall Street Journal* (6 May 2002). Prior to spring of 2002, the Bush Administration had withdrawn from the ICC's preparatory meetings in hopes that the ICC might not be able to develop without the aid of U.S. leadership. Broomhall, *supra* note 59 at 178. Such a 'stillbirth' had been the fate of the International Trade Organization (ITO) and the League of Nations, which collapsed after U.S. support soured. Arthur A Stein, "The Hegemon's Dilemma: Great Britain, the United States, and the International Economic Order" (1984) 38 *Int'l Org* 355 at 380.

⁷⁶ For the rationale of U.S. objections to the Court, see *supra* note 58 (discussing security externalities) and Atkinson, *supra* note 65 (recounting objections by U.S. diplomats). Also see Jason G Ralph, *Defending the Society of States: Why America Opposes the International Criminal Court and its Vision of World Society* (Oxford: Oxford University Press, 2007) for an excellent summary of the U.S. position and an assessment through an IR lens.

⁷⁷ Sean D Murphy, "U.S. Efforts to Secure Immunity from ICC for U.S. Nationals" (2003) 97:3 *Am J Int'l L* 710 at 711.

⁷⁸ In October 2006, the State Department announced the U.S. had signed 103 Article 98 agreements. U.S. Department of State, Press Briefing, "Daily Press Briefing" (3 Oct. 2006), online: U.S. Department of State <<http://2001-2009.state.gov/r/pa/prs/dpb/2006/73500.htm>>. In November 2006, the White House announced it had signed agreements with Comoros and Saint Kitts and Nevis. White House, Press Release, "Memorandum for the Secretary of State" (22 November 2006), online: White House <<http://georgewbush-whitehouse.archives.gov/news/releases/2006/11/20061122-5.html>>. In April 2007, the U.S. signed an additional agreement with Montenegro: see "U.S. Montenegro Sign Defense, Troop Immunity Pacts," *Agence France Presse* (1 May 2007).

Council and bilateral exemptions, preventing U.S. nationals from enjoying blanket immunity.

A. Limiting Security Council Exemptions

Just before the ICC opened its doors in July 2002, state supporters found themselves collectively defending the Court from U.S. opposition. The day before the ICC became operational, the U.S. vetoed the renewal of the UN mission in Bosnia and Herzegovina (UNMIBH), announcing the campaign would not be reauthorized until U.S. peacekeepers were exempted from the ICC's jurisdiction.⁷⁹ In response, the ICC's members collectively moved to oppose U.S. efforts, believing that the American campaign jeopardized the Court's functionality and future. Some ICC members publicly accosted the U.S. for such a brazen political move.⁸⁰ Other states, particularly those on Council at the time, initiated a series of closed-door negotiations with the U.S., brokered by U.K. representative Jeremy Greenstock.⁸¹ Through these negotiations, ICC supporters won a number of concessions.

After the UNMIBH veto, the U.S. circulated a draft Council resolution that exempted all UN personnel from the ICC.⁸² Paragraph 1 of the draft resolution asked "that the ICC for a twelve-month period... not commence or proceed with any investigations or prosecutions" involving UN personnel.⁸³ The draft resolution noted this request was consistent with Article 16 of the ICC Statute, which allows for the Council to request the ICC delay an investigation for up to one year.⁸⁴ Paragraph 2 of the U.S. resolution, however, proposed that "on July 1 of each successive year, the request not to commence or proceed with investigations or prosecutions as

⁷⁹ *Agenda of the 4563rd Meeting of the Security Council*, UN SCOR, 57th Sess, 4563rd Mtg, UN Doc S/PV.4563 (30 June 2002) (voting on *Draft resolution [on extension of the mandate of the UN Mission in Bosnia and Herzegovina for an additional period terminating on 31 Dec. 2002]*, SC Res 712, UN SCOR, UN Doc S/2002/712 (30 June 2002) (vetoed by U.S.A 13-1-1)). Matthew Price, "UN 'Not Planning' Bosnia Pull-Out," BBC News (1 July 2002), online: BBC News <<http://news.bbc.co.uk/2/hi/europe/2078002.stm>> (reporting the Council temporarily extended the mission while negotiations continued); Murphy, *supra* note 77 at 710-711; *Agenda of the 4564th Meeting of the Security Council*, UN SCOR, 57th 2002, 4564th Mtg, UN Doc S/PV.4564 (30 June 2002) (extending UNIMBH authorization until 3 July 2002); *Security Council resolution 1421 (2002) [on continuation of provisions of Council resolution 1357 (2001) on Bosnia and Herzegovina until 15 July 2002]*, SC Res 1421, UN SCOR, 57th Sess, 4566th Mtg, UN Doc S/RES/1421(2002) (3 July 2002) (extending UNIMBH authorization until July 15, 2002).

⁸⁰ The European Parliament, for instance, passed a resolution "deeply deploring the fact that on 30 June 2002 the U.S. vetoed in the Security Council the extension." European Union, *European Parliament resolution on the draft American Servicemembers' Protection Act (ASPA)*, EP Res B5-0386/2002 (27 June 2002).

⁸¹ Martin Boer, "U.S. Troops Set for Immunity from New Court," *Financial Times* [London Edition] (13 July 2002) 6.

⁸² The draft is reprinted in Mokhtar, *supra* note 3 at 309 n50. An earlier draft had been circulated that exempted all UN peacekeepers from all international tribunals. See Murphy, *supra* note 77 at 167-168.

⁸³ Mokhtar, *supra* note 3 at 309 fn 50.

⁸⁴ *Rome Statute*, *supra* note 73 at art 16 ("No investigation or prosecution may be commenced or proceeded with under this Statute for a period of 12 months after the Security Council, in a resolution adopted under Chapter VII of the Charter of the United Nations, has requested the Court to that effect; that request may be renewed by the Council under the same conditions.").

set forth in paragraph 1 shall be renewed and extended during successive twelve-month periods thereafter unless the Security Council decides otherwise...."⁸⁵ This language made the general exception for UN peacekeepers continuous until the Council passed another resolution ending the exemption (and, given the U.S. veto in the Security Council, until the U.S. agreed). In this manner, the draft language skirted Article 16's limitation on Council-requested delays to one year, language that drafters at Rome had included explicitly to limit the Council's control over investigations.

Upon receiving the U.S. draft resolution, ICC proponents refused to support an open-ended exemption.⁸⁶ Protesting states pointed out that the draft resolution would undermine the nascent Court by creating "one law for the goose and another for the gander."⁸⁷ Others echoed Secretary General Annan, who concluded that the draft resolution, if passed, would "fl[y] in the face of treaty law since it would force States that have ratified the Rome Statute to accept a resolution that literally amends the treaty."⁸⁸ Adding weight to these arguments was the fact that the ICC supporters held a significant bloc in the Security Council, with six of the fifteen Security Council members in 2002 being state parties to the Court. ICC supporters also gained some political high ground during negotiations by holding a public Council debate in which more than thirty states condemned the U.S. position as an abuse of its power.⁸⁹ The combination of these factors affected the United States' position, and during the course of negotiations the hegemon agreed to limit the duration of the exemption to one year. At the conclusion of the year, the resolution would have to be renewed by a Council vote.⁹⁰ With all Council members satisfied by this concession, Resolution 1422, requesting a general exemption for all UN peacekeepers for one year, was passed unanimously.⁹¹

The consequence of the change from an open-ended to temporal exemption was felt in 2004, when the U.S. tried to renew Resolution 1422 a second time (Resolution 1422 was renewed in 2003 on a 12-0-3 vote, with

⁸⁵ Bryan MacPherson, "Authority of the Security Council to Exempt Peacekeepers from International Criminal Court Proceedings," *ASIL Insights* (June 2002), online: ASIL <http://www.asil.org/insigh89.cfm#_edn8>.

⁸⁶ *Agenda of the 4568th Meeting of the Security Council*, UN SCOR, 59th Sess, 4568th Mtg, UN Doc S/PV.4568 (10 July 2002).

⁸⁷ Paul Heinbecker, "The Changing International Stage" (Presentation delivered at the Chumir Foundation, Calgary, May 2004), online: <<http://www.heinbecker.ca/Speeches/ChumirSymposiumMay2004.pdf>>. Heinbecker was the Canadian ambassador to the United Nations during the 2002 negotiations.

⁸⁸ Letter from Kofi Annan to Colin Powell (3 July 2002), online: AMICC <http://www.amicc.org/docs/SG_to_SS.pdf>.

⁸⁹ See *Agenda of the 4568th Meeting of the Security Council*, *supra* note 86.

⁹⁰ For a discussion of this debate from the EU's perspective, see Thomas, *supra* note 64 at 381-83.

⁹¹ The compromise took the first paragraph of the U.S. draft proposal but reduced the language that automatically renewed the request for ICC exemption to a statement merely expressing the "intention to renew the request." *Security Council resolution 1422 (2002) [on suspension for 12 months of investigation or prosecution cases involving personnel from States not parties to the Rome Statute of the International Criminal Court]*, SC Res 1422, UN SCOR, 57th Sess, 4572nd Mtg, UN Doc S/RES/1422(2002) (12 July 2002) at para 2.

