# Knights of the Court: The State Coalition Behind the International Criminal Court

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*Abstract: In its first years of operation, both the caseload and global role of the International Criminal Court (ICC) have steadily increased. The Court owes much of its success to a coalition of states that has championed a strong, independent judiciary to try heinous international crimes. These states have repeatedly clashed with the United States over a number of issues involving the ICC's jurisdiction. This article examines the pro-ICC coalition and its strategies during these disputes. It argues that the coalition's success stems from the make-up of its membership, which endows it with varied sources of power and tempers its principled positions with an understanding of the political realities of the international order. The ICC coalition also serves as a case study of the power politics behind the formation of international law. While international law continues to be forged under the forces of* realpolitik*, this coalition's success indicates that power-forged international law does not have to be the handmaiden of the most powerful states.*

**Introduction** ........ **2**
**I. Negotiations, *Realpolitik* and International Law** ........ **4**
A. Power Matters: Realist Regime Theory ........ 5
B. Expanding on Realism: Political Power ........ 8
Realist Explanations of How Power Influences Form ........ 8
**II. The Coalition Behind the International Criminal Court** ........ **13**
A. Overview of the ICC Coalition ........ 14
Origins of the ICC Coalition ........ 14
The ICC Coalition after Rome ........ 16
B. Exemptions to the ICC ........ 18
Limiting Security Council Exemptions ........ 19
Limiting Bilateral Exemptions ........ 24
C. The Expansion of the ICC: Resolution 1593 ........ 27
The Language of Resolution 1593 ........ 31
Resolution 1593 in Perspective ........ 32
**III. The Political Power of the ICC Coalition** ........ **33**
A. The Political Power of Size ........ 35
B. The Political Power of Diversity ........ 38
C. Coalitional Behavior: Principled Flexibility ........ 42
**Conclusion** ........ **45**

## INTRODUCTION

In July 2008, Surinam and the Cook Islands became the 107th and 108th State Parties to the International Criminal Court (ICC). The number of ICC members has steadily increased since 1998, and the Court has, consequently, increased both its caseload and its role in defining the parameters of international criminal law.[1] Not all nations, however, have supported these trends. The United States, not a member of the Court, has taken particularly great efforts to minimize the ICC's weight in the international system. The US has, in connection with its ICC protests, done the following:

- 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.[2]

These tactics have won the US 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 US 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.

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[1] See, e.g., *Prosecutor v. Anto Furundzija*, International Criminal Tribunal for the Former Yugoslavia, Case No. IT-95-17/IT, Judgment, 10 Dec. 1998, para. 227 (describing the ICC's role in developing customary international law).

[2] *See generally* Marc Weller, *Undoing the Global Constitution: UN Security Council Action on the International Criminal Court*, 78 INT'L AFFAIRS 693 (2002) (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*, 35 VAND. J. TRANSNAT'L L. 1503 (2002) (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*, 3 INT'L CRIM. L. REV. 295 (2003) (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*, 24 BERKELEY J. INT'L L. 650 (2006) (discussing U.S. actions in opposition to ICC).

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 recent political disputes about the ICC.[3] Using United Nations documents, contemporaneous media accounts of these political disputes, statements by diplomats and statements during the disputes, and various secondary sources, this article revisits the major political incidents over the ICC during the Bush Administration. While this account alone will hopefully enrich our understanding of the ICC, this article uses the case study to assess how international law is forged.

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 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 *realpolitik* model of the forces behind international law, drawing in particular from the field of International Relations (IR).[4] Unlike traditional *realpolitik* explanations of the international system, however, this article's focus remains on the ways in

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[3] 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* Oren R. Young, *Regime Dynamics: The Rise and Fall of International Regimes*, 36 INT'L ORG. 277, 278 (1982) (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.

[4] 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*, 93 AM. J. INT'L L. 361, 362 (1999) (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*, 92 AM. J. INT'L LAW 367, 375 (1998).

which states implement their strengths during international negotiations. Section I ends by discussing how parliamentary and procedural strategies fit within a paradigm of *realpolitik*. 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 US campaign to exempt itself from the Court's jurisdiction. Second, the article examines the 2005 Security Council referral of Sudan to the ICC, over US objections. In Section III, the article returns to explanations of how states exercise power during international disputes, looking at the ICC coalition's strengths and tactics during negotiations. It highlights three facets of the ICC coalition—size, diversity, and negotiating mindset—that were critical to its success in negotiations with the United States. The paper concludes by arguing that admitting the presence of *realpolitik* in international law does not cheapen the corpus of law and that the ICC example should lead some to reassess their criticisms of realist accounts of international law.

## I. NEGOTIATIONS, *REALPOLITIK* AND INTERNATIONAL LAW

Academically, this article's paradigm derives from the "regime theory" school of International Relations (more precisely what is commonly known as the "realist" variant of regime theory).[5] Regime theory has two general foci.[6] One is the effect of regimes (also referred to as 'institutions' in today's

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[5] Though the definition of 'regime' remains unsettled, many scholars use the consensus definition first proposed by Krasner in 1983: "sets of implicit or explicit principles, norms, rules, and decision-making procedures around which actors' expectations converge in a given area of international relations." Krasner, *supra* note 6, at 2. *But see* Susan Strange, Cave! hic dragones*: A Critique of Regime Analysis*, 36 INT'L ORG. 479 (1982) (critiquing 'regime' concept). Regime does not necessarily denote a physical forum, and many in IR distinguish "regimes" from "organizations," which refer to actual international bodies (most regimes, however, are accompanied by some organization). Simmons & Martin, *supra* note 7, at 194; Hasenclever et al., *supra* note 8, at 10. Regimes also vary in the number of actors involved. For purposes of simplicity, the paper will make a distinction here between 'universal regimes' and non-universal 'multilateral institutions' covering the same issue area. Global and non-universal regimes can have great overlap—near identical definitions of human rights, for instance, are used by regional and global courts alike.

[6] Stephen D. Krasner, *Structural Causes and Regime Consequences: Regimes as Intervening Variables*, *in* INTERNATIONAL REGIMES 1 (Stephen D. Krasner ed. 1983).

literature[7]), particularly on state behavior. Conclusions run the gamut, from those that see institutions as toothless to those that believe they dictate the majority of state behavior.[8] The second, and the main consideration of this article, asks "where international institutions [including international law] come from and why they take the distinctive forms they do."[9]

### A. Power Matters: Realist Regime Theory

While many in the old realist vanguard, like IR dons Morgenthau, Waltz, and Mearsheimer, dismiss regimes as incapable of having effects on the relations of states,[10] a strain of realists began to study regime formation in the late 1970s. Sticking to old realist values, realist regime theorists argue that "[t]he basic causal variables that lead to the creation of regimes are power and interest."[11] More specifically, regime realists believe the role of power privileged stronger states with the ability to dictate what regimes would be formed in the international order. International regimes exist, Gilpin argues, "because it has been in the interest of the predominant power(s) for them to do so."[12] Consequently,

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[7] Some have asserted a distinction between institutions and regimes. However, others have not followed this distinction and treated the two as synonymous. *See* ROBERT GILPIN, GLOBAL POLITICAL ECONOMY: UNDERSTANDING THE INTERNATIONAL ECONOMIC ORDER (2001); Beth A. Simmons & Lisa L. Martin, *International Organizations and Institutions*, *in* INTERNATIONAL RELATIONS (Walter Carlsnaes, Thomas Risse-Kappen & Beth A. Simmons, eds. 2002). This paper will follow the latter trend.

[8] *See* Andreas Hasenclever, Peter Mayer & Volker Rittberger, THEORIES OF INTERNATIONAL REGIMES (1997) (discussing competing theories of regime formation); Simmons & Martin, *supra* note 7 (same).

[9] Lloyd L. Gruber, RULING THE WORLD: POWER POLITICS AND THE RISE OF SUPRANATIONAL INSTITUTIONS 29 (2000).

[10] *See* Hans J. Morgenthau, *Positivism, Functionalism, and International Law*, 34 AM. J. INT'L L. 260 (1940); John J. Mearsheimer, *The False Promise of International Institutions*, INT'L SECURITY 9 (1994); *see also* Jack Goldsmith, *Law for States: International Law, Constitutional Law, Public Law*, 122 HARV. L. REV. 1791, 1827–28 (2009) (arguing that realism cannot account "for why nations would bother to expend resources to negotiate and enter into treaties and follow and debate customary rules"); Oona A. Hathaway, *The Continuing Influence of the New Haven School*, 32 YALE J. INT'L L. 553, 555 (2007) (summarizing early realist critiques of international law).

[11] Krasner, *supra* note 6, at 21.

