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WORKING TOWARDS JUSTICE FOR ALL: STRENGTHENING THE APPREHENSION MECHANISM OF THE INTERNATIONAL CRIMINAL COURT

John Griffith

On February 26, 2003, a group known as the Darfur Liberation Front took credit for an attack in Golo, a rural district in the Darfur region of Western Sudan, thus initiating the present conflict in Darfur. Since that time, a reported 300,000 lives have been lost and an additional two million people have been displaced as a result of the fighting there. In June of 2005, President George W. Bush described the killings in Darfur as genocide. As of July 12, 2010, the International Criminal Court (ICC) has issued two arrest warrants for Suda-

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1 John Griffith graduates with a BA in political science in April 2015 and plans on attending law school in fall 2015. He wishes to thank editors Cory Chipman and Ryan Yergensen for their indefatigable dedication. He further acknowledges Ryan Awerkamp, Kenneth Daines, Randall Raban, Kris Tina Carlston, Professors Darren Hawkins, Ray Christensen, and Eric Talbot Jensen for their contributions.


nese President Omar al-Bashir. In the arrest warrants, the ICC—a permanent tribunal tasked with investigating and prosecuting genocide, war crimes, the crime of aggression, and crimes against humanity—formally accused al-Bashir of five counts of crimes against humanity, two counts of war crimes, and three counts of genocide.

A case such as this necessarily begs the following question: who is responsible for arresting a head of state? Though the ICC has been given assent by the international community to charge and prosecute individuals—even heads of state—for the crimes enumerated above, the Court lacks any power of apprehension. For an individual to be prosecuted by the ICC he or she must first be delivered to the Court by an independent third party or arrive by his or her own choice. This makes the situation very difficult to resolve when the individual in question is the president of a country. These restrictions allow al-Bashir to remain free while the crisis in Darfur persists.

The international community’s failure to arrest the President of Sudan is just one of many possible cases that demonstrate how the restrictions placed upon the ICC often make justice an unreachable goal. The limitations on the ability of the ICC to physically apprehend a suspected criminal are in place for the purpose of protecting states’ sovereignty. Yet while sovereignty is an important right of each state, it is not so sacred as to justify permitting war criminals and those committing genocide to continue such acts uninhibited. For this reason, a change must be made in the operational powers of the ICC.

It should be noted that the International Criminal Court operates by the consent of its member states, also known as States Party to the

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Rome Statute. For this reason, any action to make the ICC autonomous and therefore no longer constrained by a state’s sovereignty would be futile, as no country would agree to give up its sovereignty to the ICC. However, refusal to abdicate sovereignty does not mean that a solution to this problem cannot be found.

In order to demonstrate how this situation may be rectified, it is important to understand the issues at play. Accordingly, I will first briefly examine the evolution and background of sovereignty, the limitations it places upon the ICC and its current implications for global, intergovernmental bodies like the United Nations. I will then discuss notable historical criminal tribunals and the legal concerns they raised. Following this, I will examine cases that illustrate the ability of the United Nations Security Council to overcome a state’s sovereignty in response to international conflicts. Finally, I will propose a system whereby the International Criminal Court may petition the United Nations Security Council to take action in apprehending those whose crimes are considered to be outstanding. In so doing, I will discuss the relationship between the International Criminal Court and the United Nations Security Council in order to demonstrate the viability of the proposed system. By examining the relationship between these two bodies and the treaties that bind them, I will show how a petitioner-petitionee relationship can exist between the Court and the Security Council and how such an arrangement stands to resolve many of the impediments to justice that currently plague the Court.

1. Sovereignty

The current idea of sovereignty has its origins in the 1648 Peace of Westphalia. From the Peace of Westphalia comes the term Westphalian sovereignty, which espouses the belief that a nation-state should have control over its own affairs. Under this system, a na-
tion’s head of state, or sovereign, is in charge of its territorial integrity instead of a separate foreign agent.