France, Germany, and Syria abstaining⁹²). By June 2004, seven states indicated they would abstain on a resolution that renewed the exemption, presenting a coalition that prevented the U.S. from obtaining the requisite nine 'yes' votes needed to pass a Council resolution. Though the whip count was not officially released, media accounts reported the nations signalling an intention to abstain were France, Spain, Germany, Brazil, Chile, Benin and Romania—all members of the ICC.⁹³ As resistance grew to the U.S. position, non-ICC members also voiced their opposition to the continuation of exemptions.⁹⁴ Chinese officials indicated that China would veto any quick vote offered by the U.S. without debate and also abstain on any other vote.⁹⁵ The confluence of opposition was insurmountable for U.S. diplomats. In late June, the U.S. circulated a revised proposal to Council members that would have made the one-year extension explicitly non-renewable.⁹⁶ When this compromise found no suitors, the U.S. dropped the issue and merely pulled a handful of U.S. peacekeepers from UN missions in protest.⁹⁷

Though one explanation for the U.S. failure may be that ICC members became increasingly indignant at the ICC exemption and, therefore, increasingly willing to oppose the U.S., two other factors more likely account for the change of U.S. fortunes in 2004. One was the expanding foreign policy agenda of the United States during the 2000s and central role the Security Council played in this agenda. Despite its trouble in securing Council approval of the invasion of Iraq in 2003, the U.S. had nonetheless used the Security Council as an international "legislature" to pass resolutions in connection with its "Global War on Terror."⁹⁸ Moreover, by 2004 the United Nations had established the assistance mission in Iraq through Security Council Resolution 1500, but the resolution was due for renewal in August 2004.⁹⁹ As the U.S. global campaign on terrorism and the war in Iraq both intensified, the U.S. likely believed its political stores needed to be rationed, and the issue linkages that were necessary to secure exemptions in 2002 were too costly in 2004.

Secondly, the ICC's increasing membership in its first years strengthened the power of its coalition, both globally and within the Security Council.

⁹² See *Resolution 1487*, *supra* note 67.

⁹³ Mark Turner, "U.S. Struggles to Win Immunity for its Troops," *Financial Times* (9 June 2004); "U.S. puts forward compromise proposal on war crimes court," *Xinhua* (23 June 2004).

⁹⁴ To reiterate, these states are not members of the ICC coalition, as defined by this article.

⁹⁵ Chinese officials linked their new position to efforts to refuse the U.S. military a "blank check." Turner, *supra* note 93; "China Will Not Back U.S. on Immunity from New Court," *Reuters* (18 June 2004). Media accounts also linked the new Chinese position to its displeasure with Taiwanese attempts to achieve observer status in the World Health Organization. Evelyn Leopold, "Opposition Growing to U.S. Exemption on Global Court," *Reuters* (27 May 2004).

⁹⁶ Jonathan Birchall, "Washington Seeks Compromise over ICC Immunity," *Financial Times* (23 June 2004) at 8.

⁹⁷ U.S. Defense Department, Press Briefing, "Defense Department Operational Update Briefing," (1 July 2004), online: <<http://www.defense.gov/transcripts/transcript.aspx?transcriptid=2741>>.

⁹⁸ Stefan Talmon, "The Security Council as World Legislature" (2005) 99 *Am J Int'l L* 175.

⁹⁹ *Security Council resolution 1500* (2003) [on establishment of the UN Assistance Mission for Iraq], SC Res 1500, UN SCOR, 58th Sess, 4808th Mtg, UN Doc S/RES/1500 (14 August 2003).

While ICC members occupied six Council seats in 2002 and five in 2003, the election of Benin, Brazil, and Romania to rotating non-permanent seats on the Council in 2004 gave the ICC a quorum of seven seats, sufficient to block renewals without any one state having to either: use a veto or directly vote against a U.S. proposal. With seven votes on the Council, ICC members could form a coalition to block exemptions and publicly expressed intent to do so early on during discussions. This broad-based opposition, moreover, was effective because it distributed the costs of opposition among multiple members. While the ICC could have technically halted U.S. proposals before obtaining this quorum of seats—both the U.K. and France have vetoes but use them rarely¹⁰⁰—such a strategy would have placed these costs on a single state. By contrast, the passive opposition by collective abstention in 2004 made it significantly more difficult for the U.S. to coax support.

The ICC coalition's ability to end general ICC exemptions in 2004 was prefaced by the concessions obtained during the 2002 negotiations with the U.S.. The adjustment of the 2002 agreement, in turn, reflects a common method by which states find a mutually agreeable framework for cooperation.¹⁰¹ Realists and neoliberals alike have noted that terms of international agreements reflect the distribution of resources and power in the international system.¹⁰² Given that the U.S. was willing to make a significant compromise on its initial proposal, one can infer that, as early as 2002, the coalition of pro-ICC supporters was a force capable of making demands, even from the system's superpower. Moreover, given that the trend of exemption agreements has leaned towards the pro-ICC position of late, one can also infer the coalition's power is growing in relation to U.S. power. Since 2003, the Security Council has not granted a general exemption from the ICC's jurisdiction.

At the same time, the ICC coalition found it necessary to compromise with the U.S., falling back to a secondary position in accepting the temporary exemption in 2002. Similarly, members in 2003 accepted one more extension. The U.K. and Spain, both ICC members on the Council in 2003, voted for the renewal resolution; even France, which chose to abstain on the vote, did not exercise its veto. During both the 2002 and 2003 votes, this compromise was almost necessary, as the coalition was too weak on the Council to press the issue. When these negotiations began, many states were horrified at the prospect of having to compromise with the U.S.; ICC parties claimed that the

¹⁰⁰ The connection of political power to latent and material capabilities likely also explains why states that nominally have the same political tools at its disposal use them with varying frequencies. France and the U.K.'s hesitancy to use their Security Council vetoes, for instance, may be explained by their decline since the formation of the Council. See Steve Chan, "Power, Satisfaction and Popularity: A Poisson Analysis of UN Security Council Vetoes" (2003) 38 *Cooperation & Conflict* 339 at 347 (analyzing the varying frequencies of states' exercise of vetoes).

¹⁰¹ Barbara Koremenos, "Loosening the Ties that Bind: A Learning Model of Agreement Flexibility" (2001) 55 *Int'l Org* 289.

¹⁰² See e.g. Barbara Koremenos, Charles Lipson & Duncan Snidal, "The Rational Design of International Institutions" (2001) 55 *Int'l Org* 761 at 761; Richard H Steinberg & Jonathon M Zasloff, "Power and International Law" (2006) 100 *Am J Int'l L* 74.

U.S. was “hijacking” the ICC Statute, and that a resolution “would effectively kill the Court before it is born.”¹⁰³ After negotiations, however, ICC states would acknowledge they were “very pleased” or at least “satisfied” with the compromise for the moment.¹⁰⁴

While this flexibility paid dividends in only two years, it remains unclear whether the ICC coalition would have fared similarly well had it refused to compromise with the U.S. in 2002 and 2003. While it is difficult to estimate counterfactuals, one can note that European nations believed the U.S. would continue its strong-arm tactics if the ICC coalition did not compromise. One European official argued that the U.S. was completely willing to “kill peacekeeping and the ICC with one stone.”¹⁰⁵ Had the U.S. pressure continued, the totality of hegemonic pressure may have in fact strangled the court at its birth. Even if the Court had survived, however, relations between the U.S. and the ICC coalition certainly would have soured beyond the state that existed in the first years of operation. Instead, the two sides remained cordial during discussions, allowing negotiations to continue. This cordiality probably minimized the minimal U.S. retaliation in 2004 when it could not renew the temporary exemption. This cordiality was even more important in 2005 during negotiations over the Darfur referral, explored later in this article.

B. Limiting Bilateral Exemptions

Like the Security Council strategy, the U.S. Article 98 exemption campaign has not been an absolute success. The campaign, begun after the compromise on Resolution 1422, has largely relied upon the United States’ ability to offer material sticks and carrots to coerce agreements.¹⁰⁶ One main stick for the U.S. was the *American Servicemembers’ Protection Act*, passed by Congress in 2002. This legislation prohibited U.S. military aid to any ICC member that had not signed a bilateral agreement with the U.S.¹⁰⁷ Congress

¹⁰³ Fiji Representative to the Preparatory Commission for International Criminal Court, Statement, (7 July 2002), online: United Nations Information Service <<http://www.unis.unvienna.org/unis/pressrels/2002/13008.html>>.

¹⁰⁴ Martin Boer, “U.S. Troops Set for Immunity from New Court,” *Financial Times* (London Edition) (13 July 2002) at 6.

¹⁰⁵ Carola Hoyos, “U.S. Takes Chance to Target Peacekeeping,” *Financial Times* (2 July 2002) at 11.