[12] Robert Gilpin, *The Politics of Transnational Economic Relations*, in TRANSNATIONAL RELATIONS AND WORLD POLITICS 54 (Robert O. Keohane & Joseph S. Nye, Jr. eds. 1972); Goldsmith, *supra* note 10, at 1825 (noting that realist principles led "realists to think that international law would inevitably reflect the distribution of power among nations").

realists describe regimes, including international law, as an "epiphenomenon of underlying power" distributed through the international system.[13]

While realism has enjoyed hegemony in many facets of IR scholarship, it lost its preeminence in regime theory after the publication of work by Robert Keohane.[14] Drawing largely on microeconomics and game theory, Keohane proposed that regimes might be established among states if the outcome promised gains for all parties involved. "Egoistic governments can rationally seek to form international regimes on the basis of shared interests," he summarized.[15] Regimes, in turn, could coordinate cooperative endeavors and reduce the possibility of defection and cheating (the potential of being played for a sucker being a major disincentive for international cooperation). Keohane's work spurred the massive new subfield of neoliberal institutional regime theory (hereinafter "institutionalism"), with scholars applying its predictions to explain regimes formed around multiple issues, ranging from environmental concerns to nuclear non-proliferation.[16]

The explosion of institutionalist literature garnered two major responses from realists. First, realists claim that states are not solely focused on *absolute* gains earned from cooperation but also the *relative* gains of cooperating parties. "[R]ealists find that states are *positional,* not atomistic, in character," Grieco notes, "and therefore realists argue that, in addition to concerns about cheating, states in cooperative arrangements also worry that their partners might gain more from cooperation than they

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[13] Richard H. Steinberg & Jonathon M. Zasloff, *Power and International Law*, 100 AM. J. INT'L L. 74 (2006). Modern U.S. courts have alluded to the omnipresence of realpolitik in foreign affairs. *See, e.g.*, Occidental of Umm al Qaywayn, Inc. v. A Certain Cargo of Petroleum, 577 F.2d 1196, 1204-05 (5th Cir. 1978) ("In their external relations, sovereigns are bound by no law . . . . Because no law exists binding these sovereigns and allocating rights and liabilities, no method exists to judicially resolve their disagreements."); Miami Nation of Indians of Indiana v. United States Dep't of the Interior, 255 F.3d 342, 347 (7th Cir. 2001) (discussing how foreign affairs often implicate political questions given omnipresence of "the unjudicial mindset that goes by the name *Realpolitik*").

[14] ROBERT O. KEOHANE, AFTER HEGEMONY: COOPERATION AND DISCORD IN THE WORLD POLITICAL ECONOMY (1984).

[15] *Id.* at 107.

[16] *See, e.g.*, Robert O. Keohane, ed. INTERNATIONAL INSTITUTIONS AND STATE POWER: ESSAYS IN INTERNATIONAL RELATIONS THEORY (1989) (collection of essays discussing regime formation in different subjects of foreign affairs); Barbara Koremenos, Charles Lipson & Duncan Snidal, *The Rational Design of International Institutions*, 55 INT'L ORG. 761 (2001) (offering multivariate model of factors that influence institutional structure).

do."[17] Given that state security is a zero-sum game, Grieco and others argue, a state will oppose cooperation if the relative distribution of gains leaves it in a less secure position than it was before cooperation.[18] Regimes, moreover, do not have to be explicitly linked to security for relative gains to be a concern. Some regimes, Gowa argues, will have "security externalities" that affect the sphere of security by giving competitors resources (e.g. money, technology, etc.) that can be applied to increase the security of a competitor at the expense of other states (again, the assumption being a zero-sum security scenario).[19]

The second realist response to institutionalism questions the frequency of cooperative opportunities in the international system. Cooperation on many issues fails to develop not because there was a chance of "market failure" but because the states could not agree upon one solution.[20] In most international circumstances, realists argued, there are many solutions to the problem at hand, but each states will prefer one (but not the same) of these solutions over the most preferred point of the other actors. A dispute therefore emerges not over whether to cooperate or not, but rather over which of the solutions will the parties settle on.[21] So even when cooperation does occur in the international system, it is often preceded by an interstate struggle in which states apply power and pressure to define the parameters of the final agreement.[22] These types of disputes are settled "primarily by the relative bargaining power of the states involved."[23] In this way, larger powers are still able to dictate the parameters of the regime.

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[17] Joseph M. Grieco, *Anarchy and the Limits of Cooperation: A Realist Critique of the Newest Liberal Constitutionalism*, 42 INT'L ORG. 485, 486 (1988); *see also* Robert Jervis, *Realism, Game Theory, and Cooperation*, 40 WORLD POLITICS 317, 334–35 (1988).

[18] Conversely, if an action threatens one state's security more than it does other states', one can extrapolate that the disproportionately affected state would oppose the measure.

[19] Joanne Gowa, *Bipolarity, Multipolarity, and Free Trade*, 83 AM. POL. SCI. REV. 1245, 1245–46 (1989). Issues do not have to be a guaranteed 'security externalities' for states to be concerned about them. States are cautious about the uncertainty of organizations and regimes and their possible adverse effects and act correspondingly. Koremenos et al., *supra* note 16, at 782.

[20] Stephen D. Krasner, *Global Communication and National Power: Life on the Pareto Frontier*, 43 WORLD POLITICS 336, 339 (1991).

[21] *Id.* at 340.

[22] James D. Fearon, *Bargaining, Enforcement, and International Cooperation*, 52 INT'L ORG. 269 (1998).

[23] Krasner, *supra* note 20, at 337.

Therefore, even factoring in instances of cooperation, "outcomes related to either regimes or behavior ultimately remain a function of the distribution of power among states."[24]

**B. Expanding on Realism: Political Power**

*Realist Explanations of How Power Influences Form*

Realists focus almost uniformly on economic and military capabilities as the main sources of power in international politics. Power can be 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."[25] Regime realists focus less on the military and more on the latent element of power. The most common source of 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."[26] It is these sources, realists argue, that prove ultimately determinative of regime content.

While latent resources and military capabilities are separate reservoirs of power, a different issue is the manner in which states utilize these resources to influence regime negotiations. Regime realists have proposed a variety of mechanisms by which latent power is operationalized. One way, Gilpin notes, is via the "use of side payments (bribes), sanctions, and/or other means."[27] Carrot-and-stick approaches can also 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.)

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[24] Stephen D. Krasner, *Regimes and the Limits of Realism. in* INTERNATIONAL REGIMES, *supra* note 6, at 357; *see also* SUSAN STRANGE, MARKETS AND FORCES (1988) (discussing how regimes reflect great power influence); GILPIN, *supra* note 12 (discussing institutional forms as being forged by international power).

[25] JOHN J. MEARSHEIMER, THE TRAGEDY OF GREAT POWER POLITICS 55 (2003); *see also* STEPHEN M. WALT, THE ORIGINS OF ALLIANCES 9 (1987).

[26] KEOHANE, *supra* note 14, at 32.

[27] GILPIN, *supra* note 12, at 97; *see also* ROBERT GILPIN, THE POLITICAL ECONOMY OF INTERNATIONAL RELATIONS, at chp. 3 (1987).

that it views as stable and in its interest.[28] 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.[29] These goods, while non-excludable, are still offered by a larger power as a way to sweeten to 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.[30] Some authors suggest that latent power may not be equally fungible for all issue areas and in some cases has simply no purchase.[31] The structure of regime negotiations 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 at negotiating conventions. In the limited timespan during which regime negotiations often take place, sometimes little opportunity presents itself to influence negotiations via latent mechanisms.[32] Others argue there is also a lack of evidence that states use 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.[33] If latent mechanisms are the only way by which latent and military power is expressed, then

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[28] Stephen D. Krasner, *State Power and the Structure of International Trade*, 28 WORLD POLITICS 317 (1970); GILPIN, *supra* note 12, 93-102; *see also* Duncan Snidal, *The Limits of Hegemonic Stability Theory*, 39 INT'L ORG. 579 (1985); Joanne Gowa, *Rational Hegemons, Excludable Goods, and Small Groups: An Epitaph for Hegemonic Stability Theory?*, 41 WORLD POLITICS 377 (1989).

[29] *See* Krasner, *supra* note 28; Charles Kindleberger, THE WORLD IN DEPRESSION, 1929-1939 (1977) (theorizing hegemonic stability theory).

[30] *See, e.g.*, Barry Eichengreen, *The Political Economy of the Smoot-Hawley Tariff*, *in* INTERNATIONAL POLITICAL ECONOMY: PERSPECTIVES ON GLOBAL POWER AND WEALTH 221 (Jeffrey A. Frieden & David A. Lake eds. 2000) (arguing there is still "ambiguity about the instruments with which the hegemon makes its influence felt" during the course of negotiations); OREN R. YOUNG, INTERNATIONAL GOVERNANCE: PROTECTING THE ENVIRONMENT IN A STATELESS SOCIETY, at ch. 5 (1994); Wagner 1988.