Along with sovereignty and the freedom to determine one’s own political fate came the idea of legal equality among states. Unique to this belief was the idea that rather than any one empire having pre-eminence over another, individual states ought to hold the same legal standing as one another. Strengthening states’ legal rights also led to an implicit discouragement of foreign intervention in a state’s domestic affairs. Adopting the tenets of Westphalian sovereignty leads to a more insular world—one where what happens within a state’s borders is, for the most part, that state’s right and duty to resolve of its own accord. This philosophy has become the backbone of modern international treaty law.

The founding principles in the creation of the United Nations in 1945 reinforced the international community’s commitment to Westphalian thinking. The ratification of the Charter of the United Nations showed that Westphalian sovereignty was respected by the international community, despite having been tested by the imposition of new laws that foreign powers enforced during the criminal tribunals following the Second World War. Though the mission of the UN was to bring about global peace through international agreement, cooperation, and understanding, its charter is still surprisingly blunt in its deference to the traditional notions of Westphalian sovereignty. In the second Article the United Nations Charter makes it clear that the body intends to operate with full respect to the sovereignty of its Member States, verifying, “The Organization is based on the principle of the sovereign equality of all its Members.”

Further support is lent to states’ sovereignty by the fourth paragraph of the same article, wherein it states, “All Members shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any state, or in any other manner inconsistent with the Purposes of the United Nations.”

These statements clearly illustrate that the UN seeks to uphold and respect the sovereignty of its Member States.

7 U.N. Charter art. 2 para. 1.
8 Id. at para. 4.
Additional deference to sovereignty can be found in the seventh paragraph of the second Article of the Charter, which says, “Nothing contained in the present Charter shall authorize the United Nations to intervene in matters which are essentially within the domestic jurisdiction of any state or shall require the Members to submit such matters to settlement under the present Charter; but this principle shall not prejudice the application of enforcement measures under Chapter VII.”

This final section is important not only for its evident respect for sovereignty, but also for the caveat listed at the end, which will be discussed later. Nonetheless, the opening sentences of the Charter clearly show that the principles of sovereignty first enacted as a result of the Peace of Westphalia were foundational to the United Nations Charter.

The Rome Statute—the founding document of the International Criminal Court—like the United Nations Charter, includes reservations to prevent the Court from infringing upon a state’s sovereignty. For example, the Preamble states that it is:

Reaffirming the Purposes and Principles of the Charter of the United Nations, and in particular that all States shall refrain from the threat or use of force against the territorial integrity or political independence of any State, or in any other manner inconsistent with the Purposes of the United Nations, [and]

Emphasizing in this connection that nothing in this Statute shall be taken as authorizing any State Party to intervene in an armed conflict or in the internal affairs of any State.

Though the wording is less explicit than that of the United Nations Charter, the limitations written into the Rome Statute are nonetheless effective in their assurance of the rights historically afforded to sovereign states.

9  Id. at para. 7.

One way that the ICC respects sovereignty is explained in Article 4, paragraph 2, which limits the jurisdiction of the Court to signatories of the Rome Statute. However, an exception is made for those territories that are not signatories if they first agree to be subject to the Court’s jurisdiction. Essentially, this limits the ICC to prosecute only those suspected of having committed genocide, war crimes, or crimes against humanity in countries that first agree to the terms of the statute. Furthermore, Article 17 declares that cases are inadmissible before the ICC if the state that has jurisdiction over that crime is taking or has taken action towards the prosecution of said crime.

Perhaps the greatest surrendering of ICC power by the Rome Statute to honor sovereignty is found in Part 9—International Cooperation and Judicial Assistance. This section establishes that the Court must rely on others to do the work that must take place before any trial is to happen. For example Article 89, Paragraph 1 states that, “The Court may transmit a request for the arrest and surrender of a person, together with the material supporting the request outlined in Article 91, to any State on the territory of which that person may be found and shall request the cooperation of that State in the arrest and surrender of such a person.”\textsuperscript{11} Such language demonstrates the inability of the Court to perform any duty that takes place within a state. It must necessarily rely on the state that plays host to the accused to apprehend and deliver the individual before the Court. Only then may the Court exercise any real authority. Should a state decide not to participate, the Court is severely lacking in its ability to respond because it wields no power to override that state’s sovereignty. Consequently, the Court has virtually no power to act against recalcitrant states. In the words of the Pre-Trial Chamber of the ICC, “the ICC has no enforcement mechanism and thus relies on

the States’ cooperation, without which it cannot fulfill its mandate and contribute to ending impunity.”