¹⁰⁶ In certain limited cases, the U.S. has employed non-traditional forms of leverage. Macedonia, for instance, agreed to a bilateral agreement after the U.S. agreed to refer to the former country as “Macedonia” rather than the “Republic of Macedonia” in the text of the agreement (the Balkan state is currently in a dispute with the Greek region of Macedonia over the country’s proper name). See U.S. House of Representatives, 108 Cong Rec H7513 (23 July 2003) (statement of Rep Carolyn Maloney); See also Rep Carolyn Maloney, Press Release, “Bush Administration’s November Surprise to Unilaterally Recognize FYROM as Macedonia: Maloney Blasts Decision As ‘Harmful to Greece & U.S. Interests in Balkans’” (5 November 2004), online: U.S. House of Representatives <<http://maloney.house.gov/press-release/bush-administration%E2%80%99s-november-surprise-unilaterally-recognize-fyrom-macedonia>> (referring to the Congresswomen’s earlier condemnation of the Bush administration’s policy of permitting Article 98 to be signed using the name “Macedonia”).

¹⁰⁷ *American Servicemembers’ Protection Act of 2002*, §2001, Pub L No 107-593 (2002), Amdt 3597, HR 4775. (The Act exempted certain U.S. allies.).

also later passed an amendment that prohibited ICC members that had not signed Article 98 agreements from receiving humanitarian aid from the U.S. "Economic Support Fund."¹⁰⁸ Even when the U.S. does not directly threaten another state via explicit legislative provisions, its massive economic and military influence gives it substantial negotiating leverage. McGoldrick has connected many of the Article 98 agreements to economic and military relationships between the U.S. and the other signing state:

[I]n August 2002 Romania received the first installment of substantial financial assistance from the US for flood aid/disaster relief.... Kyrgyzstan has been a base for US anti-terrorist operations. Gambia has a traditional role of sending peacekeepers.... A small group of US military personnel maintain an emergency airfield in Tajikistan. Israel is a major US ally and receives massive financial support from it. Pakistan has become a particularly important ally in the war against terrorism....¹⁰⁹

U.S. efforts, however, have been curtailed when ICC proponents apply their own economic leverage to nations considering a pact with the U.S.. After the U.S. signed its first agreement with Romania in August 2002, for instance, EU nations (all of which are ICC members) announced an intention to develop a common position on the U.S. campaign. In addition, they advised states aspiring to join the EU to refrain from signing agreements until the EU position had been announced.¹¹⁰ On September 30, 2002, the EU released its "Guiding Principles" on Article 98(2) of the ICC Statute. In this document, the EU concluded that the U.S. Article 98 agreements were inappropriately broad and that EU states should not sign them as drafted.¹¹¹ In light of EU pressure, ten states scheduled to accede to the EU announced in July 2003 that they would subscribe to the EU's common position and reject U.S. overtures to sign Article 98 agreements.¹¹²

In some ways, the success of the U.S. exemption campaign has been successful only when the EU has refused to employ its own economic strength. During the Article 98 campaign, for instance, the U.S. threatened many members of the African, Caribbean and Pacific Group of States (ACP) with promises to withdraw aid if they refused to sign Article 98 agreements. Some of these nations approached members of the ICC coalition, particularly the EU, begging for the coalition to compensate them for lost aid.¹¹³ While

¹⁰⁸ *Foreign Operations, Export Financing and Related Programs Appropriations Act, 2005*, §574, Pub L No 108-447, Amdt 706, HR 4818. (Note that for fiscal year 2006, the stipulation jeopardized \$326.6 million of U.S. economic assistance for twelve nations.).

¹⁰⁹ Dominic McGoldrick, "Political and Legal Responses to the ICC," in Dominic McGoldrick, Peter Rowe & Eric Donnelly, eds, *The Permanent International Criminal Court: Legal and Policy Issues* (Oxford: Hart Publishing, 2004) 389 at 427-28.

¹¹⁰ Elizabeth Becker, "European Union Urges Aspirants to Rebuff U.S. on World Court," *New York Times* (14 August 2002) at A11; see also Thomas, *supra* note 64 at 383-87 (discussing EU responses to U.S. bilateral campaign).

¹¹¹ Council of the European Union, Press Release, "Conclusions of the Council of the European Union on the ICC," (30 Sept. 2002).

¹¹² McGoldrick, *supra* note 109 at 394. The EU subsequently stated that it would not consider EU applicants' position on the ICC in connection with their EU application.

¹¹³ Parliamentarians for Global Action, Memorandum, "ACP-EU Joint Parliamentary Assembly

some ICC states supported the idea of compensation, the EU eventually came to the official position that it would not compensate ACP states for the lost aid.¹¹⁴ The reason for refusing compensation, interestingly, was not a lack of resources. As one EU Council representative explained, the EU ultimately decided it “‘simply didn’t want to play the same game as the U.S.’”¹¹⁵ While this decision was principled, the ICC coalition’s decision to remain above the realpolitik fray afforded the U.S. a greater opportunity to push its campaign. Subsequently, 51 of the 79 ACP states reportedly signed Article 98 agreements with the U.S..¹¹⁶

From another perspective, however, the U.S. bilateral campaign was only initiated after earlier strategies were blocked by ICC supporters; therefore, U.S. exposure relates directly to its compromise with ICC supporters in earlier negotiations like that over Resolution 1422. Being forced to resort to bilateral negotiations, in turn, has left the U.S. exposed to ICC prosecution in certain critical areas. Public records show the United States has signed no Article 98 agreements with OECD states and only 10 of the 50 largest GDPs.¹¹⁷ The U.S. has also failed to secure agreements where ICC jurisdiction would appear to have the greatest security externalities (i.e. where a U.S. military campaign might likely take place in the near future)—for instance, in North Korea, Iran, Libya, and Syria.¹¹⁸ Some of these states are unlikely to ever sign an Article 98 agreement with the U.S., not because they support the ICC in principle but because they believe the tribunal can be used “as a tool against domination by militarily superior powers.”¹¹⁹

3. *The Expansion of the ICC: Resolution 1593*

Even with the exemptions obtained by the United States, the ICC’s influence continues to grow. One major step came in 2005, when the Security Council referred it the situation in Darfur, Sudan.¹²⁰ The Sudan referral was both the first time the ICC investigated a case involving a state not party to the Court and the first time the Council made use of a permanent, rather than *ad hoc*, forum for judicial referrals.¹²¹ It also confirmed the nascent court

Affirms Principle of Compensation for Developing Countries Suffering Consequences of Bilateral Non-Surrender Campaign,” (16 October 2003), online: AMICC <www.amicc.org/docs/ACP_EU10_03.pdf>.

¹¹⁴ Sibylle Scheipers & Daniela Sicurelli, “Empowering Africa: Normative Power in EU-Africa Relations” (Paper delivered at the European Union Studies Association, May 17 2007), online: <<http://aei.pitt.edu/8035/>>.

¹¹⁵ *Ibid.*

¹¹⁶ Georgetown Law Library, “International Criminal Court—Article 98 Agreements Research Guide,” online: Georgetown University Law Centre <http://www.ll.georgetown.edu/intl/guides/article_98.cfm>.

¹¹⁷ *Ibid.*

¹¹⁸ *Ibid.* Even though those nations are not party to the ICC, Article 12(3) of the ICC Statute would allow these nations to refer incidents to the ICC.

¹¹⁹ Hirad Abthani, “The Islamic Republic of Iran and the ICC” (2005) 3:3 *J Int’l Crim Justice* 635 at 643; see also Steven C Roach, *Politicizing the International Criminal Court: The Convergence of Politics, Ethics, and Law* (Lanham, MD: Rowman & Littlefield Publishers Inc, 2006) at 146.

¹²⁰ *Resolution 1593*, *supra* note 67.

¹²¹ Prior to Darfur, the ICC had received three cases self-referred to the ICC by State Parties—one

as a genuinely global tribunal, raising it to an echelon above multilateral and regional courts. Even as late as fall 2004, however, the likelihood of the ICC receiving a case via Security Council resolution was doubted by scholars and diplomats alike. One commentator in late 2004 lamented, "[t]he prospect of Security Council referral of cases to the ICC, once lauded as the most viable and likely 'trigger mechanism' to bring cases before the Court, now seems unthinkable because of resistance from the United States."¹²² The ICC's sudden reversal of fortunes was in large part due to the size, diversity, and tactical strategy of its core supporters.

From Rome until Darfur, ICC proponents and the U.S. remained in deadlock. During this period, the self-interested play for both groups was to defect from the other such that ICC members independently developed the Court without any support from (and sometimes under heavy opposition applied by) the U.S.. In foreign affairs, however, changes in the international system often arise in the wake of an event that serves as a "political shock" that changes either the distribution of power or the interests of states.¹²³ In the case of the ICC, Darfur served as that shock by presenting the first situation since the ICC's birth in which states felt politically obligated to support a referral of an international situation to a judicial tribunal. The United States, in particular, had committed itself to supporting such a referral; in September 2004, U.S. Secretary of State Powell had publicly labelled Darfur a case of "genocide" and stated the local *janjaweed* should "bear responsibility" for the atrocities.¹²⁴ Though a few Council members were hesitant to refer the situation, international support was great enough that the pertinent issue quickly became not whether to refer Darfur to a tribunal, but what type of tribunal the Security Council would select to adjudicate the situation.¹²⁵

Even with Darfur bringing states back to the negotiating table, the relevant parties still differed over what tribunal would best serve as the organ for investigating and possibly prosecuting the referred cases. ICC advocates favoured referral of the Darfur situation to the ICC, which would accept jurisdiction under Article 13(b) of the ICC Statute.¹²⁶ The U.S., fearing the prospect of setting a precedent and adding to the legitimacy of the ICC,

by Uganda in 2003, one by the Democratic Republic of Congo in 2004, and one by the Central African Republic in 2005.

