



5-2018

Five Sides of Justice: The Dangerous and Disproportionate Influence of the Permanent Five Members of the UN Security Council on the International Criminal Court

Nathan Hogan
n8hogan@gmail.com

Follow this and additional works at: <https://scholarsarchive.byu.edu/byuplr>

 Part of the [Social and Behavioral Sciences Commons](#)

BYU ScholarsArchive Citation

Hogan, Nathan (2018) "Five Sides of Justice: The Dangerous and Disproportionate Influence of the Permanent Five Members of the UN Security Council on the International Criminal Court," *Brigham Young University Prelaw Review*: Vol. 32, Article 18.
Available at: <https://scholarsarchive.byu.edu/byuplr/vol32/iss1/18>

This Article is brought to you for free and open access by the All Journals at BYU ScholarsArchive. It has been accepted for inclusion in Brigham Young University Prelaw Review by an authorized editor of BYU ScholarsArchive. For more information, please contact scholarsarchive@byu.edu, ellen_amatangelo@byu.edu.

**FIVE SIDES OF JUSTICE:
THE DANGEROUS AND DISPROPORTIONATE
INFLUENCE OF THE PERMANENT FIVE MEMBERS
OF THE UN SECURITY COUNCIL ON THE
INTERNATIONAL CRIMINAL COURT**

Nathan Hogan¹

Early in the morning on April 4, 2017, a one-story building in the district of Khan Sheikhoun, Syria exploded in a thick cloud of mustard yellow. As the cloud settled, those nearby began to experience irritated eyes, constricted pupils, shortness of breath, foaming at the mouth, and asphyxiation. 86 people were killed.²

Government officials in Damascus claimed that the attack was carried out by separatist groups.³ However, a report released by the Organization for the Prohibition of Chemical Weapons and the United Nations' Joint Investigative Mechanism concluded that the Syrian government was responsible for the attack and had used chemical weapons on its own citizens.⁴

1 Nathan Hogan is a senior at Brigham Young University studying political science and Portuguese studies. He plans to attend law school in fall 2019. He would like to thank Garrett Meisman and Tyler Lindley for their assistance in editing this paper.

2 Rami Abdulrahman, *Observatory says 58 killed in suspected chemical attack in Syria, military source denies*, SYRIAN OBSERVATORY FOR HUMAN RIGHTS, Apr. 5, 2017, <http://www.syriaahr.com/en/?p=64161>.

3 BBC News, *Syria chemical "attack": What we know*, BBC NEWS, Apr. 26, 2017, <http://www.bbc.com/news/world-middle-east-39500947>.

4 Nick Bruce-Cumming, *UN Panel faults Syria's Military for Chemical Attack*, Sept. 6, 2017, <https://www.nytimes.com/2017/09/06/world/middleeast/syria-chemical-weapons.html>.

The International Criminal Court (ICC) is the international body charged with holding individuals and regimes accountable for war crimes, which include the use of chemical weapons. However, efforts to bring the Syrian government to justice for these crimes have been unsuccessful. The ICC does not have jurisdiction over many states, including Syria. Nevertheless, in cases where the ICC does not have jurisdiction, the UN Security Council can use its power to refer a criminal for prosecution at the ICC.⁵ However, despite support from all other members of the Security Council, Russia and China both vetoed a draft resolution calling for the crisis in Syria to be referred to the ICC in 2014.⁶ This opportunity for the Security Council to protect the Syrian people and prosecute confirmed war criminals was lost.

Unfortunately, rather than making it easier to prosecute elusive war criminals, the Council's power to refer states to the ICC complicates the pursuit of justice. Multiple heads of state should be referred to the ICC but are not because these prospective criminals have allies among the permanent five members of the Security Council. The permanent five members use their veto power to protect their allies from prosecution by the ICC. Criminals responsible for abductions of homosexual men in Chechnya, excessive police brutality in Gaza, and genocide in Myanmar have not been referred to the ICC because of the strong allegiances they have with Russia, the United States, and China.⁷ The rules regarding decision-making on the Security Council create inefficiency and impede the execution of justice. The ICC referral process is a compelling example of this inefficiency. The Council should be reformed so that the members can override the veto of

5 Rome Statute, art. 13, Jul. 17, 1998, 2187 U.N.T.S. 3844.

6 Meetings Coverage, *Referral of Syria to International Criminal Court Fails as Negative Votes Prevent Security Council from Adopting Draft Resolution*, UNITED NATIONS SECURITY COUNCIL, May 22, 2014, <https://www.un.org/press/en/2014/sc11407.doc.htm>.