[31] YOUNG, *supra* note 30, at 119-120.

[32] G. John Ikenberry, *A World Economy Restored: Expert Consensus and the Anglo-American Postwar Settlement*, 46 INT'L ORG. 289-321 (1992).

[33] *See, e.g.*, KEOHANE, *supra* note 14, at 38. Carrots, like ex ante bribes, are much more common.

there may be reason to question whether power—as realists define it—is in fact determinative of regime content.

*Beyond Sticks and Carrots: Parliamentary Mechanisms of Influence*

Obviously, states can influence actors and negotiation outcomes through manners other than side payments and public good provisions. One class of other mechanism takes advantage of parliamentary or political rules that define the negotiating environment, often referred to as "political power." Following Strange's definition, "we can say that people have political power if they control the machinery of state or any other institution and can use it to compel obedience or conformity to their wishes and preferences from others."[34] Expressed this way, use of procedural mechanisms is clearly an exercise of power, in that through procedural tactics "A has the power over B to the extent that [A] can get B to do something that B would not otherwise do."[35]

This article, however, defines political power more subtly. Here, political power refers to *the ability to affect the conditions of a negotiation, via strategies that employ preexisting regimes and organizations*. 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/or
3. Changing the relative payoffs of competing proposals during the course of the negotiations.[36]

An exercise of power 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.[37] In this

[34] STRANGE, *supra* note 24, at 25. The term "political power" is an unfortunately misleading term because procedural tactics are not an independent source of power (this is because the preexisting rules were themselves negotiated and shaped by power politics, such that stronger states structure rules in such a way that gives them a position of privilege). The author would prefer to use "political mechanism" or "institutional mechanism" to describe this method of applying latent power. However, past literature has almost uniformly used the term "political power," and this paper follows this tradition. Future writers, however, may want to consider a shift in terminology.

[35] MEARSHEIMER, *supra* note 25, at 57 (quoting Robert A. Dahl, *The Concept of Power*, 2 BEHAVIORAL SCI. 202-03 (1957)).

[36] Krasner, *supra* note 20, at 340.

article, political power is presumed to be exercised for coercive purposes, to induce states to agree to a regime, rule or collective action that it otherwise would not desire. In other words, political power here does not involve any form of socialization; when a state changes course and agrees to another state's demands, it does so begrudgingly, and not because its interests have changed.[38]

Political power is not a new *source* of power but rather another *mechanism* by which power sources are operationalized.[39] Inverting Clausewitz's maxim that "war is politics by other means," Foucault in a 1976 lecture offered that "politics is the continuation of war by other means." He continued,

> According to this hypothesis, the role of political power is perpetually to use a sort of silent war to reinscribe that relationship of force, and to reinscribe it in institutions…. Politics, in other words, sanctions and reproduces the disequilibrium of forces manifested in war.[40]

Another way to conceive of the relationship between power and politics is to think of political power as one of the many *currencies* by which underlying power—determined by latent and military capabilities—is exercised. Just as electricity is a different form of energy derived from an original fuel, strength derived from political sources should not be viewed as a *new* source but rather as a different incarnation of preexisting latent power. The distribution of power is maintained in part because established regimes reflect the distribution of bargaining power at the time of negotiation.[41] This distribution, in turn, does not vary largely during the lifespan of the regime, or else the institution would collapse (e.g. the collapse of the Bretton Woods exchange in the 1970s) or be renegotiated such that it reflects the current distribution

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[37] *See* Jervis, *supra* 17, at 322; Ofer Eldar, *Vote-Trading in International Institutions*, 19 EUR. J. INT'L L. 3 (2008).

[38] 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.

[39] The term "political power" is an unfortunately misleading term. The author would prefer to use "political mechanism" or "institutional mechanism" to describe this method of applying latent power. However, past literature has almost uniformly used the term "political power," and this paper follows this tradition. Future writers, however, may want to consider a shift in terminology. The author thanks Janina Dill for this point.

[40] MICHEL FOUCAULT, SOCIETY MUST BE DEFENDED": LECTURES AT THE COLLÈGE DE FRANCE, 1975-76, at 16 (Francois Ewald & Alessandro Fontana eds., David Macey trans. 2003). For a systematic application of Foucauldian theory to international law, see LEONARD M. HAMMER. A FOUCAULDIAN APPROACH TO INTERNATIONAL LAW: DESCRIPTIVE THOUGHTS FOR NORMATIVE ISSUES 12-13(2007) (describing international law as international politics).

[41] In this way, this paper does not diverge from the theories of early regimes realists. *See supra* notes 11–13 and accompanying text.

of power (e.g. the recalculations of the IMF's weighted voting system in 2006).[42] The strategic use of preexisting regimes (i.e. the exercise of political power), therefore, does not diverge greatly from the distribution of power across the international system.

Because it reflects the distribution of latent power in the system, political power cannot endow an actor or group of actors more than material capabilities allow.[43] States employ procedural strategies, however, because at times they have significant benefits over other mechanisms of coercion (i.e. alternative currencies of power). One, where sticks and carrots are impossible because of time or resource constraints, political mechanisms may still be available. Second, political power can reduce the moments in which fights over regime form would end in mutually destructive behavior, for instance, the application of reciprocal sanctions between otherwise stable allies.[44] Third, a state may employ political power because the party 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 procedurals 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.[45] These reasons are not exhaustive but do explain why a state could favor political mechanisms over other strategies to employ its latent power.[46]

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[42] There is internal dissension among realists as to how static established regimes are, and how much they evolve with a changing distribution of power. Snidal, *supra* note 28, at 584. This paper, for manners of simplicity, treats regimes as "international arrangements… easily upset when either the balance of bargaining power or the perception of national interest… change among those who negotiate them." Strange, *supra* note 5, at 487. This paper does not evaluate the empirical accuracy of this assumption.

[43] 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 UK'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*, 38 COOPERATION & CONFLICT 339, 347 (2003), for an analysis of varying frequencies of states' exercise of vetoes.

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

[45] 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.

[46] Political 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

Parliamentary tactics are particularly predominant in legal regime negotiations, in part because preexisting regimes are often used as the forums for new negotiations.[47] Negotiations for the formation of the World Trade Organization (WTO) and the new trade regimes that accompanied it were all negotiated 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.[48]

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 arguably the most important international legal institution to emerge in the last decade—the International Criminal Court—to understand the forces that shaped its formal rules and its less formal practices, and what tactics were so successful for the ICC coalition.

## II. THE COALITION BEHIND THE INTERNATIONAL CRIMINAL COURT

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.[49] To give appropriate context, however, the Section 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 US to exempt itself

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that the use of political 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 political power on one issue, unless that regime was perceived as absolutely critical to its survival.

[47] James D. Morrow, *Modeling the Forms of International Cooperation: Distribution versus Information*, 49 INT'L ORG. 387, 408–11 (1994).

[48] 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 preexisting 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.

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

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 Darfur atrocities.

**A. Overview of the ICC Coalition**

*Origins of the ICC Coalition*

The origins of today's ICC coalition predate the Court itself. The coalition dates back to as early as 1995, when a few states began to outline a campaign for a permanent international criminal tribunal.[50] By 1996 these states had agreed to "create a permanent international court as soon as possible."[51] The coalition also began to grow significantly, forming a bloc that between 1995 and June 1998 grew to approximately forty-two states.[52] 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 severest international crimes.[53] 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 'triggered' by State complaints and/or referrals by the Security Council; [fourth,] a recognition of the experiences of victims, particularly women and children, in armed conflict and the criminal law process.[54]

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[50] MARLIES GLASIUS, THE INTERNATIONAL CRIMINAL COURT: A GLOBAL CIVIL SOCIETY ACHIEVEMENT 22 (2006) (noting original coalition included Argentina, Canada, Norway, and Netherlands).

[51] Fanny Benedetti & John L. Washburn, *Drafting the International Criminal Court Treaty*, 5 GLOBAL GOVERNANCE 1, 20 (2000).

[52] Leila Nadya Sadat, *The Establishment of the International Criminal Court: From the Hague to Rome and Back Again, in* THE UNITED STATES AND THE INTERNATIONAL CRIMINAL COURT: NATIONAL SECURITY AND INTERNATIONAL LAW 43 n.11 (Sarah B. Sewall & Carl Kaysen eds. 2000).

[53] See WILLIAM A. SCHABAS, AN INTRODUCTION TO THE INTERNATIONAL CRIMINAL COURT 16 n.54 (2d ed. 2004) for a list of the LMG states.

[54] GLASIUS, *supra* note 50, at 23.

The LMG would become the chaperone for proposals over 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.[55]

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.[56] The LMG proposal, for instance, supported certain propositions that remained at odds with the proposal submitted by the International Law Commission.[57] 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.[58] Proposals for an independent and empowered Court similarly received opposition from many militarily active nations,[59] who feared that security externalities of an autonomous Court might jeopardize their military strength.[60] US military leaders

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

[56] 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 50, at 23.