¹²² William A Schabas, "United States Hostility to the International Criminal Court: It's all about the Security Council" (2004) 15 Eur J Int'l L 701 at 702.

¹²³ Paul F Diehl, Charlotte Ku & Daniel Zamora, "The Dynamics of International Law: The Interaction of Normative and Operating Systems" (2003) 57 Int'l Org 43.

¹²⁴ John R Crook, "U.S. Proposes New Regional Court to Hear Charges Involving Darfur, Others Urge ICC" (2005) 99 Am. J Int'l L 501 at 501.

¹²⁵ Under game theory terminology, Darfur suddenly turned the "Deadlock" scenario into a game known as "Battle of the Sexes." For a description of the ICC debate analyzed through game theory, see Atkinson, *supra* note 65.

¹²⁶ See *Rome Statute*, *supra* note 73 at art 13(b) ("The Court may exercise its jurisdiction with respect to a crime referred to in article 5 in accordance with the provisions of this Statute if...[a] situation in which one or more of such crimes appears to have been committed is referred to the Prosecutor by the Security Council acting under Chapter VII of the Charter of the United Nations.").

favoured any of a number of non-ICC forums taking the case.¹²⁷ In early 2005, for instance, U.S. officials circulated a proposal for the creation of a new regional “Sudan Tribunal” based in Arusha, Tanzania, to be jointly administered by the UN and the African Union (AU).¹²⁸ Most Council members, however, remained uninterested in any options other than the ICC.¹²⁹ By early February 2005, a coalition of nine states—a majority large enough to block U.S. proposals—had taken the position that an ICC referral was the only acceptable solution.¹³⁰ By mid-February, press reports stated twelve of the fifteen members in the Security Council preferred the ICC option over any other.¹³¹

Just as the increasing number of ICC members influenced the exemption debate in 2004, the large coalition proved critical in settling the Darfur dispute. By 2005, ICC membership in the Security Council grew to a supermajority—nine states—such that bloc voting gave it the requisite nine votes necessary to pass a resolution without any additional support.¹³² Whereas the seven-member group of ICC states had merely been a blocking coalition in 2004, the additional members gave the group the positive power to undertake its own initiatives in 2005.¹³³ The coalition was still unable to override the U.S. veto. Nevertheless, ICC proponents could deliberately force a vote in order to impose the costs of a veto—those associated with appearing to publicly condone atrocities—on the United States.¹³⁴ U.S. leaders were conscious of this new risk, and Ambassador Prosper warned early in the Darfur debate that the U.S. did not want to be forced into a “thumbs-up or thumbs-down” vote on the ICC.¹³⁵ Many ICC members on the Council, however, began to do exactly that, stating that the ICC was the only appropriate forum to receive the Darfur referral.¹³⁶

After the U.S. proposals failed to garner support, the ICC coalition made

¹²⁷ Crook, *supra* note 124 at 501.

¹²⁸ Warren Hoge, “U.N. Finds Crimes, Not Genocide in Darfur,” *New York Times* (1 February 2005), online: NYT <<http://www.nytimes.com/2005/02/01/international/africa/01sudan.html>>; Judy Aita, U.S. Department of State – Bureau of International Information Programs, “African Union Tribunal Proposed for War Crimes in Darfur” (9 February 2005), online: ReliefWeb <http://reliefweb.int/sites/reliefweb.int/files/reliefweb_pdf/node-169236.pdf>; John R Crook, “U.S. Proposes New Regional Court to Hear Charges Involving Darfur, Others Urge ICC” (2005) 99 Am J Int’l L 501 at 501-502.

¹²⁹ *Agenda of the 5158th Meeting of the Security Council*, UN SCOR, 60th Sess, 5158th Mtg, UN Doc S/PV.5158 (1 April 2005).

¹³⁰ “Highlights of new US draft on Sudan at UN,” *Reuters* (15 February 2005) (noting “at least nine other council members prefer[] the International Criminal Court that Washington opposes....”).

¹³¹ “UN Council Deadlocked over Court for Darfur Trials,” *Reuters* (18 February 2005).

¹³² The ICC members on the Council in 2005 were Argentina, Benin, Brazil, Denmark, France, Greece, Romania, Tanzania, and the United Kingdom.

¹³³ Chan, *supra* note 100 at 358.

¹³⁴ *Ibid* at 344.

¹³⁵ Quoted in Colum Lynch, “U.S., Europe Debate Venue for Darfur Trials,” *Washington Post* (21 January 2005) at A11.

¹³⁶ See Mark Turner, “US Urges UN Oil Sanctions over Darfur,” *Financial Times* (2 February 2005) (quoting Jean Marc de la Sabliere, French ambassador to the UN, as suggesting that referring Darfur to the ICC would mark “progress in civilization” and that no proposed alternatives was a “good option”); *Agenda of the 5158th Meeting of the Security Council*, *supra* note 129 at 7 & 9.

the next move. On March 23, France circulated a formal draft resolution to other Council members that referred Darfur to the ICC.¹³⁷ French officials claimed they had assurances of support from eleven Council members¹³⁸ and announced it would call for a public vote, which would force the U.S. into the awkward position of vetoing the only referral proposal that had sufficient support among Council members.¹³⁹ Faced with the mounting pressure, the U.S. employed a series of last minute strategies to delay the vote and win more concessions. On March 24, U.S. Secretary of State Condoleezza Rice called French Foreign Minister Michel Barnier and reportedly implied that the U.S. would veto the French proposal as drafted.¹⁴⁰ The French delegation subsequently delayed the vote, and leaders from France, the U.K., and the U.S. began a series of negotiations to construct a resolution the U.S. would not oppose. On March 31, the U.S. finally dropped its opposition to the ICC referral, agreeing to abstain on the vote.¹⁴¹ Resolution 1593, referring the Darfur situation to the ICC, passed 11-0 with four abstentions.¹⁴²

A. The Language of Resolution 1593

Through the last-minute negotiations, the U.S. obtained a number of concessions that limited the jurisdiction of the ICC. Most notable was Article 6 of Resolution 1593, which decided that

...nationals, current or former officials or personnel from a contributing State outside Sudan which is not a party to the Rome Statute of the International Criminal Court shall be subject to the exclusive jurisdiction of that contributing State for all alleged acts or omissions arising out of or related to operations in Sudan.¹⁴³

The French draft proposal, circulated in late March, had included an ICC exemption, but one much more limited in scope. In the last hours of negotiations, the scope of the persons covered by this exemption expanded from the “nationals and members of the armed forces”¹⁴⁴ in the draft to “nationals, current or former officials or personnel” in the final version.¹⁴⁵ The change in language increased the exemption’s scope to one similar to that of Article 98 agreements. This scope, which exempted NGOs,

¹³⁷ Warren Hoge, “France Asking U.N. to Refer Darfur to International Court,” *New York Times* (24 March 2005) at A3.

¹³⁸ *Ibid.*

¹³⁹ *Ibid.*

¹⁴⁰ Nicholas Kravetz, “France Puts Off War-Crimes Vote,” *Washington Times* (25 March 2005) at A13.

¹⁴¹ *Resolution 1593*, *supra* note 67; Hans-Peter Kaul, “Construction Site for More Justice: The International Criminal Court After Two Years,” (April 2005) 99:2 *Am J Int’l L* 380.

¹⁴² United Nations, Press Release, SC/8351, “Security Council Refers Situation in Darfur, Sudan, to Prosecutor of International Criminal Court,” (31 March 2005) (U.S., Algeria, China, and Brazil abstained from the vote.)

¹⁴³ *Resolution 1593*, *supra* note 67 at para 6.

¹⁴⁴ See Draft resolution [on referring the situation in Darfur since 1 July 2002 to the Prosecutor of the International Criminal Court], UN Doc S/2005/199 (31 March 2005).

¹⁴⁵ *Resolution 1593*, *supra* note 67 at para 6.

contractors, intelligence officers, and other nationals of non-ICC states, had been the EU's main objection to U.S. bilateral exemptions.¹⁴⁶ Agreeing to the same scope in a Security Council resolution was a bitter pill for some states to swallow; Brazil, despite being a heavy proponent of the ICC referral, abstained on the final vote on Resolution 1593, claiming the Resolution's exemption was "inconsistent [with] international law."¹⁴⁷

In addition to the exemption, other smaller but still substantive concessions were made to the U.S. in exchange for its acquiescence on Resolution 1593. The resolution's preamble took note "of the existence of agreements referred to in Article 98-2 of the Rome Statute"—a political concession to the U.S. effectively acknowledging its bilateral campaign.¹⁴⁸ Incorporating U.S. demands that it not underwrite the ICC in any way, Article 7 stipulated ICC members, and not the UN, would bear the costs of the Darfur investigation and trials. Similarly, Article 2 included a clause "recognizing that States not party to the Rome Statute have no obligation under the Statute."¹⁴⁹ These concessions ensured that the U.S. retained the majority of its bargaining chips for later negotiations with the ICC, including material and tactical public goods that the Court supporters had desired since Rome.