7 HUMAN RIGHTS WATCH, *WORLD REPORT 2017* (2017), https://www.hrw.org/sites/default/files/world_report_download/wr2017-web.pdf.

a permanent member with a supermajority of the 15 members.

Part I of this paper will explain the purpose of the International Court and the conditions under which it may claim jurisdiction. Part II explores the limitations of the Court's territorial jurisdiction and the need for further means of expanding its influence. Additionally, this part will detail the process by which a non-state party may be referred to the Court by the Security Council. Part III outlines the history of UN war tribunals and referrals to the ICC by the Security Council. Part IV demonstrates how the political considerations of the Security Council can severely inhibit the Court's mandate to end impunity. Part V explores the history of past possibilities of Security Council reform and proposes the veto override to circumvent the political influence of the permanent five members.

I. THE STRUCTURE & FUNCTION OF THE INTERNATIONAL CRIMINAL COURT

The most important role of the ICC in the multilateral international system is to provide justice, end impunity, and establish the rule of law by prosecuting individuals for genocide, crimes against humanity, and war crimes. Articles 6, 7, and 8 of the Rome Statute, the treaty that established the ICC, give specific definitions of genocide, crimes against humanity, and war crimes over which the ICC has jurisdiction.⁸ The other forms of jurisdiction assumed by the ICC are territorial jurisdiction over crimes that occur within the borders of states party to the Rome Statute, voluntary jurisdiction over a state that has willingly submitted to the ICC's authority, and special jurisdiction over cases referred to the ICC by the Security Council.⁹ Furthermore, the ICC is a complementary, supranational court, meaning it is not intended

8 Rome Statute, art. 6-8.

9 Rome Statute, art. 13 and art. 5.

to override national courts.¹⁰ Article 17 of the Rome Statute states that the Court only has jurisdiction when national courts are unable or unwilling to prosecute crimes.¹¹ Therefore, the Office of the Prosecutor can only act to open a prosecution when a case meets the aforementioned jurisdictional criteria and a state has neglected to prosecute crimes within its own legal system. These restrictive conditions make it difficult for the ICC to end impunity because many war criminals are outside its jurisdiction.

II. LIMITATIONS OF TERRITORIAL JURISDICTION

The territorial jurisdiction of the International Criminal Court is limited to the 124 states which are currently parties to the Rome Statute, or to those states which otherwise consent to its jurisdiction by filing a declaration with the Court.¹² With over 100 nations having declined to become party to the Rome Statute, including Russia, the United States, and China, the only way that the ICC could prosecute crimes in these states would be if the situation were referred by the Security Council, or if the state itself voluntarily chose to allow the ICC to open an investigation concerning a crime committed inside its borders.¹³ Unfortunately, few states submit to the ICCs jurisdiction voluntarily, and as mentioned above, the Security Council is hindered by political interests. These and other limitations make it very difficult for the ICC to preserve justice within the international system. For

10 Sidney McKenney, *The United States' Need to Ratify the Rome Statute: The United States and its International Obligation* (May 17, 2013) (PhD dissertation, James Madison University), <http://www.e-ir.info/2013/05/17/the-united-states-need-to-ratify-the-rome-statute>.

11 *Id.*

12 Jurisdiction over a consenting state that is not party to the Rome Statute will hereafter also be referred to as voluntary jurisdiction. *Understanding the International Criminal Court*, REGISTRY, INTERNATIONAL CRIMINAL COURT, 2002.