[57] SCHABAS, *supra* note 53, at 15.

[58] GLASIUS, *supra* note 50, 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.

[59] 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. For troop size information, see CENTER FOR STRATEGIC & INTERNATIONAL STUDIES, http://www.csis.org/media/csis/ pubs.htm.

[60] 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. Gowa, *supra* note 19, 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.

An international institution's externalities vary for each state, depending on the state's relative position in the international system. LMG states largely did not share the same security concerns as great military powers; many states believed the ICC actually had positive security effects. The EU's pro-ICC stance, for instance, 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

believed the ICC might hamstring US hegemonic military capabilities by questioning the legitimacy of some military decisions and tactics.[61] In particular, the broad jurisdiction proposed for the ICC worried states because the expanded standard, which abandoned the traditional requirement of sovereign consent before starting an investigation, would eliminate the traditional state check on international institutions.

Despite the concerns of the US and others, the LMG's "strong court" movement gained momentum at the Rome drafting conference in June and July 1998.[62] The forty-odd state bloc entering Rome expanded to sixty-one members by the final days of negotiation,[63] and reached agreements with other non-LMG states through further negotiations.[64] 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.

*The ICC Coalition after Rome*

For matters of simplicity, the membership of the ICC coalition can be considered to be all states party to the court, the 108 nations that have now ratified the convention.[65] Within this group, however, a smaller core group of states has taken the lead in promoting an active role for the Court. Many of these countries are the same states that held leadership roles at Rome, but the group is not identical to that of

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between nations and largely accounts for the different positions taken by states during the ICC's drafting sessions. *See* Lawrence R. Atkinson, Global Use of the International Criminal Court: Jostling on the Pareto Frontier, Paper Presented at the International Studies Association, March 2008, *available at* http://www.allacademic.com/meta/p250991_index.html (discussing externalities of the ICC); Mieczysław P. Boduszyński & Kristina Balalovska, Woodrow Wilson International Center for Scholars, Between a Rock and a Hard Place: How the U.S.-EU Battle over Article 98 played out in Croatia and Macedonia (Sept. 2003), *available at* http://www.wilsoncenter.org/topics/pubs/71BalalovskaBoduszynskifinal.doc (discussing EU and U.S. divergent interests on ICC and political pressure accordingly placed on Eastern European countries).

[61] Sarah B. Sewall et al., *The United States and the International Criminal Court: An Overview*, *in* THE UNITED STATES AND THE INTERNATIONAL CRIMINAL COURT, *supra* note 52, at. 16; BRUCE BROOMHALL, INTERNATIONAL JUSTICE AND THE INTERNATIONAL CRIMINAL COURT: BETWEEN SOVEREIGNTY AND THE RULE OF LAW 166 (2003).

[62] *See, e.g.*, COMMENTARY ON THE ROME STATUTE OF THE INTERNATIONAL CRIMINAL COURT – OBSERVERS' NOTES, ARTICLE BY ARTICLE (Otto Triffterer ed. 1999) (describing debate and negotiation of each article at Rome); M. CHERIF BASSIOUNI, THE LEGISLATIVE HISTORY OF THE INTERNATIONAL CRIMINAL COURT (2005) (recounting negotiation at Rome); THE ROME STATUTE OF THE INTERNATIONAL CRIMINAL COURT (Antonio Cassese, Paola Gaeta & John R. W. D. Jones eds. 2002); SCHABAS, *supra* note 53 (discussing Rome Conference).

[63] SCHABAS, *supra* note 53, at 15.

[64] Fen Olser Hampson & Holly Reid, *Coalition Diversity and Normative Legitimacy in Human Security Negotiations*, 8 INT'L NEGOTIATION 7, 35 (2003).

[65] An updated list of Member States can be found at http://www.icc-cpi.int/Menus/ASP/states+parties/.

the LMG.[66] The change in the setting of international negotiations has had a particular 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 about the Court have taken place.[67] 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 US[68]

After Rome, the coalition has continued to enjoy middle power leadership and financial support, which has increased as larger states like France and Japan have joined.[69] Many larger states, such as members of the EU and Canada, were among the first to ratify the ICC Statute. This initiation by middle powers had an important snowballing effect for the ICC coalition. The commitment of these larger states, Broomhall argues, "created the political support and financial viability of the Court that other States

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[66] 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 to prime minister in 2003, and the resignation of UN Ambassador Paul Heinbecker in 2004.

[67] Germany served a term on the Security Council in 2003 and 2004, but it was not present at the initial Security Council debates on the ICC in 2002, nor at the Council negotiations on the Darfur referral in 2005.

[68] 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 is the constant worry that the UK, in part due to its broader alliance with the U.S., will defect from the group. *See, e.g.*, *Italy and Britain May Exempt U.S. From ICC*, ASSOC. PRESS, Aug. 31, 2002; Nicholas Kralev, *London Agrees to Keep Darfur Trials Out of ICC*, WASH. TIMES, Feb. 4, 2005, at A6. However, the UK has still ultimately stayed within the ICC coalition in the end game of all major disputes and used its middle position to referee some disputes.

[69] Using the varying rates of UN dues, Broomhall estimates that Japan's new membership will reduce the financial burden of the ICC from 78.17% of the total ICC budget to approximately 54.14 percent. BROOMHALL, *supra* note 61, at 164.

needed as a precondition for their own support. Partly as a result, many sub-Saharan African and Central and Eastern European States… accelerated their processes of ratification."[70]

**B. Exemptions to the ICC**

In April 2002, 66 nations had ratified the ICC Statute, enough to bring into international force.[71] 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 US began an "active" campaign to limit the role and reach of the ICC, beginning with the (in)famous "unsigning" of the Rome treaty.[72] Off the record, at least one US 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."[73] This change in US tactics forced the coalition to lead a stand against the US campaign, one that largely took place over the next three years.[74]

Though unable to stop the ICC's founding, the US has successfully secured a variety of jurisdictional exemptions for its nationals and servicemembers, much to the chagrin of Court supporters. These exemptions have come via two methods. On four occasions, the US has obtained language in Security Council resolutions that limited the ICC's jurisdiction over US peacekeepers. In addition, the US has signed numerous bilateral treaties termed "Article 98 agreements." Under these agreements, the

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[70] *Id.* at 169.

[71] *See* U.N. Doc. A/CONF.183/9, art. 126 (July 17, 1998) ("[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 July 1, 2002.

[72] On May 6, 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 US "does not intend to become a 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 (May 6, 2002) (on file with author).

[73] Jess Bravin, *U.S. to Pull Out of World Court on War Crimes*, WALL ST. J., May 6, 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 US leadership. BROOMHALL, *supra* note 61, at 178. Such a 'stillbirth' had been the fate of the International Trade Organization (ITO) and the League of Nations, which collapsed after US support soured. Arthur A. Stein, *The Hegemon's Dilemma: Great Britain, the United States, and the International Economic Order*, 38 INT'L ORG. 355, 380 (1984).

[74] For the rationale of U.S. objections to the Court, see *supra* note 60 (discussing security externalities) and Atkinson, *supra* note 60 (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 (2007) for an excellent summary of the U.S. position and an assessment through an IR lens.

signing state agrees not to turn any US national over to the ICC.[75] Given that the ICC may not try any suspect *in abstentia* (Article 63 of the ICC Statute), Article 98 agreements also effectively provide any state that exercises its rights under these agreements an exemption to the ICC. In April 2007, the US reported that it had signed an Article 98 agreement with Montenegro, bringing the total number of Article 98 agreements to at least 106.[76]

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

*Limiting Security Council Exemptions*

Just before the ICC opened its doors in July 2002, state supporters found themselves collectively defending the Court from US opposition. The day before the ICC became operational, the US vetoed the renewal of the UN mission in Bosnia and Herzegovina (UNMIBH), announcing the campaign would not be reauthorized until US peacekeepers were exempted from the ICC's jurisdiction.[77] In response, the ICC's members collectively moved to oppose US efforts, believing that the American campaign jeopardized the Court's functionality and future. Some ICC members publicly accosted the US for such a

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[75] Sean D. Murphy, *U.S. Efforts to Secure Immunity from ICC for U.S. Nationals*, 97 AM. J. INT'L L. 710, 711 (2003).

[76] In October 2006, the State Department announced the U.S. had signed 103 Article 98 agreements. U.S. State Department Press Briefing, 3 Oct. 2006. In November 2006, the White House announced it had signed agreements with Comoros and Saint Kitts and Nevis. Press Release, White House, Memorandum for the Secretary of State, Nov. 22, 2006. In April 2007, the U.S. signed an additional agreement with Montenegro. *U.S., Montenegro Sign Defense, Troop Immunity Pacts*, AGENCE FRANCE PRESSE, May 1, 2007.