B. Resolution 1593 in Perspective

Like many descriptions of U.S. exemptions from the ICC, commentary about these last-minute concessions has largely characterized them as victories extracted by a hegemon.¹⁵⁰ However, an examination of the Resolution 1593 negotiations can also lead to a different conclusion. Namely these negotiations seem to demonstrate that, by 2005, the coalition in support of the ICC was strong enough to successfully balance the hegemonic power of the U.S. on the issue of the Court, itself. The strength of the ICC coalition appears even stronger when one considers the relative trade-off of Resolution 1593. On one side of the scale, Darfur was an "historic" step for the ICC.¹⁵¹ Resolution 1593 established the ICC as an organ of the "international atrocities regime"—beyond its capacity as a simple multilateral institution—backed by the Chapter VII authority of the Security Council.¹⁵² Moreover, the referral was even more significant for the

¹⁴⁶ Council of the European Union, Press Release, "Conclusions of the Council of the European Union on the ICC" (30 September 2002).

¹⁴⁷ Statement of Brazilian delegation: *Agenda of the 5158th Meeting of the Security Council*, *supra* note 129 at 11.

¹⁴⁸ *Resolution 1593*, *supra* note 67 at Preamble; see also Heyder, *supra* note 3 at 659; Luigi Condorelli & Annalisa Ciampi, "Comments on the Security Council Referral of the Situation on Darfur to the International Criminal Court" (2005) 3 J Int'l Crim Justice 590 at 598.

¹⁴⁹ *Resolution 1593*, *supra* note 67 at para 2.

¹⁵⁰ See e.g. Robert Cryer, "Sudan, Resolution 1593, and International Criminal Justice" (2006) 19:1 Leiden J Int'l L 195.

¹⁵¹ Human Rights Watch, Press Release, "U.N. Security Council Refers Darfur to the ICC Historic Step Toward Justice; Further Protection Measures Needed" (31 Mar 2005), online: HRW <<http://hrw.org/english/docs/2005/03/31/sudan10408.htm>>.

¹⁵² Antonio Cassese, "Is the ICC Still Having Teething Problems?" (2006) 4 J Int'l Crim Justice 434 at 436.

reputation of the ICC. At least one EU official argued that the Council's failure to refer Darfur to the ICC would have been a huge blow to the Court in its early years and undermined its credibility as a global institution.¹⁵³ Compared to these gains, ICC supporters sacrificed relatively little. The U.S. exemption appears largely symbolic, given that even without the exemption, should the ICC ever try a U.S. national, the U.S. would likely apply such pressure that the Court continued association with the case would jeopardize the very existence of the institution.¹⁵⁴ Similarly, while the ICC failed to garner funding and resource support from the UN on the Darfur referral, the ICC had never relied upon such support for its functioning (as noted above, the non-necessity of external resources was one of the unique circumstances about the coalition and a critical component of its strength).

It is unclear whether the U.S. would have abstained if it had not received the last-minutes concessions earned before the Resolution 1593 vote. At minimum, without agreeing to the concessions, the coalition would have risked forcing a mutually detrimental deadlock, with the U.S. vetoing the only offer on the table. A more fundamentalist coalition, one that refused to any compromises, would have had a significantly smaller probability of earning a referral. There were protests from members within the coalition about the concessions given in the final moments of the Resolution 1593 negotiations; however, the coalition's flexibility and ability to acknowledge the political realities of negotiating with the hegemonic were likely critical its ultimate success in obtaining the referral. The newfound power of the coalition, would possibly have been all for naught without the willingness demonstrated by the majority of the coalition to compromise.

IV. The Power of the ICC Coalition

The ICC's evolution leading up to the Darfur referral reveals the role of power and security interests in the formation of international law and regimes. It is unlikely power politics will ever be absent from the ICC. On the final day of the Rome Conference, M. Cherif Bassiouni, chairman of the ICC's drafting committee, claimed that "[t]he ICC reminds governments that realpolitik, which sacrifices justice as the altar of political settlements, is no longer accepted."¹⁵⁵ Six years after proclaiming realpolitik's death in Rome, Bassiouni wrote,

¹⁵³ See e.g., Daniel Dombey & Mark Turner, "Solana Voices Doubts on Darfur Case Going to ICC," *Financial Times* (17 February 2005) at 6 (reporting that the EU's foreign policy representative feared "EU could fail in its bid to refer the Darfur massacres to the International Criminal Court, a development that would cast doubt on the court's future").

¹⁵⁴ A slightly sensational expression of this U.S. sentiment is the infamous "Invade the Hague clause" of the *American Servicemembers' Protection Act* (ASPA), which grants the U.S. executive authority to use "all means necessary and appropriate to bring about the release of any person... who is being detained or imprisoned by, on behalf of, or at the request of the International Criminal Court." *American Servicemembers' Protection Act of 2002*, *supra* note 107.

¹⁵⁵ Bassiouni, *supra* note 60 at 121.

The principal obstacles to the effectiveness of the ICC will always be realpolitik and states' interests. Thus, it must be acknowledged that the ICC is not the decisive word on international criminal justice over states' interests and realpolitik—the tensions between the two will always be present.¹⁵⁶

Such a lesson, while disheartening for some, is not a novel one. As Maurice Bourquin notes, "[i]nternational law is a legal crystallization of international politics."¹⁵⁷

That said, the progress made by the ICC coalition in the face of hegemonic opposition suggests that international law can remain a progressive force even under realpolitik conditions. In general, the ICC's development has strengthened international criminal law. The International Criminal Tribunal for the former Yugoslavia noted that the Rome Statute "may be taken to restate, reflect or clarify customary rules or crystallise them, whereas in some areas it creates new law or modifies existing law."¹⁵⁸ While the U.S. has obtained certain exemptions and loopholes, these are relatively narrow.¹⁵⁹ The ICC case study highlights two important themes that will likely become more prevalent in future years. First, in today's world the United States does not possess of position of such hegemonic influence that it can unilaterally dictate the outcome of a legal regime.¹⁶⁰ While the United States still remains capable of dominating bilateral negotiations and extracting large concessions in multilateral settings, these powers are limited.

¹⁵⁶ M Cherif Bassiouni, "The ICC – QuoVadis?" (2006) 4 J Int'l Crim Justice 421 at 427; Also see M Cherif Bassiouni, "The Perennial Conflict Between International Criminal Justice and Realpolitik" (2006) 22 Ga St L Rev 541 at 549 ("However morally compelling these arguments about individual human rights [are], it remains necessary to induce states to recognize and enforce such rights. The need for such an inducement arises because outcomes from an international legal system . . . are likely to be detrimental to state interests and may limit the waning Westphalian concept of state sovereignty.").

¹⁵⁷ Cited in David Davenport, "The New Diplomacy: The ban on land mines, the International Criminal Court, and beyond" (2002/2003) 116 *Policy Review* 18.

¹⁵⁸ *Furundzija*, *supra* note 2 at para 227.

¹⁵⁹ One legal scholar helpfully ascertained two countervailing trends in international law:

[O]n the one hand [one sees] a broadening trend, in that the various prosecutorial means used to hold individuals accountable for violations of certain international crimes has expanded; and on the other hand a narrowing trend, in that the protection from prosecution afforded by international law to certain individuals, that once seemed to falter, has been reinstated.

Olivia Swaak-Goldman, "Recent Developments in International Criminal Law: Trying to stay afloat between Scylla and Charybdis" (2005) 54 Int'l & Comp L Q 691 at 691. Again, however, the trend of exemptions has been rather narrow, in part due to the efforts of the ICC coalition to limit the efforts of the United States.

¹⁶⁰ The weight of the U.S. in the international system is, in itself, a hotly contested issue in IR. Compare Robert Knowles, "American Hegemony and the Foreign Affairs Constitution," (2009) 41 Ariz St L J 87 (arguing the U.S. remained a hegemonic power) and Susan Strange, "The Persistent Myth of Lost Hegemony" (1987) 41 Int'l Org 551, with Helen V Milner & Jack Snyder, "Lost Hegemony?" (1988) 42 Int'l Org 749, (arguing U.S. was no longer hegemonic). This paper, however, agrees with Nye's assessment that while the U.S. is the uncontested predominant power in the international system, its hegemony does not extend to the point that it unilaterally dictates the "rules and arrangements by which international relations are conducted." Joseph S Nye, Jr, *Soft Power* (New York: PublicAffairs, 2004) at 16.

The costs of bilateral negotiations are such that developing universal legal regimes through bilateral negotiations is largely not possible. This forces the United States into certain multilateral institutions, in which it must make concessions. These concessions can be quite important, both immediately (as in the referral of Sudan to the Court) and in the long-term (as in the acceptance of a non-permanent immunity agreement in 2002 and 2003).