13 Rome Statute, art. 13.

example, if a state fails to prosecute a perpetrator of a war crime, this criminal could escape prosecution by the ICC if he or she committed a crime in one of the states that has not signed nor ratified the Rome Statute. Heads of state or government officials could easily escape prosecution by removing themselves from the group of states party to the ICC and thereby ending the Court's territorial jurisdiction within the boundaries of their nation.¹⁴

Some states that lie outside of the ICC's territorial jurisdiction, such as Syria¹⁵ and North Korea¹⁶ are prominently suspected of crimes against humanity. In 2013, this suspicion was confirmed when the United Nations formed a commission of inquiry to investigate such crimes in North Korea.¹⁷ Thus far, these states have been unwilling to submit to the ICC through voluntary jurisdiction.¹⁸ Relying solely on territorial or voluntary jurisdiction under its own authority, the court is severely limited in its ability to fulfill its mission of ending impunity.

The delegates in Rome recognized this limitation. To avoid the prospect of an international court that cannot obtain jurisdiction over international criminals, the Statute gives the ICC the opportunity to exercise jurisdiction over the nationals of states that are not parties to the Statute and have not otherwise consented to the court's jurisdiction. Article 13 of the Rome Statute allows the Court to exercise its jurisdiction within a state if

14 *Id.*

15 *About the Syria Crisis*, UNITED NATIONS OFFICE FOR THE COORDINATION OF HUMANITARIAN AFFAIRS, <http://www.unocha.org/syrian-arab-republic/syria-country-profile/about-crisis> (last visited Nov. 21, 2017).

16 Human Rights Council, *Report of the Special Rapporteur on the situation of human rights in the Democratic People's Republic of Korea*, U.N. Doc. A/HRC.34.66 (Feb. 22, 2017).

17 G.A. Res. 22/13 (Apr. 9, 2013).

18 Peter Popham, "North Korea refutes war crimes charge and says human rights system is 'advantageous'" THE INDEPENDENT, Nov. 18, 2014, <http://www.independent.co.uk/news/world/asia/north-korea-refutes-war-crimes-charge-and-says-its-human-rights-system-is-advantageous-9868982.html>.

a crime is referred to the Prosecutor by the Security Council acting under Chapter VII of the Charter of the United Nations. Chapter VII states that the Security Council “has primary responsibility for the maintenance of international peace and security” under the UN Charter.¹⁹ This clause allows the Council to respond to any threat to international security by referring a state to the ICC.

III. HISTORY OF WAR TRIBUNALS AND SECURITY COUNCIL REFERRALS

The UN Security Council is composed of 15 member states of the United Nations. Five of these are permanent members with veto power: The United States, China, Russia, Britain, and France. The other 10 members of the Council are rotating members who are chosen from each of the five global geographical regions: Latin America and the Caribbean, Africa, Asia, Eastern Europe, and Western Europe.²⁰ Each region generally nominates two countries, and the final decision is made through a vote in the UN General Assembly.²¹

To refer a crime to the ICC, the Security Council must include the referral in a resolution. In order for the resolution to pass, it must receive nine out of fifteen votes in support. If one of the permanent five members of the Security Council uses their veto power to vote against the resolution, it does not pass.²²

The countries who have ratified the UN Charter have authorized the Council to do what is necessary to maintain peace in the international system. Under this authority, the Security Council formed criminal tribunals in Yugoslavia and Rwanda²³

19 Charter of the United Nations, art. 24. Oct. 24, 1945, 1 U.N.T.S.

20 U.N. Charter, art. 23.

21 *Id.*

22 U.N. Charter, art. 27.

23 *Id.*

and extended ICC jurisdiction to Libya²⁴ and Darfur.²⁵ States that are not party to the ICC can still fall under the ICC's jurisdiction if the Security Council uses its power under Article 23 to refer a state to the ICC.²⁶ The Security Council's ability to refer individuals to the ICC for prosecution can overcome the limitations mentioned above. Ideally, it is the most effective way for the ICC to prosecute perpetrators of international crimes in rogue states that do not fall under the Court's territorial or voluntary jurisdiction.²⁷

The International Criminal Tribunal for the Former Yugoslavia (ICTY) addressed crimes committed within the territory of the former Yugoslavia since 1991 and laid the foundations for conflict resolution across the globe. The International Criminal Tribunal for Rwanda (ICTR) was established to bring justice to those responsible for the serious violations of international law that occurred during the Rwandan genocide.