[77] U.N. SCOR, 59th Sess., 4568th mtg., UN Doc. S/PV.4563 (June 30, 2002) (voting on draft S.C. Res. 712, U.N. Doc. S/2002/712 (vetoed by USA 13-1-1)). Matthew Price, *UN 'Not Planning' Bosnia Pull-Out*, BBC NEWS, July 1, 2002, *available at* http://news.bbc.co.uk/ 2/hi/europe/2078002.stm; MURPHY, *supra* note 74, at 164–66. The Council temporarily extended the mission while negotiations continued. S.C. Res. 1420, U.N. Doc. S/PV.4564 (June 30, 2002) (extending UNIMBH authorization until July 3, 2002); S.C. Res. 1421, U.N. Doc. S/RES/1421 (July 3, 2002) (extending UNIMBH authorization until July 15, 2002).

brazen political move.[78] Other states, particularly those on Council at the time, initiated a series of closed-door negotiations with the US, brokered by UK representative Jeremy Greenstock.[79] Through these negotiations, ICC supporters won a number of concessions.

After the UNMIBH veto, the US circulated a draft Council resolution that exempted all UN personnel from the ICC.[80] 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.[81] 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.[82] Paragraph 2 of the US resolution, however, proposed that "on July 1 of each successive year, the request not to commence or proceed with investigations or prosecutions as set forth in paragraph 1 shall be renewed and extended during successive twelve-month periods thereafter unless the Security Council decides otherwise…."[83] This language made the general exception for UN peacekeepers continuous until the Council passed another resolution ending the exemption (and, given the US veto in the Security Council, until the US 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 US draft resolution, ICC proponents refused to support an open-ended exemption.[84] Protesting states pointed out that the draft resolution would undermine the nascent Court by

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[78] 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." EUR. PARL. DOC. (P5 TA0367) 3 (2002).

[79] Martin Boer, *U.S. Wins Year's Immunity for Troops from War Crimes Court*, FIN. TIMES, July 13, 2002, at 1.

[80] The draft is reprinted in Mokhtar, *supra* note 2, at 309 n.50. An earlier draft had been circulated that exempted all U.N. peacekeepers from all international tribunals. *See* MURPHY, *supra* note 74, at 167–68.

[81] Mokhtar, *supra* note 2, at 309 n.50.

[82] U.N. Doc. A/CONF.183/9, art. 16 (July 17, 1998) ("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.").

[83] *Id.*

[84] U.N. SCOR, 59th Sess., 4568th mtg., U.N. Doc. S/PV.4568 (July 10, 2002).

creating "one law for the goose and another for the gander."[85] Others echoed Secretary General Annan, who concluded the draft resolution, if passed, would literally "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."[86] 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 US position as an abuse of its power.[87] 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 which time the resolution would have to be renewed by a Council vote. With all Council members satisfied by this concession, Resolution 1422, requesting a general exemption for all UN peacekeepers for one year, was passed unanimously.[88]

The consequence of the change from an open-ended to temporal exemption was felt in 2004, when the US tried to renew Resolution 1422 a second time (Resolution 1422 was renewed in 2003 on a 12-0-3 vote, with France, Germany, and Syria abstaining[89]). By June 2004, seven states indicated they would abstain on a resolution that renewed the exemption, presenting a coalition that prevented the US 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 signaling an intention to abstain were

[85] Paul Heinbecker, Presentation, The Changing International Stage, May 2004, *available at* http://www.heinbecker.ca/Speeches/ChumirSymposiumMay2004.pdf. Heinbecker was the Canadian ambassador to the United Nations during the 2002 negotiations.

[86] Letter from Kofi Annan to Colin Powell (July 3, 2002) (on file with author).

[87] *See* U.N. Doc. S/PV.4568, *supra* note 84.

[88] 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." *Id.* at para. 2.

[89] *See* S.C. Res. 1487, U.N. Doc. S/RES/1487 (June 12, 2003).

France, Spain, Germany, Brazil, Chile, Benin and Romania—all members of the ICC.[90] As resistance grew to the US position, non-ICC members also voiced their opposition to the continuation of exemptions. Chinese officials indicated that China would veto any quick vote offered by the US without debate and also abstain on any other vote.[91] The confluence of opposition was insurmountable for US diplomats. In late June, the US circulated a revised proposal to Council members that would have made the one-year extension explicitly non-renewable.[92] When this compromise found no suitors, the US dropped the issue and merely pulled a handful of US peacekeepers from UN missions in protest.[93]

Though one explanation for the US failure may be that ICC members became increasingly indignant at the ICC exemption and, therefore, increasingly willing to oppose the US, two other factors more likely account for the change of US fortunes in 2004. One is the complicated calculus of using a Security Council veto in the post-9/11 world. While each permanent member holds the power to unilaterally stop a Council resolution, it is the interest of many to refrain from actions that might lead to a protracted deadlock between Council members, particularly one that spreads across multiple issues.[94] This concern is particularly poignant for the US, which has recently used the Security Council as an international "legislature" to pass resolutions in connection with its Global War on Terror.[95] As the US global campaign on terrorism and the war in Iraq both intensified, the US 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.

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[90] Mark Turner, *U.S. Struggles to Win Immunity for its Troops*, FIN. TIMES June 9, 2004; *U.S. puts forward compromise proposal on war crimes court*, XINHUA, June 23, 2004.

[91] Chinese officials linked their new position to efforts to refuse the U.S. military a "blank check." Turner, *supra* note 90; *China Will Not Back U.S. on Immunity from New Court*, REUTERS, June 18, 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, May 27, 2004.

[92] Jonathan Birchall, *U.S. Seeks Compromise over ICC Immunity*, FIN. TIMES, June 23, 2004, at 8.

[93] Lawrence Di Rita, Defense Department, Press Briefing, July 1, 2004, *transcript available at* http://www.defenselink.mil/transcripts/2004/tr20040701-0951.html.

[94] Forums that permit issue linkages have become increasingly important in international forums. David Leebron, *Linkages*, 96 AM. J. INT'L L. 5 (2002).

[95] Stefan Talmon, *The Security Council as World Legislature*, 99 AM. J. INT'L L. 175, 175 (2005).

Secondly, the ICC's increasing membership in its first years strengthened the power of its coalition, both globally and within the Security Council. While ICC members occupied six Council seats in 2002 and five in 2003, the election of Benin, Brazil, and Romania to the Council to rotating non-permanent seats in 2004 gave the ICC a quorum of seven seats, sufficient to block renewals without any one state 1) having to use a veto or 2) directly voting against a US proposal. With seven votes on the Council, ICC members could form a coalition to block exemptions.[96] This broad-based opposition, moreover, was effective because it distributed the costs of opposition among multiple members. While the ICC could have technically halted US proposals before obtaining this quorum of seats—both the UK and France have vetoes but use them rarely[97]—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 US 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 US The adjustment of the 2002 agreement, in turn, reflects a common method by which states find a mutually agreeable framework for cooperation.[98] Realists and neoliberals alike have noted that terms of international agreements reflect the distribution of resources and power in the international system.[99] Given that the US 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 US power. Since 2003, the Security Council has not granted a general exemption from the ICC's jurisdiction.

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[96] See *infra* note [xx] for further discussion about this type of blocking coalition and its exercise of "negative" power.

[97] See Chan, *supra* note 43, at 347 (analyzing varying frequencies of states' exercise of vetoes).

[98] Barbara Koremenos, *Loosening the Ties that Bind: A Learning Model of Agreement Flexibility*, 55 INT'L ORG. 289 (2001).

[99] *See, e.g.*, Koremenos et al., *supra* note 16, at 761; Steinberg & Zasloff, *supra* note 13, at 64.

At the same time, the ICC coalition found it necessary to compromise with the US, falling back to secondary positions in accepting a temporary exemption in 2002. Similarly, members in 2003 accepted one more extension. The UK 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 US ICC parties claimed that the US was "hijacking" the ICC Statute, and that a resolution "will effectively kill the Court before it is born."[100] After negotiations, however, ICC states would acknowledge they were "very pleased" or at least "satisfied" with the compromise for the moment.[101]

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 US in 2002 and 2003. While it is difficult to estimate counterfactuals, one can note that European nations believed the US would continue its strong-arm tactics if the ICC coalition did not compromise. One European official argued that the US was completely willing to "kill peacekeeping and the ICC with one stone."[102] Had the US 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 US 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 US 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.

*Limiting Bilateral Exemptions*

[100] Statement of Fiji Representative, Preparatory Commission for International Criminal Court, July 7, 2002, *available at* http://www.unis.unvienna.org/unis/pressrels/2002/l3008.html.