Clearly, the effects of the Peace of Westphalia are an integral part of modern international law. The tenets of state sovereignty laid out over three centuries ago live on in the foundational documents of some of the foremost international institutions. While this has certainly done much good in preserving the freedoms of smaller nations, unbending adherence to these notions of sovereignty also comes at a price. Specifically, the efficacy of international bodies whose purpose is to protect the weak and bring justice to those who would do them harm—most notably, the ICC—has been inhibited by its inability to overcome states’ Westphalian rights.

II. Historical Tribunals

Over the years, there have been many international tribunals convened in order to address a wide array of legal violations. Some of the most famous and recent were the military tribunals established by the Allied Forces after World War II to bring to justice those responsible for the atrocities committed by the Nazis and the Empire of Japan. If the efficacy of these tribunals were measured solely by the number and prominence of the condemned that received punishment, then there would be no need to devise a new system. However, the backlash against the structure and methods of these tribunals highlighted the need for an independent international court to deal with violations of universally agreed upon human rights laws.

Perhaps the best known of these tribunals were the Nuremberg Trials. Convened in November 1945, the Nuremberg Trials sought to punish prominent members of the Nazi Party for the war crimes and crimes against humanity perpetrated before and during the hostilities. In these proceedings, the accused stood trial before a court whose judges and prosecutors were made up of representatives of the Allied Powers—specifically the United States, the United King-

dom, France, and the Soviet Union—while the defendants were represented in large part by German lawyers. Of the twenty-four major war criminals indicted, twelve were sentenced to death by hanging.\(^\text{13}\)

Yet many at the time, and since, took issue with the proceedings in Nuremburg. Shortly after the conclusion of the Nuremberg trials, Quincy Wright asked:

> How can principles enunciated by the Nuremberg Tribunal, to take it as an example, be of legal value until most of the states have agreed to a tribunal with jurisdiction to enforce those principles? How could the Nuremberg Tribunal have obtained jurisdiction to find Germany guilty of aggression, when Germany had not consented to the Tribunal? How could the law, first explicitly accepted in the Nuremberg Charter of 1945, have bound the defendants in the trial when they committed the acts for which they were indicted years earlier?\(^\text{14}\)

The questions raised here point to a possible lack of respect for the sovereignty of the state of Germany. That is, rather than allow Germany to prosecute the suspected war criminals on its own, the Allied Powers overrode its autonomy and exerted their own justice on the accused. When it comes to regarding a state’s apparent rights to sovereignty, it would appear that the Nuremberg International Military Tribunal overstepped its bounds.

Like that in Nuremburg, a military tribunal was also held in Japan in order to prosecute those believed to be responsible for Japan’s role in the hostilities. The International Military Tribunal for the Far East (commonly known as the Tokyo Trials) was convened in April 1946 by order of General Douglas MacArthur, the Supreme Allied Commander. The Tribunal would operate as directed under the Charter of the International Military Tribunal for the Far East

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(CIMTFE), which was modeled after that of the Nuremburg tribunal. Like the Charter of the International Military Tribunal that bound the Nuremburg Trials, the CIMTFE laid out three offences for which individuals could be charged: crimes against peace, war crimes, and crimes against humanity. Like their counterpart at Nuremburg, the Tokyo Trials were not without similar criticism. It is worth noting that Japan did not formally accept the judgments of the Tokyo Trials until 1951.15

When discussing the Nuremburg and the Tokyo Trials, the issue of sovereignty must be considered. Specifically, one may ask what right the Allied Powers had to violate the sovereignty of the states of Japan and Germany and convene their own tribunals in accordance with their own perceptions of the law. Ultimately, the answer is that the authority to override these states’ sovereignty was not given, but was taken. Because each nation had been involved in a war and lost, German and Japanese sovereignty was nonexistent. Instead, the countries were run by the victors—the Allied Powers.