A campaign of violence perpetrated by government-backed Arab militias against African tribes in Darfur, Sudan's western region, has claimed more than 70,000 civilian victims and uprooted an additional estimated 1.8 million people.²⁸ Under President Al-Bashir, Sudan signed the Rome Statute on September 8, 2000, but the Sudanese government never ratified the treaty.²⁹ Security Council referral was the only way that the

24 S.C. Res. 1970, U.N. Doc.S/RES/1970 (Feb. 26, 2011).

25 S.C. Res. 1593, U.N. Doc.S/RES/1593 (Mar. 31, 2005).

26 *Id.*

27 *Id.*

28 Scott Straus, *Darfur and the Genocide Debate*, Foreign Affairs, Feb. 2005, <https://www.foreignaffairs.com/articles/sudan/2005-01-01/darfur-and-genocide-debate>.

29 *Darfur, Sudan. Situation in Darfur, Sudan* ICC-02/05, INTERNATIONAL CRIMINAL COURT, February 2005, <https://www.icc-cpi.int/darfur>.

ICC could obtain jurisdiction over the criminals in Darfur.³⁰ The council referred the situation in Darfur to the ICC in March of 2005.

Human rights violations and war crimes committed by Muammar Gaddafi's government during the Libyan Civil War also attracted the attention of the international community. Libya was also not party to the Rome Statute, and therefore not under the Court's jurisdiction. However, the Security Council referred the situation to the ICC in 2011. The Council's decision regarding Libya was made by consensus, with the approval of various permanent members with veto power who also are not party to the Rome Statute such as the United States, Russia, and China.³¹

IV. PROBLEMS WITH SECURITY COUNCIL REFERRALS

Although all of the aforementioned actions taken by the Security Council were relatively successful in bringing justice to perpetrators of war crimes in these countries, they have also been met with criticism. Many political scientists argue that because the ICTY was established by the Security Council rather than the General Assembly, it lacks the broad international basis required of a valid international court.³² These criticisms established the foundation for the argument that the Security Council exercises illegitimate levels of control over the ICC because of the unequal powers of the permanent five members of the Security Council. The debate regarding the referral of the situation in Darfur to the ICC focused on the United States and its longstanding opposition

30 Press Release, *Security Council Refers Situation in Darfur, Sudan to Prosecutor of International Criminal Court*, UNITED NATIONS SECURITY COUNCIL, (Mar. 31, 2005), <https://www.un.org/press/en/2005/sc8351.doc.htm>.

31 Steven Groves and Brett Schaefer, *The Motivation for the Referral of Libya to the ICC: Political Pressure or Justice?* THE HERITAGE FOUNDATION, Mar. 4, 2011.

32 Hemi Mistry and Deborah Ruiz Verduzco, *The UN Security Council and the International Criminal Court*, International Law Meeting Summary, with Parliamentarians for Global Action, CHATHAM HOUSE, March 16, 2012.

to the Court out of fear that US government and military officials would be prosecuted unfairly at the ICC.³³ The US approved the final text of the resolution only because it included a provision that citizens of a contributing State which was not a party to the Rome Statute would only be subject to voluntary jurisdiction.³⁴ This specification prevented the US from using its veto to block the Council's referral.³⁵ Although the resolution passed after the US chose to abstain from the vote, the fact that one member of the Council could have singlehandedly prevented the ability to pursue justice for war crimes is disconcerting.

The circumstances in Libya highlighted the politicization of the Court due to the Security Council referral process. Many international relations scholars argue that the referral only happened because the permanent five members had a stake in the conflict.³⁶ Why should only Libya be prosecuted by the ICC when there were many other states that fit the same criteria but were not referred? There are many other examples of rogue states that break international human rights law and should be prosecuted at the ICC. However, unlike Libya, these nations have allies on the Security Council. Claims of genocide in the civil war in Syria, atrocities occurring in prison camps in North Korea, unlawful detention and torture in Iran and the Philippines, and indiscriminate attacks on children in Yemen are all examples of cases where justice is impeded by the veto power of one of

33 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 Functions and Status*, 24 BERKELEY J. INT'L L. 1, (2006).

34 Press Release, *Security Council Refers Situation in Darfur, Sudan to Prosecutor of International Criminal Court*, U.N. Press Release SC/8351, UNITED NATIONS SECURITY COUNCIL, Mar. 31, 2005, <https://www.un.org/press/en/2005/sc8351.doc.htm>.