[101] Martin Boer, *U.S. Troops Set for Immunity from New Court*, FIN. TIMES, July 13, 2002, at 6.

[102] Carola Hoyos, *U.S. Takes Chance to Target Peacekeeping*, FIN. TIMES, July 2, 2002, at 11.

Like the Security Council strategy, the US 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.[103] One main stick for the US was the American Servicemembers' Protection Act, passed by Congress in 2002. This legislation prohibited US military aid to any ICC member that had not signed a bilateral agreement with the US[104] Congress also later passed an amendment that prohibited ICC members that had not signed Article 98 agreements from receiving humanitarian aid from the US "Economic Support Fund."[105] Even when the US 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 US 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….[106]

US efforts, however, have been curtailed when ICC proponents apply their own economic leverage to nations considering a pact with the US After the US signed its first agreement with Romania in August 2002, for instance, EU nations (all of which are ICC members) announced that they would develop a common position to the US campaign and advised states aspiring to join the EU to refrain from

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[103] 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). [cite]

[104] H.R. 4775, 107th Cong., §2001 (2002). The Act exempted certain U.S. allies.

[105] H.R. 4818, 108th Cong., amt. 706 (2004). For fiscal year 2006, the stipulation jeopardized $326.6 million of U.S. economic assistance for twelve nations. AMERICAN NON-GOVERNMENTAL ORGANIZATIONS COALITION FOR THE INTERNATIONAL CRIMINAL COURT, THE NETHERCUTT AMENDMENT, Dec. 7, 2004, http://www.amicc.org/usinfo/congressional.html#nethercutt.

[106] Dominic McGoldrick, *Political and Legal Responses to the ICC*, IN THE PERMANENT INTERNATIONAL CRIMINAL COURT: LEGAL AND POLICY ISSUES 427–28 (Dominic McGoldrick, Peter Rowe & Eric Donnelly eds. 2004).

signing agreements until the EU position had been announced.[107] 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 US Article 98 agreements were inappropriately broad and that EU states should not sign them as drafted.[108] 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 US overtures to sign Article 98 agreements.[109]

In some ways, the success of the US 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 US 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.[110] While some ICC states supported the idea of compensation, the EU eventually to the official position that it would not compensate ACP states for the lost aid.[111] 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 US'"[112] While this decision was principled, the ICC coalition's decision to remain above the *realpolitik* fray mind afforded the US much more opportunity to

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[107] Elizabeth Becker, *European Union Urges Aspirants to Rebuff U.S. on World Court*, N.Y. TIMES, Aug. 14, 2002, at A11.

[108] Press Release, Council of the European Union, Conclusions of the Council of the European Union on the ICC. Sept. 30, 2002.

[109] McGoldrick, *supra* note 106, at 394. The EU subsequently stated that it would not consider EU applicants' position on the ICC in connection with their EU application.

[110] Parliamentarians for Global Action, Memorandum, ACP-EU Joint Parliamentary Assembly Affirms Principle of Compensation for Developing Countries Suffering Consequences of Bilateral Non-Surrender Campaign," Memorandum, Oct. 16, 2003, *available at* www.amicc.org/docs/ACP_EU10_03.pdf.

[111] Sibylle Scheipers & Daniela Sicurelli, Empowering Africa: Normative Power in EU-Africa Relations, Paper presented at European Union Studies Association (May 17, 2007), *available at* http://aei.pitt.edu/8035/.

[112] *Id.*

push its campaign. Subsequently, 51 of the 79 ACP states have reportedly signed Article 98 agreements with the US.[113]

From another perspective, however, the US bilateral campaign was only initiated after earlier strategies were blocked by ICC supporters; therefore, US 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 US 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.[114] The US has also failed to secure agreements where ICC jurisdiction would appear to have the greatest security externalities (i.e. where a US military campaign might likely take place in the near future)—for instance, in North Korea, Iran, Libya, and Syria.[115] Some of these states are unlikely to ever sign an Article 98 agreement with the US, 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."[116]

**C. 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.[117] 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.[118] It also confirmed the nascent court 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

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[113] Data on Article 98 agreements taken from GEORGETOWN LAW LIBRARY, INTERNATIONAL CRIMINAL COURT—ARTICLE 98 AGREEMENTS RESEARCH GUIDE, *available at* http://www.ll.georgetown.edu/intl/guides/article_98.cfm.

[114] *Id.*

[115] *Id.* 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.

[116] Hirad Abtahi, *The Islamic Republic of Iran and the ICC*, 3 J. INT'L CRIM. JUSTICE 635, 643 (2005); *see also* STEVEN C. ROACH, POLITICIZING THE INTERNATIONAL CRIMINAL COURT: THE CONVERGENCE OF POLITICS, ETHICS, AND LAW 146 (2006).

[117] S.C. Res. 1593, U.N. Doc. S/RES/1593 (Apr. 1, 2005) (hereinafter "Resolution 1593").

[118] Prior to Darfur, the ICC had received three cases self-referred to the ICC by State Parties—one by Uganda in 2003, one by the Democratic Republic of Congo in 2004, and one by the Central African Republic in 2005.

case via Security Council resolution was doubted by scholars and diplomats alike. One commentator in late 2004 lamented, "[t]he prospect of the Security Council referral of case 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."[119] 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 US remained in deadlock, where the self-interested play for both groups was to defect from the other such that ICC members independently developed the ICC without any support from (and sometimes under heavy opposition applied by) the US 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.[120] 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, US Secretary of State Powell had publicly labeled Darfur a case of "genocide" and stated the local janjaweed "bear responsibility" for the atrocities. [121] Though a few Council members were hesitant about a referral, international support was great enough that the pertinent issue quickly became not whether to refer Darfur to a tribunal, but what type of tribunal would the Security Council select to review the situation.[122]

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 favored referral of the Darfur situation to the ICC, which would accept jurisdiction

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[119] William A. Schabas, *United States Hostility to the International Criminal Court: It's all about the Security Council*, 15 EUR. J. INT'L L. 701, 702 (2004).

[120] Paul F. Diehl, Charlotte Ku, & Daniel Zamora, *The Dynamics of International Law: The Interaction of Normative and Operating Systems*, 57 INT'L ORG. 43 (2003).

[121] John R. Crook, *U.S. Proposes New Regional Court to Hear Charges Involving Darfur, Others Urge ICC*, 99 AM. J. INT'L L. 501, 501 (2005).

[122] 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 60.

under Article 13(b) of the ICC Statute.[123] The US, fearing the prospect of setting a precedent and adding to the legitimacy of the ICC, favored any of a number of non-ICC forums taking the case.[124] In early 2005, for instance, US 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).[125] US negotiators also proposed forming a permanent but regional "African Criminal Court,"[126] modeled after an AU plan to create a permanent tribunal that would be administered by African nations alone.[127] Most Council members, however, remained uninterested in options besides the ICC.[128] By early February 2005, a coalition of nine states—a majority large enough to block US proposals—had taken the position that an ICC referral was the only acceptable solution.[129] By mid-February, press reports stated twelve of the fifteen members in the Security Council preferred the ICC option over any other.[130]

Just as the increasing number of ICC members affected 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.[131] Whereas the seven-member group of ICC states had

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[123] *See* U.N. Doc. A/CONF.183/9, art. 13(b) (July 17, 1998) ("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.").

[124] Crook, *supra* note 121, at 501.

[125] "African Union Tribunal Proposed for War Crimes in Darfur," WASH. FILE, Feb. 9, 2005; John R. Crook, *U.S. Proposes New Regional Court to Hear Charges Involving Darfur, Others Urge ICC*, 99 AM. J. INT'L L. 501, 501–02 (2005).

[126] Nicholas Rostow, counsel to the U.S. mission in the UN, explained, "We have an idea for the creation of an African Criminal Court which would become a permanent fixture of the African landscape […] They need such an institution, and as I understand it, they want it." Quoted on Radio Netherlands, 28 Feb. 2005.

[127] Bernard Hibbitts, *Nigeria proposes African tribunal for Sudan*, JURIST, Mar. 17, 2005. Some African states favored a regional tribunal that would not garner the same suspicions "neo-colonial" justice that an international tribunal attracted. Robert Cryer, *Sudan, Resolution 1593, and International Criminal Justice*, 19 LEIDEN J. INT'L L. 195, 218 (2006).

[128] U.N. SCOR, 60th Sess., 5158th mtg. at 4, U.N. Doc. S/PV.5158 (Apr. 1, 2005).

[129] Mark Turner, *U.S. Urges UN Oil Sanctions over Darfur*, FIN. TIMES, Feb. 2, 2005, at 8.

[130] *UN Council Deadlocked over Court for Darfur Trials*, REUTERS, Feb. 18, 2005.