After the cessation of hostilities in Germany and Japan, arrangements were made whereby the countries might be administered during the period of postwar reconstruction. Two bodies were created—the Allied Control Council and the Allied Council for Japan—in order to oversee the postwar efforts in Germany and Japan, respectively. These councils were overseen by the European Advisory Commission and the Far East Commission, two organizations formed as a result of diplomatic conferences held to determine the fate of the Axis powers. Although there was significant debate regarding control of these countries after the war, ultimately neither Germany nor Japan enjoyed the privileges of a sovereign state.

Germany’s lack of sovereignty can be seen in the wording of the Charter of the International Military Tribunal that gave jurisdiction to the Nuremburg Trials. Section II, Article 6 lays out the various crimes for which the accused could be charged at Nuremburg. For example, crimes against humanity are defined as “murder, extermination, enslavement, deportation, and other inhumane acts

committed against any civilian population, before or during the war; or persecutions on political, racial or religious grounds in execution of or in connection with any crime within the jurisdiction of the Tribunal, whether or not in violation of the domestic law of the country where perpetrated.\textsuperscript{16} The final statement that individuals would be held responsible despite the legality of their actions under the laws of the state where they took place is a clear blow to the sovereignty of the laws of that state. The message seems to be that not all states are legally equal, or at least that the laws of some states trump those of others, despite the actions being committed and the trial thereof taking place in those subsidiary states. In other words, these tribunals were conducted irrespective of the laws of the other nations that were essentially denied their sovereign power to control the affairs within their borders.

After examination of the Nuremburg and Tokyo Trials, it becomes apparent that, despite the usual reliance upon, and deference to, states’ rights to sovereignty, historical examples do exist where one state exerts control over the political and legal affairs of another—even applying prosecutorial power to ex post facto laws\textsuperscript{17}—with relative acceptance from the global community. Still, these tribunals were undoubtedly held under special circumstances. Consequently, it must be determined whether these unique circumstances are an exception or if one could rely upon the legal framework and precedent already in place as a basis for further circumvention of state sovereignty.

\textsuperscript{16} International Military Tribunal Charter - Annex to the Agreement for the Prosecution and Punishment of the Major War Criminals of the European Axis, Aug. 8, 1945, U.N.

\textsuperscript{17} Compare Letter from Dr. Stahmer, All Defense Counsel Ger., to Nuremberg Trial Tribunal, (Nov. 19, 1945), http://avalon.law.yale.edu/imt/v1-30.asp (leveling allegations of applying ex post facto laws), \textit{with} Letter from Nuremberg Trial Tribunal, Allied Forces, to Dr. Stahmer, All Defense Counsel Ger., (Nov. 21, 1945), http://avalon.law.yale.edu/imt/judlawch.asp (rejecting those allegations and ruling that insofar as it was a plea to the jurisdiction of the Tribunal it was in conflict with Article 3 of the Charter).
III. The United Nations’ Ability to Override Sovereignty

The United Nations Security Council has the ability to override a country’s sovereignty if the necessary vote count is attained. To pass a resolution, the Security Council needs an affirmative vote from nine of the fifteen members, five of which must be the permanent members. Under Chapter VII of the UN Charter, the Security Council has the ability to completely or partially interrupt economic relations as well as sea, air, postal, and radio communications, or to sever diplomatic ties. Should these methods prove inadequate, the Security Council is granted further power to impose its decisions by force.

One of the resolutions that authorized force infringing upon another country’s sovereignty was in July 1992 when the Security Council unanimously passed Resolution 794. Resolution 794 created the Unified Task Force (UNITAF)—an American-led, United Nations-sanctioned multinational force—to provide humanitarian assistance to Somalia. This eventually led to Resolution 775, also known as UNISOMII, which deployed an additional 3,500 personnel and included an arms embargo against Somalia.¹⁸

Instances where the Security Council acted against a state’s sovereignty are not limited to Somalia. In 1994, the Council passed Resolution 940 by a unanimous decision of twelve votes to zero in response to the government coup and internal warfare in Haiti. In keeping with Chapter VII of the Charter, the resolution authorized an American-led multinational force to facilitate the departure of military leaders from Haiti, and for the elected politicians to return to a secure and stable environment.¹⁹ Some earlier examples include the resolutions authorizing force during the Korean War and the Congo Crisis of the 1960s. These resolutions show that despite its general respect for sovereignty, the Council has exercised its peace-


keeping and peacemaking abilities under Chapter VII at sovereignty’s expense.