35 *Libya. Situation in Libya*, ICC-01/11, INTERNATIONAL CRIMINAL COURT, February 2011, <https://www.icc-cpi.int/libya>.

36 *Id.*

the permanent five members of the UN Security Council.³⁷

Because the five permanent members of the Security Council can use their veto power without restraint, some argue that the UN does not adequately represent current power dynamics between states. As the balance of power among nations began to shift and diversify in the late twentieth century, international scholars and diplomats began calling for Security Council reform that better reflected the true balance of power in the international system.³⁸ Although some of the original permanent five members of the Council have begun to support the individual bids that specific countries have made for permanent membership and veto power, the majority of the permanent five members remain opposed to changing the status quo and relinquishing their own power within the main body responsible for drafting and passing international law.³⁹ For example, although most of the permanent five members have shown some level of support for India's bid for permanent membership, China vehemently refuses to allow it.⁴⁰ China also loudly opposes Japan's quest for permanent membership.⁴¹ Despite the strong opposition to change in the Security Council, reform is necessary to ensure that the Council maintains its legitimacy.

This paper provides a solution for the current limitations of ICC jurisdiction to bring war criminals to justice when these criminals are being shielded from prosecution by one or more of the permanent five members of the Security Council. Such a

37 *Human Rights Watch*, WORLD REPORT 2017, (2017) https://www.hrw.org/sites/default/files/world_report_download/wr2017-web.pdf.

38 Thomas G. Weiss and Sam Daws, *World Politics, Continuity and Change Since 1945*, THE OXFORD HANDBOOK ON THE UNITED NATIONS (Nov. 2008).

39 DIMITRIS BOURANTONIS, *THE HISTORY AND POLITICS OF UN SECURITY COUNCIL REFORM*, (Routledge 2005).

40 Vinay Kaura, "India-Japan Relations and Asia's Emerging Geopolitics", *INDIAN JOURNAL OF ASIAN AFFAIRS*, VOL. 29, NO. 1/2, (June-Dec. 2016), PP. 17-38.

41 *Id.*

solution is also necessary because controversy has arisen over the apparent selectiveness of the Security Council in making referrals to the ICC. Given that Security Council decisions are made by political rather than judicial figures, these referral decisions are sometimes affected by the political affiliations of its members, particularly the five permanent members. On May 22, 2014, both China and Russia cast negative votes to veto a draft resolution that would refer Syria to the ICC for its abuse of human rights.⁴²

Syria is not the only case where the politicization of the Security Council has impeded justice. Ethnic, religious, and linguistic minorities in Myanmar have been subject to extrajudicial killings, sexual violence, socio-economic exploitation, forced displacement, and denial of citizenship since the 1980s.⁴³ However, this case has not been referred to the ICC because of Myanmar's close relationship with China. Bilateral trade between China and Myanmar exceeds \$1.4 billion, and China is the chief beneficiary of Myanmar's extensive oil and natural gas reserves.⁴⁴ Access to Myanmar's ports and naval installations provides China with strategic influence in the Bay of Bengal, in the wider Indian Ocean region, and in Southeast Asia.⁴⁵ The military regime in Myanmar is also protected from referral through its close relationship with Russia. Russia negotiated a nuclear research deal with Myanmar in 2007,⁴⁶ and Myanmar is

42 SC/11407, *Referral of Syria to International Criminal Court Fails as Negative Votes Prevent Security Council from Adopting Draft Resolution*, U.N. MEETINGS COVERAGE AND PRESS RELEASES, <https://www.un.org/press/en/2014/sc11407.doc.htm>.

43 Michael Bristow, *Chinese dilemma over Burma protests*, BBC NEWS, Sept. 25 2007, <http://news.bbc.co.uk/2/hi/asia-pacific/7011746.stm>.