Second, the ICC case study emphasizes the existence many of the different sources of power that are available to groups of smaller states in context of multilateral negotiations. While these are all derivative of commonly understood sources of power in international relations, the ICC's history puts flesh on the bone to help us understand the mechanism by which a coalition's collective strength can be operationalized. This section extrapolates two variables—size and diversity—that underpin the strength of a coalition and promise to shape the future of international law. It ends by briefly discussing the influence of U.S. power on the ICC's institutional form.

1. *The Power of Size*

One of the remarkable features of the ICC coalition is the sheer size of its support, despite the U.S. effort to minimize its impact. The speed with which the Court reached the sixty-member threshold needed to bring the Statute into force, for instance, exceeded many predictions, and the Court's membership continued to grow in its first years. As the membership grew, the number of state parties seated on international organizations—particularly the Security Council—increased to the point where a supermajority of states on the Council were ICC members, despite only two of the five permanent members being state parties. And increasing ICC membership, in turn, correlated with more states that were willing to champion a “strong” ICC that would serve as a focal point within the domain of international criminal justice.

A few scholars have suggested that coalitional size is a source of power. Fen Olser Hampson and Holly Reid, for instance, have argued that coalitions rely on their size for legitimacy.¹⁶¹ Legitimacy, in turn, lowers uncommitted states' opposition to institutions and the norms the institutions promote—what Hampson and Reid term a “halo effect.”¹⁶² The ICC coalition's success is evidence, the authors claim, “that new norms and principles are taking root and slowly reshaping the international landscape,” a process that relates back to the broad-based support for the regime.¹⁶³

While the legitimating effect described by Hampson and Reid may occur, the ICC coalition's size provided more tangible sources of power, particularly of the compulsory and institutional variety. In terms of

¹⁶¹ Hampson & Reid, *supra* note 62 at 11 (“The larger the size of the coalition that subscribes to a new set of norms, principles, and institutions, the greater the sense of legitimacy that is accorded to those norms and the institutions on which they are based.”)

¹⁶² Political elites, Hampson and Reid suggest, are drawn by the “‘halo effect’... [of] appearing to be on the morally ‘right’ side of the issue.” *Ibid* at 35.

¹⁶³ *Ibid* at 8.

compulsory power, increasing membership gave the ICC financial support that weaned it off the United States' chequebook—one of the U.S.' most commonly invoked sources of compulsory power. Since the days of the Rome Conference, a number of affluent middle powers like Germany and Canada were willing to bear the financial burdens of the Court. With the ICC's annual budget around U.S. \$100 million, these financial commitments are not insignificant.¹⁶⁴ As early as Rome, ICC supporters have recognized that, if the ICC was avoid being held hostage by the United States' economic power, it would need to gain broad support to finance the Court. One commentator explicitly linked broad-based membership with financial independence: "If all the like-minded sign on, that's virtually all of Europe, with the exception of France. That's Canada, Australia, much of Africa and Latin America, all sorts of other countries—there's funding there, support, resources, a definite start."¹⁶⁵ After Rome, even more financially stable members, like France and Japan, joined the court and provided the court with dues that helped finance the ICC.¹⁶⁶

The compulsory power gained from the ICC coalition's size generally has not been used offensively, in the sense of imposing direct pressure on a state to support the Court. The EU's "Guiding Principles" in response the U.S. bilateral exemption campaign—using access to EU markets as a direct bargaining chip—have been the exception rather than the general rule for the ICC coalition. Generally the financial strength of the ICC coalition has been expressed as what Lloyd Gruber terms "going it alone" power.¹⁶⁷ In a going it alone scenario, a certain group's earlier agreements can affect multilateral negotiations by altering payoffs such that preferred options of certain players are taken off the table through path-dependence. Essentially, Gruber's model explains how state entrepreneurship in forming multilateral negotiations is actually a source of power.

¹⁶⁴ See generally Georg Witschel, "Financing Regulations and Rules of the Court" (2002) 25 *Fordham Int' L J* 665 (discussing the financial considerations of the ICC).

¹⁶⁵ *Ibid.* The recent history of the ICC also suggests a collection of middle powers is capable of serving as a substitute for the U.S. in terms of both resources and leadership in legal regimes. Questions about the logistical and financial support have largely been answered in the first years. Though inducing states and other parties to help with investigations and prosecutions may have been easier with the U.S. as a supporter, the court has been able to launch investigations and prosecutions. From an operational perspective, the Court has not been perfect, but it has remained on its feet without the U.S. It has thus far survived the growing pains any international tribunal encounters.

¹⁶⁶ Using the varying rates of UN dues, Broomhall estimates that Japan's new membership will reduce the financial burden of the EU from 78.17% of the total ICC budget to approximately 54.14%. Broomhall, *supra* note 59 at 164.

¹⁶⁷ Lloyd L Gruber, *Ruling the World: Power Politics and the Rise of Supranational Institutions* (Princeton: Princeton University Press, 2000) at 29. Gruber notes that in a multi-player game, a coalition of actors can first make a smaller compromise while ignoring the demands of other players with which it ultimately still wishes to cooperate. If states A, B, and C are all trying to agree upon an institutional design, A and B may first come to an agreement, which then changes the payoff matrix for state C. The agreement of A and B suddenly makes the prospect of cooperation more beneficial (or defection more costly) than it was previously, inspiring C to join. In this way, A and B may induce an ultimate solution different than that which would have been arrived at if all three actors negotiated simultaneously.

But states can only be entrepreneurial under Gruber's model if states left out of early negotiations are non-vital to the institution. Traditionally, the U.S. has been critical to any institution's success, providing the institution with both financial support and the additional legitimacy of having the world's superpower on board (it was no coincidence that U.S. negotiators made allusions to the League of Nations at Rome).¹⁶⁸ The ICC experience, however, indicates how broad state support can make U.S. participation non-vital, giving future coalitions evidence that "going it alone" without the U.S. is a viable option.

The ICC coalition's institutional power, which has been gained through increasing membership, has been on display at different stages of negotiations.¹⁶⁹ Given the voting scheme of the Rome Conference—one nation, one vote—the LMG's bloc of sixty-plus states accounted for more than forty percent of the 160 participating states. The strength was enhanced by the particular voting rules implemented at the Rome Conference; only a simple majority, with no geographic representation or agreement from the great powers, was necessary to pass the draft treaty.¹⁷⁰ Simple majority voting was also the rule in procedural decisions, which further served the LMG. In the final moments of the conference, for instance, the U.S. attempted to forward amendments to the treaty that would satisfy some of their strategic objections, particularly about jurisdiction. The amendments, however, were procedurally blocked from further consideration by the tabling of motions by Norway on behalf of the LMG.¹⁷¹ These parliamentary tactics helped to marginalize the U.S. during negotiations.¹⁷²

After Rome, size continues to afford the ICC coalition a source of institutional power. The most common examples of this leverage have come from negotiations conducted within the UN Security Council. Under Article 27 of the UN Charter, a supermajority of nine of the fifteen members must

¹⁶⁸ Lawrence Weschler, "Exceptional Cases in Rome: The United States and the Struggle for an ICC," in Sarah B. Sewall & Carl Kaysen, eds, *The United States and the International Criminal Court: National Security and International Law* (Lanham, Maryland: Rowan & Littlefield Publishers, 2000) 85 at 103. The need for the U.S., in turn, has given the U.S. control over the parameters of the organization in question—a form of compulsory power analogous to that described by realist variants of hegemonic stability theory. See *supra* notes 40-41 and accompanying text.

¹⁶⁹ Coalition size, of course, also relates back to the latent power of any set of states; the larger the coalition, the better chance that coalition can avoid being dictated to by more powerful individual states.

¹⁷⁰ *Ibid* at 24.

¹⁷¹ See Weschler, *supra* note 168 at 107; Bassiouni, *supra* note 60 at 90.

¹⁷² Size also permitted the LMG to assert informal methods of control over the Rome negotiations. Ambassador David Scheffer, who headed the U.S. negotiation party at Rome, complained that the "treaty text was subjected to mysterious, closed-door and exclusionary process of revision by a small number of delegates, mostly from the like-minded group, who cut deals to attract certain wavering governments into supporting a text that was produced at 2:00 AM on the final day of the conference, July 17." David J Scheffer, "The United States and the International Criminal Court," (1999) 93 Am J Int'l L 12 at 20. While Scheffer described the group as small, the size of the coalition allowed the LMG to occupy the driver's seat over the ICC treaty, and only from this position were closed-door sessions productive for the group.

support a resolution for it to pass.¹⁷³ In addition, for a given vote to pass the permanent five members of the Council—China, France, Russia, the U.S., and the U.K.—must refrain from exercising their respective vetoes, meaning they must either support the resolution or abstain from voting. Given these Council rules, size comes into play in two distinct respects, which Steve Chan helpfully refers to as negative and positive power.¹⁷⁴ Negative power is the ability to defeat a draft resolution offered.¹⁷⁵ Given Council rules, negative power can be exercised via a veto, but it can also come from a coalition of seven states that abstain or vote against the resolution as a bloc. Positive power is the ability to pass a resolution without conceding to other countries' demands in order to gain the necessary nine votes to pass a resolution.¹⁷⁶ No state can unilaterally exercise positive power on the Council; a bloc of nine votes, by contrast, can be sufficient to avoid more concessions.¹⁷⁷

Since the number of ICC members correlates to the size of the coalitional bloc, the number of states party to the ICC is an important determinant of the coalition's power.¹⁷⁸ Based on simple probability, a larger coalition increases the total number of ICC members that will likely serve on the Council at any one time.¹⁷⁹ In the case of the ICC, for instance, the increasing number of states parties translated first to the possession of negative power (including the ability to block the U.S. renewal of Security Council-obtained exemptions) and then to positive power (such as the events of the Resolution 1593 vote).