When considering the current peacekeeping and peacemaking missions in which UN forces are currently engaged, it becomes clear that there is precedent for intervention in “any threat to the peace, breach of the peace, or act of aggression.” The tacit consent to the Council’s ability to overcome sovereignty as manifested by membership in the UN indicates a modicum of agreement to this unique prerogative of the Council. The recognition and acceptance of this ability will be an important factor when considering extending the Security Council’s authority over criminals at large.

IV. THE RELATIONSHIP BETWEEN THE ICC AND THE UN

The drafters of the Rome Statute understood that the relationship between the ICC and the UN would be special. On the one hand, they recognized that in order to prevent its proceedings from being overly politicized, it must be a separate entity from the UN. Yet, completely separating the ICC from the UN would greatly diminish the efficacy of the Court. Therefore, a cooperative relationship would be established between the two wherein the ICC would gain some of the benefits of association with the UN without becoming one of its organs. For this and many other reasons, a multilateral treaty rather than a UN General Assembly or Security Council resolution created the ICC. To ensure the cooperation between the two bodies, Article 2 of the Rome Statute directed that a special relationship be forged between the Court and the UN by means of an agreement that would be approved by the Assembly of States Parties to the Statute. This agreement, named The Negotiated Relationship Agreement Between the International Criminal Court and the United Nations, was adopted in October of 2004.

The articles within the Negotiated Relationship detail how the Court is to be related to the UN. The relationship between the ICC and the UN is generalized in Article 3 of the Negotiated Relationship, which states the following:

20 U.N. Charter, supra note 7, art. 39.
The United Nations and the Court agree that, with a view to facilitating the effective discharge of their respective responsibilities, they shall cooperate closely, whenever appropriate, with each other and consult each other on matters of mutual interest pursuant to the provisions of the present Agreement and in conformity with the respective provisions of the Charter and the Statute.\(^{21}\)

Subsequent articles expound upon this relationship, discussing the use of facilities, exchange of information, financial matters, and other general issues of cooperation and assistance. Additionally, Article 16 of the Rome Statute gives the UN Security Council the authority to suspend ICC investigations or prosecutions for a renewable twelve-month period. Consideration of such minutia shows the intricate level of expected cooperation between the two bodies.

One important aspect of the unique relationship between the ICC and the UN is that it offers a way that the Court can expand its jurisdiction. One weakness of the Rome Statute is that it limits the Court’s jurisdiction to its signatories. Essentially, this makes any country that has not ratified the Statute immune from prosecution by the Court.\(^{22}\) However, the Rome Statute provides a mechanism by which the Court may exercise jurisdiction over a state that is not a party to the Statute. Article 13, section (b), states:

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 . . . 23

Such a referral comes by way of petition from the Security Council. It was such a referral that allowed the Court to investigate and eventually issue a warrant for President al-Bashir. Sudan, not having ratified the Rome Statute, would be immune from the Court’s proceedings were it not for such a caveat. In general, referrals from the Security Council that extend the Court’s jurisdiction, like in the case of Darfur, are issued on an ad hoc basis.

The ability of the Security Council to extend the Court’s jurisdiction is an important aspect of the relationship between the two bodies. Still, while it stands to do much good by bringing those to justice who might otherwise be outside the law, it also has the potential to be abused. Being the world’s preeminent source for the establishment and protection of international peace, the Council often has before it several matters of great concern, some of which can be issues du jour, such as the Kony 2012 phenomenon. Under pressure from outside forces to take action, the Council may refer such cases to the ICC for investigation. Yet, with no ability to do anything once a breach of law is substantiated, the issue becomes moot and waits upon some third party to champion the cause. By exploiting this aspect of the relationship, the Council can make all appearances of taking action while not actually doing anything to resolve the problem, essentially washing its hands of the issue. In this sense, the ICC is a place where the demands of justice are not met.