44 Lixin Geng, *Sino-Myanmar Relations: Analysis and Prospects*, THE CULTURE MANDALA, Vol. 7 no. 2, Dec. 2006.

45 *Id.*

46 *Russia and Burma in Nuclear Deal*, BBC NEWS, May 15, 2007, <http://news.bbc.co.uk/2/hi/asia-pacific/6658713.stm>.

a major Russian weapons buyer.⁴⁷ In 2007, both China and Russia vetoed a Security Council resolution meant to punish Myanmar for its consistent violation of international human rights law.⁴⁸

With such bleak track records in protecting human rights, it may be less surprising that China and Russia have obstructed international law. However, they are not the only permanent five members who have let politics determine their decision in the ICC referral process. Since March 2015, Saudi Arabia has been carrying out a massive bombing campaign against Yemen, leaving well over 12,000 people dead.⁴⁹ The conflict has its roots in a rebellion that forced Yemeni president Abdrabbuh Mansour Hadi to hand over power to Shia Houthis rebels.⁵⁰ Alarmed by the rise of the Houthis, who they believe to be backed militarily by Iran, Saudi Arabia began an air campaign aimed at restoring Mr. Hadi's government.⁵¹ War crimes have been committed by both Houthi forces and the Saudi military.⁵² Yemen and Saudi Arabia are not party to the Rome Statute; therefore Security Council intervention is required for the ICC to claim jurisdiction. However, both the United States and the United Kingdom oppose any action by the ICC in Yemen because both countries make substantial sums of money selling weapons to Saudi Arabia. Since the beginning of the war, the UK has approved 194 export licenses for arms and related equipment to Saudi Arabia, totaling more than four

47 Richard Connolly and Cecilie Sendstad, *Russia's Role as an Arms Exporter: The Strategic and Economic Importance of Arms Exports for Russia*, RUSSIA AND EURASIA PROGRAM, CHATHAM HOUSE, Mar. 2017.

48 Richard Connolly and Cecilie Sendstad, *Russia's Role as an Arms Exporter: The Strategic and Economic Importance of Arms Exports for Russia*, RUSSIA AND EURASIA PROGRAM, CHATHAM HOUSE, Mar. 2017.

49 Yemen crisis: Who is fighting whom? BBC NEWS, Dec. 2, 2017, <http://www.bbc.com/news/world-middle-east-29319423>.

50 *Id.*

51 *Id.*

52 *Human Rights Watch*, WORLD REPORT 2017: YEMEN, (2016).

billion dollars in revenue.⁵³ The United States has sold similar amounts of arms to Saudi Arabia. The US State Department recently approved a resumption in the 300-million-dollar sale of US-made precision-guided missiles to the Saudi government.⁵⁴

Furthermore, multiple African states have expressed disapproval of the ostensibly disproportionate targeting of African nations since the Court's inception. After repeated threats by multiple African states to withdraw from the International Criminal Court, Burundi, the Gambia, and South Africa finally signaled their intentions to do so in 2016.⁵⁵ However, whether they will make good on their declarations is unclear.⁵⁶ As of July 2017, nine out of ten cases before the court involved African parties.⁵⁷ While it is disputed whether this treatment proportionately represents the number of war crimes committed in Africa, this imbalance has cast doubt upon the impartiality of the selection process.⁵⁸

These are not the only cases where political considerations have trumped ethical verdicts in referrals to the ICC by the Security Council. Criminals in North Korea and Sri Lanka are protected by UN delegates from China. Israeli police perpetrating offenses against Palestinians in Israel are protected

53 Rasha Mohamed, *The UK has made 10 times more in arms sales to Saudi Arabia than it's given in aid to Yemen*, INDEPENDENT, Mar. 22, 2017, <http://www.independent.co.uk/voices/saudi-arabia-arms-sales-yemen-war-uk-government-us-donald-trump-obama-aid-a7643066.html>.

54 *Id.*

55 Franck Kuwonu, *ICC: Beyond the threats of withdrawal*, AFRICA RENEWAL: AFRICAN NEWS AND ANALYSIS FROM THE UNITED NATIONS (May-July 2017), <https://www.un.org/africarenewal/magazine/may-july-2017/icc-beyond-threats-withdrawal>.

56 *Id.*

57 Franck Kuwonu, *ICC: Beyond the threats of withdrawal*, AFRICA RENEWAL: AFRICAN NEWS AND ANALYSIS FROM THE UNITED NATIONS (May-July 2017), <https://www.un.org/africarenewal/magazine/may-july-2017/icc-beyond-threats-withdrawal>.