2. *The Power of Diversity*

In addition to size, another remarkable feature of the ICC coalition is its diversity. The Court's current membership span all five continents and

¹⁷³ See Sidney D Bailey, "New Light on Abstentions in the UN Security Council" (1974) 50 Int'l Affairs 554.

¹⁷⁴ Chan, *supra* note 100 at 341-42.

¹⁷⁵ *Ibid.*

¹⁷⁶ *Ibid.*

¹⁷⁷ Others have noted that the two types of power are actually entwined; Winter, for instance, has noted that through repeated vetoes a single state could significantly alter the content of a Council resolution compared to that which was offered in drafts. Eyal Winter, "Voting and Vetoing" (1996) 90:4 Am Pol Sci Rev 813 at 815.

¹⁷⁸ In theory the veto power of the Permanent Five makes positive power largely a null point when negotiating with a permanent member. However, in practice the costs of vetoing a resolution—both normative and strategic—sometimes make positive power an important consideration. Costs relate to issue linkage and the risk of leading to deadlock across multiple issues. See *supra* note 98 and accompanying text (discussing costs of deadlock).

¹⁷⁹ Historically, however, bloc voting on the Council has rarely become a significant source of power for a coalition. In the Cold War era, the three contemporaneous coalitions at play in the Council—the Western bloc, the Soviet bloc, and the Southern bloc—could rarely pass resolutions without significant compromise with non-coalition members. See James E Todd, "An Analysis of Security Council Voting Behavior" (1969) 22 Western Political Q 61. In more recent years, the NATO and the "coalition of the willing" have negotiated collectively inside the Council, but both have been similarly unsuccessful given their limited presence on the Council. Size, therefore, only becomes a significant source of power, at least as the Council is concerned, for the largest and most popular coalitions.

exhibits significant balance: 32 are African States, 15 are Asian States, 18 are from Eastern Europe, 26 are from Latin American or the Caribbean, and 25 are “Western” states.¹⁸⁰ There is also significantly more socioeconomic diversity within the Court’s membership than with many other international coalitions. ICC state parties range from some of the most affluent states in the world to some of the poorest.¹⁸¹

Like coalition size, coalitional diversity has been determined to be a source of power. Like size, Reid and Hampson argue that diversity correlates with legitimacy:

International coalitions which have memberships that span the North-South, East-West divide... typically enjoy greater levels of political legitimacy and credibility than coalitions that have a narrower membership and are formed along more partisan (i.e., North-South or East-West) lines.¹⁸²

Reid and Hampson offer a variety of mechanisms by which diversity increases a coalition’s negotiating leverage, including increasing the “coalition’s capacity to ‘name and shame,’ to bring different resources and bargaining skills to the negotiating table, to take risks, and, most importantly, to secure support from civil society and a wide array of non-governmental actors in order to leverage governments.”¹⁸³

Like size, the ICC example shows diversity has a more tangible effect on power than those described by Reid and Hampson. In the context of the Security Council, for instance, geographic diversity becomes an important source of institutional power, because non-permanent seats are allocated regionally.¹⁸⁴ Under the Council’s formula, one seat is allocated to Eastern European states, two to Latin American states, two to Western European and other Western states (such as Australia, New Zealand, and Canada), and five seats to African and Asian states.¹⁸⁵ The greater a coalition’s geographic diversity, therefore, the greater the maximum number of seats a coalition can occupy at any single time. The ICC’s history bears this relationship out: as the number of state parties from various regions increased, members increasingly filled the regionally allocated seats on the Security Council.

Geographic diversity also imposes additional costs on negotiating partners. Such diversity, for instance, reduces the ability of the United States to pressure states to establish regional organizations. By imposing these transactional costs, geographic diversity channels negotiations towards universal organizations like the United Nations, thereby limiting the United States’ ability to choose a forum—a classic form of institutional power.¹⁸⁶

¹⁸⁰ “The States Parties to the Rome Statute,” *supra* note 63.

¹⁸¹ Hampson & Reid, *supra* note 62 at 12.

¹⁸² *Ibid* at 34.

¹⁸³ *Ibid* at 11.

¹⁸⁴ See *Question of equitable representation on the Security Council and the Economic and Social Council*, GA Res 1991(XVIII)[A], UN GAOR, 18th Sess, 1285th Mtg, UN Doc A/Res/1991(XVII)[A] (17 December 1963).

¹⁸⁵ *Ibid*. The resolution formally still combines these groups; however, under current practice, the election of African and Asian states is now conducted separately.

¹⁸⁶ See *supra* note 39 and accompany text.

As the examples show, the institutional form of the ICC is a product of coalitional power, particularly compulsory and institutional power. Because the ICC now plays such a central role in the greater international criminal justice movement (what Caroline Fehrl has termed the “international atrocities regime”¹⁸⁷), the experience chronicled here also documents how coalitional power has influenced the form of international criminal law. At the same time, coalitional power has not been the only force to shape the ICC’s form. The U.S. campaign has had obvious effects, though the exercise of American power has not been as decisive as some theories would predict.

3. *The United States’ Not-So-Hegemonic Power*

In its early years, the U.S. campaign against the ICC was not a subtle use of power. The use of its veto in the Security Council and the threat of ending aid to exemptions from the Court were classic examples of institutional and compulsory power. Since the Darfur referral, U.S. power is less obviously employed, but has been employed nonetheless. The U.S., for instance, continued to use the ICC’s price tag as a way to pressure the coalition by forcing them to bear the costs of the Darfur investigations and prosecutions).¹⁸⁸

The effects of U.S. power are also fairly apparent. The combination of bilateral exemptions and Security Council resolutions has limited the scope of the Court’s jurisdiction. The U.S. campaign did not simply utilize exemptions built into the ICC constitution; rather, it created large exemptions from small ambiguities in the Rome Statute. The year-long exemptions passed by the Security Council in 2002 and 2003 were decried by ICC supporters as illegitimate and larger than what was envisioned by Article 16 of the Rome Statute,¹⁸⁹ however, they resolutions containing the exemptions were still passed and honoured by all states. Similarly, the Article 98(2) bilateral agreements have been attacked as illegitimate and contrary to the Rome Statute; nevertheless, state practice and Security Resolution 1593 (recognizing the Article 98(2) agreements) provide strong indicate that these agreements may be enforceable. U.S. power, therefore, has created jurisdictional loopholes within the ICC. While its impact perhaps has not followed the traditional role that U.S. power has had on institutional form, but it has been an influential force nonetheless.

At the same time, the ICC experience reveals the limits of U.S. power in shaping institutional form. Moreover, the ICC experience undermines claims that the U.S. can still effectively dictate any international organization’s form. As discussed above, the compulsory power of the United States—exercised during negotiations over bilateral exemption—had limited success in the ICC

¹⁸⁷ Caroline Fehrl, “Explaining the International Criminal Court: A ‘Practice Test’ for Rationalist and Constructivist Approaches” (2003) 10 Eur J Int’l Rel 357 at 381 (reviewing new diplomacy literature).

¹⁸⁸ See *supra* notes 148-149 and accompanying text.

¹⁸⁹ Markus Benzig, “U.S. Bilateral Non-Surrender Agreements and Article 98 of the Statute of the International Criminal Court: An Exercise in the Law of Treaties” (2004) 8 Max Planck UN Y B 181 at 187-188.

context. Nationals of the U.S. remain exposed to the ICC's jurisdiction should it ever engage in a campaign against most of the more affluent states. In addition, the lack of bilateral agreements with states commonly deemed the gravest risks to American security (such as Cuba, Iran, Sudan, and Libya, the four "state sponsors of terrorism" identified by the U.S. State Department) means that the U.S. has a realistic chance of being investigated by the ICC in the future.¹⁹⁰

Similarly, the ICC case study reveals the limits of U.S. institutional power, even in an organization—the United Nations, and more specifically, the Security Council—where it is identified as enjoying a privileged position. The results of Security Council negotiations over Darfur, for instance, indicate that negotiations conducted in the Security Council may no longer privilege the U.S. as much as traditionally believed.¹⁹¹ The U.S.'s association with the United Nations often benefits the country in other contexts (as discussed above, for instance, the Security Council provided the U.S. with a useful forum to negotiate international counterterrorism efforts¹⁹²); thus, the U.S. is deterred from engaging in extreme behaviour which might ossify the Security Council. The interest of the U.S. in avoiding a deadlocked Council impose costs on the use of its veto, to the extent that forcing issues into the Security Council may lead the U.S. to compromise in unexpected ways.¹⁹³ Future coalitions may take heart in the fact that the veto is in practice not the trump card—and ultimate source of institutional power—one might predict in theory.