V. PROPOSED SYSTEM

Under the current system, there is only one body, the United Nations Security Council, vested with the power to override a state’s sovereignty. Article 42 of the United Nations Charter gives the Security Council the explicit ability to take “action by air, sea, or land forces as may be necessary to maintain or restore international peace and security. Such action may include demonstrations, blockade,

and other operations...of Members of the United Nations.”24 Though some might take exception to the Security Council’s ability to take military action, it is established in Article 4 that, “Membership in the United Nations is open to all other peace-loving states which accept the obligations contained in the present Charter and, in the judgment of the Organization, are able and willing to carry out these obligations.”25 The acceptance to this obligation is further elucidated in Articles 24, Section 1, and Article 25.

Currently, there are three ways in which an investigation can be opened in the ICC: referral by a State Party, the Prosecutor acting proprio motu, or by referral from the United Nations Security Council. This final method whereby an investigation can be launched is covered under Article 13 of the Rome Statute. By convention, the relationship between the ICC and the Security Council only works in one direction. However, neither the Rome Statute nor the United Nations Charter contains any language that would preclude the ICC from going to the Security Council for assistance. In fact, the framework for this type of relationship already exists. Article 87, Paragraph 6 of the Rome Statute states that, “The Court may ask any intergovernmental organization to provide information or documents. The Court may also ask for other forms of cooperation and assistance which may be agreed upon with such an organization and which are in accordance with its competence or mandate.”26 Being an organ of the UN, the Security Council is an intergovernmental organization, and as such the Prosecutor for the ICC should be free to go before the Security Council and ask for action to be taken to apprehend a suspected criminal.

The wording of the United Nations Charter also supports such a relationship. It is established in Article 34 that “The Security Council may investigate any dispute, or any situation which might lead to international friction or give rise to a dispute, in order to determine whether the continuance of the dispute or situation is likely to en-

24 U.N. Charter, supra note 7, art. 42.
25 Id. at art. 4, 24- 25.
danger the maintenance of international peace and security.”

The addition of Article 35 which establishes the right of any Member of the United Nations to bring a situation mirroring that expressed in Article 34 before the Security Council strengthens the argument for cooperation between the Council and the ICC when apprehending a suspected criminal. It could also be contended that the Council has a legal right to step in when signatories to the Rome Statute fail to cooperate with the Court. Since the “Rome Statute obliges its States parties to cooperate fully with the Court in its investigations and prosecutions” uncooperative countries could arguably be in breach of the law.

Should the ICC make such a petition, it would not be unreasonable for the Security Council to act. Under Articles 37 and 39 of the United Nations Charter, the Security Council is authorized to take action in order to maintain peace and security. Still, deciding to take measures to apprehend an individual who is threatening the peace does not necessarily require the Security Council to enter another state’s sovereign area. Articles 52 and 53 of the Charter allow the Security Council to delegate its actions to another group. This is often beneficial because it saves time and resources, and is also preferential to the international community because nearby countries often have a greater stake in the stability of their neighbor. There is even precedent for such action. In its actions in Afghanistan, the UN authorized the NATO-led International Security Assistance Force to act on its behalf.

Given the aforementioned articles of the UN Charter, under the proposed system there appears to be nothing that would prohibit the commission of NATO, the African Union, or another regional group to represent it in the effort to apprehend a human rights abuser or war criminal in one of the countries that is part

27 U.N. Charter. supra note 6, art. 34.


of such a force. Such an arrangement is also supported on the end of the ICC.  

Such an episodic collaboration between the ICC and the Security Council stands to accomplish much good in the world. First, it grants the ICC considerably more power to apprehend and prosecute those accused of heinous crimes. Unlike the current system wherein the ICC must rely on the state harboring the individual to turn him or her over to the Court, this new system vests the authority to pursue the accused on an international body with the established power to enter another’s boundaries.