58 *Id.*

by US diplomats.⁵⁹ Offenses that occurred in Iraq are blocked from investigation by American and British ambassadors.⁶⁰ The hindrance of justice presented by these prospective vetoes highlights a real challenge to the Court's effectiveness.

V. PROPOSALS FOR REFORM OF THE SECURITY COUNCIL AND THE REFERRAL PROCESS

In 2005, UN Secretary General Kofi Annan recommended two plans for Security Council reform known as Plan A and Plan B. Plan A called for the creation of six new permanent members, plus three new non-permanent members, totaling 24 seats in the Council.⁶¹ Plan B called for the establishment of eight new seats in a new class of members, who would serve for four years, subject to renewal, plus one nonpermanent seat, also totaling 24.⁶² Other calls for reform have proposed that each geographic region of the globe be allotted an equal number of rotating seats on the Security Council.⁶³

Furthermore, the G4 countries Brazil, Germany, India, and Japan are pushing for their own permanent seats on the Council. This initiative has traditionally been opposed by the Uniting for Consensus group, which is composed primarily of nations that are regional rivals and economic competitors of the G4.⁶⁴ Although all of these proposals for reform have stalled in the General Assembly or been unsuccessful due to intense

59 Harold H. Koh, *On American Exceptionalism*, 55, STAN. L. REV. 1479 (2003).

60 *Id.*

61 Jonas von Freiesleben, *A Look at the Transitional Approach to Security Council Reform*, CENTER FOR UN REFORM (June 24, 2008), <https://www.globalpolicy.org/security-council/security-council-reform/41136.html?itemid=916>.

62 *Id.*

63 *Id.*

64 *Id.*

opposition, they play a role in the debate over how the relationship between the ICC and the Security Council should be redefined.

In determining whether to make a referral to the ICC, the Council should act to promote justice and accountability rather than make its referral decisions based on political concerns. International law experts have proposed that the Council refrain from excluding nationals from non-state parties from jurisdiction as occurred in Darfur and should expand its current focus from Africa to other parts of the world.⁶⁵

Although these proposals for reform would address the inequality of the distribution of power on the Security Council and better reflect the diversifying landscape of the international system, they would not prevent the politicization of the ICC referral process because they do not specifically address veto power. However, they do provide an important framework through which this paper can address Security Council reform. Using the ICC referral process as an important example, this paper exposes the significant problems under the status quo. Members of the Security Council should be given the ability to override the veto of a permanent member if a supermajority of the Council votes to do so. Modifying the Security Council to allow for vetoes to be overridden will stop the politicization of the Security Council referral process. The permanent five members will no longer be able to arbitrarily protect their allies from justified prosecution by the ICC.

In the majority of democratic systems, a supermajority is calculated based on the entire membership of a body rather than on those present and voting.⁶⁶ The UN Security Council requires a supermajority of the fixed membership on substantive matters.⁶⁷ Specifying that the supermajority must be calculated according to

65 Michael P. Scharf, *The ICC's Jurisdiction Over the Nationals of Non-Party States: A Critique of the U.S. Position*, 64, CASE W. RES. FAC. PUB. 68 (2001).

66 HENRY SCHERMERS & NIELS BLOKKER, *INTERNATIONAL INSTITUTIONAL LAW: UNITY WITHIN DIVERSITY*, FIFTH REVISED EDITION (2011).

67 *Id.*

the fixed membership of the Security Council causes abstentions to count as votes against. As the Security Council already defines a supermajority in this way and a referral of a war criminal to the ICC would fall under the definition of a substantive matter, this recommendation uses this definition of a supermajority. Therefore, in order for the other members of the Security Council to override a veto by one of the permanent members, the override would have to pass with at least nine votes in affirmation, or a three-fifths supermajority in favor. Using this definition maintains the central tenets of voting rules in the Security Council and sets a high threshold for a veto to be overridden. Achieving such a supermajority would signal that the members of the international community represented by the states on the Security Council overwhelmingly agree that the decision should be reversed.