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

merely been a blocking coalition in 2004, the additional members gave the group the positive power to undertake its own initiatives in 2005.[132] The coalition could still not override the US veto, but 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.[133] US leaders were conscious of this new risk, and Ambassador Prosper warned early in the Darfur debate that the US did not want to be forced into a "thumbs-up or thumbs-down" vote on the ICC.[134] 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.[135]

After the US proposals failed to garner support, the ICC coalition made the next move. On March 23, France circulated a formal draft resolution to other Council members that referred Darfur to the ICC.[136] French officials claimed they had assurances of support from eleven Council members[137] and announced it would call for a public vote, which would force the US into the awkward position of vetoing the only referral proposal that had sufficient support among Council members.[138] Faced with the mounting pressure, the US employed a series of last minute strategies to delay the vote and win more concessions. On March 24, US Secretary of State Condoleezza Rice called French Foreign Minister Michel Barnier and reportedly implied that the US would veto the French proposal as drafted.[139] The French delegation subsequently delayed the vote, and leaders from France, the UK, and the US began a series of negotiations to construct a resolution the US would not oppose. On March 31, the US finally

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[132] Chan, *supra* note 43, at 358.

[133] *Id.* at 344.

[134] Quoted in Colum Lynch, *U.S., Europe Debate Venue for Darfur Trials*, WASH. POST, Jan. 21, 2005, at A1.

[135] See French Ministry of Foreign Affairs, Daily Press Briefing, 2 Feb. 2007; UN Document S/PV.5158, *supra* note 128, at 7, 9.

[136] Warren Hoge, *France Asking U.N. to Refer Darfur to International Court*, N.Y. TIMES, Mar. 24, 2005, at A3.

[137] *Id.*

[138] *Id.*

[139] Nicholas Kralev, *France Puts Off War-Crimes Vote*, WASH. TIMES, Mar. 25, 2005, at A13.

dropped its opposition to the ICC referral, agreeing to abstain on the vote.[140] Resolution 1593, referring the Darfur situation to the ICC, passed 11-0 with four abstentions.[141]

*The Language of Resolution 1593*

Through the last-minute negotiations, the US 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.[142]

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"[143] in the draft to "nationals, current or former officials or personnel" in the final version.[144] The change in language increased the exemption's scope to one similar that of Article 98 agreements. This scope, which exempted NGOs, contractors, intelligence officers, and other nationals of non-ICC states, had been the EU's main objection to US bilateral exemptions.[145] 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."[146]

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[140] Resolution 1593; *American Journal of International Law* 2005b.

[141] Press Release, United Nations, Security Council Refers Situation in Darfur, Sudan, to Prosecutor of International Criminal Court (Mar. 31, 2005). U.S., Algeria, China, and Brazil abstained from the vote.

[142] Resolution 1593, ¶ 6.

[143] *See* S.C. Draft Resolution, U.N. Doc. S/2005/199 (Mar. 31, 2005).

[144] Resolution 1593, ¶ 6.

[145] Press Release, Council of the European Union, Conclusions of the Council of the European Union on the ICC, Sept. 30, 2002.

[146] Statement of Brazilian delegation. U.N. Doc. S/PV.5158, *supra* note 128, at 11.

In addition to the exemption, other smaller but still substantive concessions were made to the US in exchange for its demur 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 US concerning its bilateral campaign.[147] Incorporating US 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."[148] These concessions ensured that the US 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.

*Resolution 1593 in Perspective*

Like many descriptions of US exemptions from the ICC, commentary about these last-minute concessions has largely characterized them as victories extracted by a hegemon.[149] However, the Resolution 1593 negotiations can also lead to a different conclusion, namely that by 2005, the coalition of pro-ICC was strong enough to successfully balance against the hegemonic US on the issue of the International Criminal Court. 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, in the words of the French foreign ministry, a "historical" step for the ICC.[150] 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.[151] Moreover, the referral was even more critical for the 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

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[147] Resolution 1593, at Preamble; see also Heyder, *supra* note 2, at 659; Luigi Condorelli & Annalisa Ciampi, *Comments on the Security Council Referral of the Situation on Dafur to the International Criminal Court*, 3 J. INT'L CRIM. JUSTICE 590, 598 (2005).

[148] Resolution 1593, art. 2.

[149] *See, e.g.*, Cryer, *supra* note 127.

[150] French Ministry of Foreign Affairs, Daily Press Briefing, 1 Apr. 2007.

[151] Antonio Cassese, *Is the ICC Still Having Teething Problems?*, 4 J. INT'L CRIM. JUSTICE 434, 436 (2006).

institution.[152] Compared to these gains, ICC supporters sacrificed relatively little. The US exemption appears largely symbolic, given that even without the exemption, should the ICC ever try a US national, the US would apply so much pressure that the case would jeopardize the very existence of the Court.[153] Similarly, while the ICC failed to gain funding and support from the UN on the Darfur referral, these resources had never been granted to the ICC in the first place (as noted above, the non-necessity of these resources was one of the unique circumstances about the coalition and a critical component of its strength).

While it is dangerous to contemplate counterfactuals, it is unclear whether the US would have abstained had it not received the last-minutes concessions earned before the Resolution 1593 vote. At minimum, the coalition would have risked forcing a mutually detrimental deadlock, with the US vetoing the only offer on the table, had it not made these concessions. A more fundamentalist coalition, one that refused to have make any compromises, would have had a significantly less probability of earning a referral. Therefore, despite protests from members within the coalitions about the concessions given in the endgame of Resolution 1593 negotiations, the flexibility and understanding of the political realities of negotiating with the hegemonic were likely critical to the coalition's ultimate success in obtaining a referral to the ICC. The newfound power of the coalition, based on its new presence, would possibly have been all for naught without such a willingness by the majority of the coalition to compromise.

## III. The Political Power of the ICC Coalition

The ICC's evolution to date reveals the role of power and security interests in the formation of international law and regimes. It is unlikely power politics will ever be divorced from the ICC. On the final day of the Rome Conference, M. Cherif Bassiouni, chairman of the ICC's drafting committee,

[152] *See, e.g.*, Daniel Dombey & Mark Turner, *Solana Voices Doubts on Darfur Case Going to ICC*, Fin. Times, Feb. 17, 2005, at 6 (reporting 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").

[153] 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." U.S. Public Law 107-593, §2008 (2002).

claimed that "[t]he ICC reminds governments that *realpolitik*, which sacrifices justice as the altar of political settlements, is no longer accepted."[154] Six years after proclaiming *realpolitik*'s death at Rome, Bassiouni wrote, "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 r*ealpolitik*—the tensions between the two will always be present."[155] Such a lesson is disillusioning for some but not a novel concept. As Maurice Bourquin notes, "[i]nternational law is a legal crystallization of international politics,"[156] and politics, as noted in Section I, is merely war by other means.[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 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 US has obtained certain exemptions and loopholes, these are relatively narrow.[159] The ICC case study highlights

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[154] BASSIOUNI, *supra* note 62, at 121.

[155] M. Cherif Bassiouni, *The ICC*—QuoVadis*?*, 4 J. INT'L CRIM. JUSTICE 421, 427 (2006); *see also* M. Cherif Bassiouni, *The Perennial Conflict Between International Criminal Justice and Realpolitik*, 22 GA. ST. L. REV. 541, 549 (2006) ("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.").

[156] Quoted in David Davenport, *The New Diplomacy*. POLICY REVIEW, December/January 2002/2003, at 18.

[157] See *supra* note 40.

[158] *Prosecutor v. Anto Furundzija*, International Criminal Tribunal for the Former Yugoslavia, Case No. IT-95-17/IT, Judgment, 10 Dec. 1998, para. 227.

[159] One legal scholar helpfully diagnosed 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*. 54 INT'L & COMP. L.Q. 691, 691 (2005). Again, however, the trend of exemptions has been rather narrow, in part due to the efforts of the ICC coalition to limit the U.S. efforts.

two important themes that will likely be more prevalent in the future years. First, in today's world the United States does not seem so hegemonic 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. The costs of bilateral negotiations are such that developing *universal* legal regimes through bilateral negotiations is largely not possible. This forces the United States to 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 indicates many of the different sources of political 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 three variables—size, diversity, ideological commonality, and what I call a mindset of "principled flexibility"—that underpin the strength of a coalition and all a group to shape the future of international law.

**A. The Political Power of Size**

Scholars have noted the Rome Conference of the ICC was remarkable because the US did not occupy the same central negotiating role that it traditionally enjoys during international conferences.[161] Some suggest Rome was a bit of a fluke in that the US largely ignored the early pre-Rome stages of negotiations and arrived at Rome without an established agenda and position on many central issues being

[160] The weight of 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*, 41 ARIZ. ST. L.J. 87 (2009) (arguing the U.S. remained a hegemonic power) *and* Susan Strange, *The Persistent Myth of Lost Hegemony*, 41 INT'L ORG. 551 (1987) (same), *with* Helen V. Milner & Jack Snyder, *Lost Hegemony?*, 42 INT'L ORG. 749, (1988) (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 16 (2004).