Furthermore, this system of prosecution is much less invasive than historical examples of capturing and trying suspected war criminals. The issues that plagued the Tokyo and Nuremburg Tribunals would largely be gone since the accused would be held to internationally-agreed upon norms for what constitutes illegal behavior. Internationally-ratified charters establish the jurisdiction under which a subject may be apprehended, delivered, and tried, so there would be little fear of vigilante justice by a conquering power, as was commonly felt towards the trials in Nuremburg and Tokyo.

Perhaps the most pressing reason that a closer working relationship is beneficial is that it shows that there is no impunity for international war criminals. The Pre-Trial Chamber of the ICC decried the sad situation that results when the Security Council takes no action on cases it refers to the Court:

When the Security Council, acting under Chapter VII of the UN Charter, refers a situation to the Court as constituting a threat to international peace and security, it is expected that the Council would respond by way of taking such measures which are considered appropriate, if there is an apparent failure on the part of the relevant State Party to the Statute to cooperate in fulfilling the Court’s mandate entrusted to it by the Council. Otherwise, if there is no follow up action on the part of the Security Council, any referral by the Council to the ICC under Chapter VII would never achieve its ulti-

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mate goal, namely, to put an end to impunity. Accordingly, any such referral would become futile.\textsuperscript{31}

Lack of action on the part of the Security Council makes a mockery of international law and discredits all the bodies concerned with international peace and integrity. Justice cannot tolerate the open flaunting of such egregious acts.

\textbf{VI. Practical Applicability}

The International Criminal Court-Security Council petition system is practical for several reasons. Most importantly, there is nothing in either the Rome Statute or the UN Charter that prohibits this relationship and the framework for such a system already exists. Also, while it empowers the ICC, it does not give the body \textit{carte blanche} to prosecute whomever it sees fit. “The more states who support the Court, the greater the Court’s legitimacy; [however] legitimacy will not bring suspects to the Court’s cells and trial chambers”.\textsuperscript{32} Were the Security Council to dispatch forces or authorize others to do so, it would first need to agree on the measure. Given the gridlock brought on by the opposing worldviews of the permanent members of the Council, the use of such force would likely be an uncommon occurrence as it would require agreement among the many members. This would serve as an impediment to politically motivated prosecutions, though it would not completely eradicate the problem. Furthermore, the Council’s ability to overcome this gridlock and agree on a course


\textsuperscript{32} Darren Hawkins, \textit{Power and Interests at the International Criminal Court}, 28 SAIS Rev. Int’l Aff. 2, Summer-Fall 2008. (statement of Professor Darren Hawkins) (“[I]t seems unlikely that the Court would consign itself wholly to an irrelevant but celebrated existence by baiting powerful states or by expanding its pretended authority at the expense of actual suspects and trials. To the extent that the judges and prosecutors desire to pursue justice against deserving perpetrators, they will attempt to work with Western states, not against them.”).
of action would send a strong message to the global community that the actions perpetrated by the accused will not be tolerated among the international community.

This petition system is also practical because the Prosecutor most often investigates those states currently harboring UN peacekeeping forces. It would be no great leap to give permission to these forces to apprehend the accused. Similarly, should peacekeeping forces be deployed to a nation for an unrelated assignment, and in the process of carrying out their mission come into contact with a national that the Prosecutor desires to try, they would have the ability to deliver him or her to the ICC for trial.

Furthermore, this system would not require any great alterations to the status quo operation of the United Nations. Because the Security Council has the ability to designate others to act in its stead, it would require very little work to hear the petition of the Prosecutor, vote on the issue and, should it be passed, authorize an intergovernmental group like the African Union to apprehend the suspect. Such an arrangement is ideal because while it gives the ICC more power to prosecute, it also puts the power to act in the hands of either an internationally-endorsed body vested with authority to override sovereignty or regional forces that are likely to be accepted within the borders of a given state.