Although this paper sets out to resolve the problem of vast inequality in the distribution of power in the international system and uses the relationship between the International Criminal Court and the Security Council as an example, the likelihood of Security Council reform appears extremely low. In addition to the fact that multiple proposals for reform have been consistently rejected, it is also very improbable that any of the permanent five members of the Security Council would be willing to accept a reform proposal that weakens their power.⁶⁸ Allowing the other members of the Security Council to possibly override a veto would greatly diminish the grip that the permanent five members have in writing and enforcing international law.⁶⁹ Furthermore, a change in the Security Council would require an amendment to the UN Charter. The amendment process is set out in Article 108 of the Charter; amendments to the UN Charter can only be made after two-thirds of the members of the General Assembly vote in favor. Two thirds of the members of the General Assembly must also ratify the new Charter according

68 Jakob S. Lund, *Pros and Cons of Security Council Reform*, CENTER FOR UN REFORM EDUCATION (Jan. 19, 2010), <http://www.centerforunreform.org/?q=node/414>.

69 *Id.*

to the specifications of their respective constitutional processes. The five permanent members of the Security Council must be included in this two thirds of the Assembly's membership.⁷⁰ Persuading all five of the permanent members to vote the same way is already an impressive diplomatic feat. Also, because the five exert a strong influence on other member states, they have the ability to form large coalitions that could make achieving a two-thirds majority difficult. Moreover, allowing the privileges of the permanent five members to be limited could also potentially undermine the functions of the Council and diminish the already faint authority of international law.⁷¹ Finally, altering the membership of the Security Council has the potential to make the UN more inefficient than many believe it already is.⁷²

However, despite its unlikelihood, such reform is necessary to prevent blatant war criminals from escaping justified prosecution because of their political relationships with permanent members of the Security Council. Until such reform is undertaken, proven war criminals like Bashar al-Assad and Kim Jong-un will remain at the head of governments with blatant disregard for human rights.

Furthermore, the Security Council is ill-equipped to manage threats to international peace and stability under the status quo. The Council's inability to prevent recent conflicts in Ukraine and Syria along with its impotence in dealing with other security issues in the Middle East is evidence enough that change is necessary. The UN's weak response to these crises arose because one of the permanent five members of the Council used its veto power to prevent multilateral action, or because the states in question refused to negotiate through the UN on the grounds that the organization is biased and held

70 Charter of the United Nations, art. 108. Oct. 24, 1945, 1 U.N.T.S.

71 HENRY SCHERMERS & NIELS BLOKKER, *INTERNATIONAL INSTITUTIONAL LAW: UNITY WITHIN DIVERSITY*, FIFTH REVISED EDITION (2011).

72 Jonathan Cristol, *Don't Reform the Security Council*, WORLD POLICY BLOG (Sept. 21, 2015), <http://www.worldpolicy.org/blog/2015/09/21/don%E2%80%99t-reform-security-council>.

hostage by the permanent five members.⁷³ In short, although the road to Security Council reform includes many seemingly insurmountable hurdles, the continual rejection of change could cause the UN to deteriorate into a feeble association of squabbling states that is only issues toothless denunciations of ever-intensifying international skirmishes. This proposal is the best solution because it circumvents the contentious issue of increasing the membership of the Council and adding more permanent members with veto power, which has elicited the greatest outcry from the current permanent five members and factions such as the Uniting for Consensus Group. By reforming the UN Charter in this manner, the UN's legitimacy will be restored and its ability to avert international conflict will be enhanced.

The current process of referring non-party states to the ICC through the Security Council is ineffective. Although this process was established to strengthen the ICC's ability to prosecute war criminals by overcoming the limitations of territorial jurisdiction, it has allowed many criminals to successfully escape the Court's jurisdiction. The veto power held by the permanent five members of the Council is used to shield criminals from legal action for political purposes. To remedy this dilemma, the Council should be reformed so that the members of the Security Council can override the veto of a permanent member with a supermajority of the 15 members of the Council. Until such action is taken, the stated purpose of the United Nations "to save succeeding generations from the scourge of war" and "reaffirm faith in fundamental human rights"⁷⁴ will be unmet. Egregious war crimes like those that occurred in Khan Sheikhou, Syria will continue unabated.

73 Harriet Grant, *UN security council must be revamped or risk irrelevance, Kofi Annan warns*. THE GUARDIAN, Sept. 23, 2015, <https://www.theguardian.com/world/2015/sep/23/un-security-council-must-be-revamped-or-risk-irrelevance-kofi-annan-warns>.

74 U.N. Charter, Preamble.