V. Conclusion

This article identifies the various sources of power which have influenced the development of the form of the International Criminal Court and content of international criminal law. Still, many have refused to accept that power can so strongly influence international law. Indeed, many trumpeted the creation of the ICC as the end of power politics and deemed the Rome Conference as an era of "new diplomacy."¹⁹⁴ Power politics, some

¹⁹⁰ See *supra* notes 116-119 and accompanying text.

¹⁹¹ This observation supports the claims of Benvenisti and Downs, who suggest that fragmentation actually favours the larger states in the system. Eyal Benvenisti & George W. Downs, "The Empire's New Clothes: Political Economy and the Fragmentation of International Law" (2007) 60 *Stan L Rev* 595.

¹⁹² See e.g. *Security Council resolution 1526 (2004) [on improving implementation of measures imposed by paragraph 4 (b) of resolution 1267 (1999), paragraph 8 (c) of resolution 1333 (2000) and paragraphs 1 and 2 of resolution 1390 (2002) on measures against Al-Qaida and the Taliban]*, SC Res 1526, UN SCOR, 59th Sess, 4908th Mtg, UN Doc S/RES/1526 (30 January 2004) (strengthening sanctions regime for suspected terrorist organizations and supporters); *Security Council resolution 1617 (2005) [on international cooperation in the fight against terrorism]*, SC Res 1617, UN SCOR, 60th Sess, 5244th Mtg, UN Doc S/RES/1617 (29 July 2005) (formalizing procedure to place individuals on sanctions list); also see *supra* note 39 and accompanying text (discussing Security Council in context of Global War on Terrorism).

¹⁹³ The United States' unwillingness to veto a peacekeeping mission in 2004 in order to extract another exemption and its acquiescence on the Darfur referral in 2005 both question the traditional wisdom that the U.S. does not care about the UN and would celebrate its demise.

¹⁹⁴ See Fehl, *supra* note 187 at 381 (reviewing new diplomacy literature). William Pace, for

argued, had given way to a new chapter in commonality and principled debate.¹⁹⁵ Perhaps the most extreme proclamation of new diplomacy came from Bassiouni, who declared, “sacrific[ing] justice at the altar of political settlements is no longer accepted.”¹⁹⁶

Such pronouncements of the end of power politics reflect a mindset Peter Wallensteen once described as *idealpolitik*—the notion that state behaviour is dictated by “principles of legitimacy” such that normative principles are privileged over simple power politics.¹⁹⁷ *Idealpolitik* is not merely a mindset shared by commentators; many states pronounced at different points in the ICC debates that they would not allow the ICC to be forged by exercises of compulsory or institutional power. In some cases, *idealpolitik* is a useful mindset, because it can increase coalitional cohesion and reduce the chances of a bloc fracturing.¹⁹⁸ Overly idealistic coalitions, however, can ultimately become inhibited by their idealism; coloured by such idealism, coalitions will refuse to compromise at critical moments and come away from the negotiating table empty-handed.¹⁹⁹

Occasionally, supporters of the ICC have been so moved by normative considerations that they have ended up unwilling to engage in power politics. The EU’s unwillingness to compensate states for aid that would be lost by refusing to sign bilateral agreements ended up backfiring, with many less affluent nations eventually acquiescing to the carrots and sticks employed by the U.S.²⁰⁰ While some may applaud the coalition’s refusal to “play the same game as the U.S.” as a principled stand, from a consequentialist perspective the decision is ultimately self-defeating.

instance, argues that LMG states eschewed old Cold War principles of “lowest common denominator” agreements, instead concluding that an effective treaty lacking the support of some important countries is preferable to an inefficient regime with universal support. William R Pace, “The Relationship between the International Criminal Court and Non-Governmental Organizations” in Herman AM von Hebel, Johan G Lammers & Jolien Schukking, eds, *Reflections on the International Criminal Court: Essays in Honour of Adriaan Bos* (The Hague: TMC Asser Press, 1999) 189 at 206.

¹⁹⁵ David Wippman, “International Criminal Court” in Christian Reus-Smit, ed, *The Politics of International Law* (Cambridge: Cambridge University Press, 2004) 151 at 152-153 (“To some extent, the Rome treaty was motivated by a desire to solve collective action problems and to reduce the transaction costs inherent in establishing ad hoc tribunals. But the Rome treaty was driven even more fundamentally by a desire on the part of many participants in the negotiations to develop and stabilise norms of legitimate behaviour by states and non-state actors.”).

¹⁹⁶ Bassiouni, *supra* note 60 at 121.

¹⁹⁷ Peter Wallensteen, “Incompatibility, Confrontation, and War: Four Models and Three Historical Systems, 1816-1976” (1981) 18 J Peace Research 57 at 75; see also Stanley Kober, “*Idealpolitik*” (1990) 79 Foreign Policy 3 (discussing *idealpolitik*’s role in the Cold War).

¹⁹⁸ See Amrita Narlikar & Diana Tussie, “The G20 at the Cancun Ministerial: Developing Countries and their Evolving Coalitions in the WTO” (2004) 27 World Economy 947 at 957 (describing the strengths of principled coalitions).

¹⁹⁹ For example, inflexibility defined the largely unsuccessful Third World coalitions formed in the 1980s: *Ibid* at 957. Similarly, the Group of Ten coalition formed during the GATT’s pre-negotiations stages of the Uruguay Round remained cohesive to a point of fault. After drafting its proposed agreement for the Round’s language, the coalition refused to even consult with other nations on the issue. They believed they had effectively achieved the “right” answer as far as they were concerned. As a result, the coalition lost steam, giving way to larger, more flexible coalitions such as the Cairns group on agriculture: *Ibid* at 958.

²⁰⁰ See *supra* notes 113-116 and accompanying text.

Refusing to recognize the role of power does not lessen power's influence, rather it simply minimizes a coalition's chance to employ its own sources of power.

In general, however, the impact of idealpolitik has been relatively muted. The ICC coalition has remained principled—committed to a strong, independent judiciary—which has allowed it to maintain a firm line against U.S. pressure and bear the costs of its defiance.²⁰¹ At the same time, the ICC coalition has not shied away from deploying its own power strategically. And even more critically, the coalition has recognized its own limited power and consequently compromised at critical moments with the U.S. and other states when it lacked the power to push through its ideal position. Had the coalition not accepted that power plays a role in negotiations, the negotiations would have most likely ended in stalemates, and inhibited the Court's growth during its first years.

In sum, the ICC experience demonstrates that appreciating the fact that power dictates form is often as important as possessing power. Heeding predictions that international politics has entered an era of new diplomacy—where persuasion or normative principles dictate form—can be extremely harmful to a state. Appreciating the role of power, therefore, remains vital for states.

* * *

The first years of the ICC shows that power politics is alive and well in the international system and continues to dictate the form of international legal regimes. At the same time, there are lessons to be learned from the success of the ICC coalition in shepherding and sheltering the young Court for the entirety of the Bush Administration. Specifically, the coalition's success demonstrates that development international law and international institutions can potentially be the product of a democratic movement when the legal regime has a deep and wide-ranging support base.²⁰² The ICC case indicates that power-centric explanations of the international system need not be as pessimistic as some often suggest they are.²⁰³ In addition, the ICC experience reveals some of the mechanisms by which smaller states may

²⁰¹ These costs are not limited to footing the ICC's bill; the U.S. has targeted individual states and offered significant sticks and carrots to encourage defection. Some individual targets have conceded to the pressure, but others have not. The U.S., for instance, has signaled that its opposition to Germany holding a permanent Security Council seat stems in part from Germany's fervent support of the ICC; despite this pressure, Germany has not tempered its fervent support for the Court. Bertrand Benoit & Guy Dinmore, "U.S. Backs Japan but not Germany for UN Place," *Financial Times* (17 June 2005) at 11.

²⁰² Indeed, the success of the ICC coalition was conceded by American diplomats as early as 2005. After the Darfur referral, the U.S. abandoned their description of the ICC as "fatally flawed" and conceded that the Court was now a fixture in the international system. See Jess Bravin, "U.S. Warms to Hague Tribunal," *Wall Street Journal* (14 June 2006). The Obama administration has voiced support for the Court.

²⁰³ See also Charles L. Glaser, "Realists as Optimists" (1994) 19 *Int'l Sec* 50 (discussing non-fatalistic predictions in realism).

exercise power in international negotiations concerning international law.

Above all, the success of the ICC coalition indicates that international law is not a handmaiden to any one state, in spite of old theories that speak of regimes being nothing more than the will of the strong. Rather, international law reflects the distribution of power in subtle and sophisticated ways in which coalitions, negotiations, and other processes can shape the determinative rules of the international system.