Yet, for all its practicality it must be said that this is not a perfect system. Under this system there is little impetus for the Security Council to encumber itself with more obligations. Simply because the ICC can petition the Council does not necessarily mean that the Council must hear it. There is nothing to prevent the Council from demurring. However, the current relationship between the Council and the ICC could be altered to require the Council to hear certain petitions. Article 22 of the Negotiated Relationship Agreement between the ICC and the UN dictates how amendments may be made to the Agreement. Under this provision an amendment could be added that requires the Security Council to hear the Prosecutor’s findings regarding any case the Council refers to the ICC. Though not precluded by law, under the status quo relationship there is nothing to impel the Council to hear the Court’s findings. While the Council’s right to bring cases before the ICC is explicitly stated in the
Rome Statute and Negotiated Relationship, the right of the ICC to petition the Council is only implicit. This proposed change resolves the aforementioned concern of the Council, washing its hands of an issue by sending it to the Court. Such an amendment would obligate the Council to give audience to a representative of the Court who would present the results of the investigation. While this change would not require the Council to take action, it would put the onus back on the Council to do something about an issue it had already recognized as worthy of action.

It should be noted that this system is not likely to make believers out of states skeptical of the ICC. Countries like the United States and China will probably not experience a sudden conversion. Furthermore, these and other permanent members of the Security Council may oppose more explicit duties for the Council. They may view this system, or an amendment to the Negotiated Relationship allowing it, as an unnecessary burden. Another concern specifically regarding the amendment is that if it were put into law, it would make the Council hesitant to send future requests. Yet, the purpose of this proposition is not to compel the Council to act, but simply to facilitate a more effective relationship between the ICC and the Council. Whether viewed through the lens of the Rome Statute, the UN Charter, or the Negotiated Relationship, there is no persuasive legal reason why the Court should not be able to petition the Security Council to take action or put pressure on the State harboring an individual to relinquish him or her to the Court.

VII. CONCLUSION

The UN Charter and other agreements demonstrate how a petitioner-petitionee relationship between the International Criminal Court and the United Nations Security Council stands to benefit the international community. The framework is already in place, and unlike the aforementioned examples of war crimes tribunals, there is jurisdiction for this method of apprehending suspects. This method would strengthen the ability of the Prosecutor of the International Criminal Court to try those accused of crimes against humanity without creating a system that overrides the sovereignty of a given
state in any new or untested manner. The UN Charter and the Rome Statute in no way preclude such a relationship. Though it is not expressly established in either, a close reading of the two shows that cooperation is entirely possible given the structure of each.

Adopting this system would lead to a safer, more just world. We may consider the situation in Syria as a hypothetical. The use of chemical weapons in the Syrian civil war is almost certainly a violation of the Rome Statute. As such, President Bashar al-Assad could have been issued an arrest warrant by the ICC if an investigation were to prove his culpability. Under the proposed system, the Council would have the ability to authorize forces to apprehend President al-Assad and take him to The Hague to stand trial. Were this to have happened, it is quite possible that much of the subsequent violence could have been forestalled, sparing the lives and preventing the suffering of scores of individuals. Of course, this action would not be possible without both China and Russia’s consent, which would be very difficult to secure.

The actions of a state official, such as al-Assad, show the weakness of this system, namely, reliance on the Council to reach an agreement. However, the difficulty of reaching an agreement does not mean that progress cannot be made. When we consider the likelihood of the apprehension of a non-state official like Joseph Kony, the odds of Security Council agreement and subsequent apprehension increase tremendously. Kony, the Lord’s Resistance Army leader, is responsible for a number of heinous crimes in Eastern Africa. Because Uganda ratified the Rome Statute in 2002 and Kony is a national of that state, he is subject to ICC jurisdiction for his crimes. As a non-state official, the likelihood of political considerations obstructing agreement by the Council is very low; a country’s ties to Uganda would have little effect on its decision to apprehend Kony because he is not a representative thereof. Passing an agreement, the Security Council could authorize a group such as the African Union to conduct operations to find and arrest Kony. These forces would be preferred because of their strong knowledge of the area.

Before this procedure could become a reality, it must be realized that the special Rome-statute prescribed relationship between the ICC and Security Council need not only work in one direction. An
exploration of the legal structures of these bodies reveals no compelling reason why they could not work more effectively in concert. Justice for the suffering is possible and immediate action towards this end should be taken. Untold lives hang in the balance.