[161] *Cf.* note 2 (discussing U.S. tactics post-Rome in response to U.S. shortcomings at the conference).

negotiated.[162] Others, however, argue that Rome was the result of an "an important normative change in international relations."[163] Fen Olser Hampson and Holly Reid, for instance, conclude that recent international "human security" treaties, including the ICC Statute, have been successfully forged in part due to a new type of highly legitimate coalition that catalyzes support.[164]

For Hampson and Reid, coalitions rely heavily on their size for legitimacy. "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."[165] Legitimacy, in turn, lowers uncommitted states' opposition to institutions to the Court.[166] The ICC coalition's success is evidence, Hampson and Reid 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.[167]

In addition to the legitimating effect Hampson and Reid describe, the ICC coalition's size provided a source of power that was often exercised through parliamentary tactics.[168] Given the voting scheme of the Rome Conference—one nation, one vote—a bloc of sixty-plus states accounted for more than forty percent of the 160 participating states. The strength was also 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 treaty.[169] Simple majority voting was also the rule in procedural decisions, which further served the LMG. In the final moments of the conference, for

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[162] Ruth Wedgwood called it a "case study in how not to conduct multilateral diplomacy." Ruth Wedgwood, *Fiddling in Rome: America and the International Criminal Court*, FOREIGN AFFAIRS, Nov./Dec. 1998, at 20.

[163] Hampson & Reid, *supra* note 64, at 7.

[164] *Id.*

[165] *Id.* at 11.

[166] Political elites, Hampson and Reid suggest, are drawn by the "'halo effect'… [of] appearing to be on the morally 'right' side of the issue." *Id.* at 35.

[167] *Id.* at 8.

[168] 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 be dictated to by more powerful individual states.

[169] *Id.* at 24.

instance, the US attempted to offer amendments to the treaty that would satisfy some of their strategic objections, particularly about jurisdiction. The amendment, however, was procedurally blocked from in-depth consideration by tabling motions offered by Norway on behalf of the LMG.[170] These parliamentary tactics helped to marginalize the US during negotiations.[171]

After Rome, size continues to afford the ICC coalition a source of parliamentary 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 support a resolution for it to pass.[172] In addition, the permanent five members of the Council—China, France, Russia, the US, and the UK—must not exercise any of their respective vetoes, meaning they must either support the resolution or abstain from voting. Given these Council rules, size comes into plays in two distinct respects, which Chan helpfully refers to as *negative* and *positive* power.[173] Negative power is the ability to defeat a draft resolution offered.[174] 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.[175] No state can unilaterally exercise positive power in the Council; a bloc of nine votes, by contrast, can be sufficient to avoid more concessions.[176]

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[170] *See* Lawrence Weschler, *Exceptional Cases in Rome: The United States and the Struggle for an ICC*, *in* THE UNITED STATES AND THE INTERNATIONAL CRIMINAL COURT, *supra* note 52, at 90; BASSIOUNI, *supra* note 62, at 90.

[171] 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*, 93 AM. J. INT'L L. 12, 20 (1999). 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.

[172] *See* Sidney D. Bailey, *New Light on Abstentions in the UN Security Council*, 50 INT'L AFFAIRS 554 (1974).

[173] Chan, *supra* note 97, at 341-42.

[174] *Id.*

[175] *Id.*

[176] Others have noted that the two types of power are actually entwined; Winter, for instance, has noted that repeated through vetoes a single state can significantly change the ultimate content of a Council resolution compared to that which was offered in drafts. Eyal Winter, *Voting and Vetoing*, 90 AM. POL. SCI. REV. 813, 815 (1996).

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.[177] 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.[178] In the case of the ICC, for instance, the increasing number of states parties translated to first negative power (including the ability to block the US renewal of Security Council-obtained exemptions) and then positive power (such as the events of the Resolution 1593 vote). Size also allowed the coalition greater sticks for leverage in negotiations (such as access to EU markets as a stick for eastern European states). All of these are examples of how latent wealth is expressed during negotiations.

**B. The Political Power of Diversity**

Like coalition size, Reid and Hampson argue that diversity afforded the LMG leverage through legitimacy. Under the larger umbrella of diversity, Reid and Hampson identify two types of variety: (1) geographic and (2) socioeconomic.[179] As to geographic diversity, the authors note that

> [i]nternational 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.[180]

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[177] While in theory the veto power of the Permanent Five makes positive power largely a null point when negotiating with a permanent member, 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* notes 95–96 and accompanying text (discussing costs of deadlock).

[178] 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 Behavior*, 22 W. POL. Q. 61 (1969). 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.

[179] Socioeconomic diversity is also referred to by international relations' realist school as "latency," what Mearsheimer once 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." JOHN J. MEARSHEIMER, THE TRAGEDY OF GREAT POWER POLITICS 55 (2001); *see also* Stephen M. Walt, *Alliance Formation and the Balance of World Power*, 9 INT'L SECURITY 3, 9 (1985).

[180] Hampson & Reid, *supra* note 64, at 34.

Similarly, Hampson and Reid note that "[m]iddle powers can help galvanize international state-based coalitions" during multilateral negotiations.[181] 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."[182]

Like coalition size, diversity within the ICC coalition has provided opportunities for procedural strategies that augment a coalition's power during negotiations in ways besides increasing its legitimacy. Geographic diversity, for instance, becomes particularly useful in Security Council debates because non-permanent seats are allocated regionally.[183] 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.[184] 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 states parties from Africa, Latin America, and North America increased, members increasingly filled the regionally allocated seats on the Security Council.

Second, geographic diversity imposes additional transaction costs on negotiating partners. Such diversity, for instance, reduces the ability of the United States to pressure states in the settings of regional organizations. By imposing these transactional costs, geographic diversity channels negotiations towards universal organizations like the United Nations, where the United States is confined by parliamentary and

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[181] *Id.* at 12.

[182] *Id.* at 11.

[183] See General Resolution A/RES 1991 A (XVIII) (17 December 1963). The resolution formally still combines these groups; under current practice, however, the election of African and Asian states are now conducted separately.

[184] *Id.*

resource constraints.[185] In addition, because the United Nations is often so beneficial to the US in other contexts (between 2002 and 2005, for instance, the Security Council provided the US with a useful forum to negotiate international counterterrorism efforts[186]), the US is disincentivized from extremely belligerent behavior that might ossify the Security Council.

Socioeconomic diversity affords group autonomy and the opportunity to proceed in institutional formation without being held hostage by certain monopolistic states. Llyod Gruber's "going it alone" model offers one example of how this autonomy leads to power during multilateral negotiations.[187] 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.[188] In this way, A and B may induce a final solution different than if all three actors negotiated simultaneously.

In this scenario, however, A and B cannot "go it alone" unless C is non-vital to the institution. Traditionally, US hegemony has made it 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.[189] The need for the US, in turn, has given the US control over the parameters of the organization in question. At

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[185] In other words, diversity limits the choices of forums, a classic form of parliamentary exercise of power. *See supra* note 37 and accompany text.

[186] *See, e.g.*, S.C. Res. 1526, U.N. Doc. S/RES/1526 (Jan. 30, 2004) (strengthening sanctions regime for suspected terrorist organizations and supporters); S.C. Res. 1617, U.N. Doc. S/RES/1617 (July 29, 2005) (formalizing procedure to place individuals on sanctions list); *see also supra* note 37 and accompanying text (discussing Security Council in context of Global War on Terrorism).

[187] GRUBER, *supra* note 9.

[188] The Principal Supplier Principle (PSP), common in trade negotiations, follows this logic; the agreement by two states consequently serves as an incentive for other states to sign agreements with the same terms, even if the state previously opposed such terms.

[189] This necessity was the underpinning for the development of the hegemonic stability theory, for instance.

Rome, the US made the case that it was similarly critical for the ICC, with negotiators making allusions to the League of Nations and other failed institutions.[190]

In contrast to past negotiations, the economic strength of some LMG members, particularly of middle powers like Germany, the United Kingdom, and Canada, provided the financial opportunity to work without the US at Rome. As one civil society member noted during negotiations, "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."[191] These states, in turn, were willing at Rome and afterwards to commit resources to the Court; with the ICC's annual budget around US$100 million, these financial commitments are not insignificant.[192] Such economic commitment by the ICC coalition's middle powers has made US support of the Court desirable but not critical. After Rome, socioeconomic diversity also has afforded the ICC coalition bargaining chips of other sorts, including access to markets like those of the European Union. In particular, these economic resources are critical for negotiations, particularly in those conducted outside an institutional framework, where the parliamentary power stemming from a coalition's size and geographic diversity offer little leverage.[193]

The ICC's history also counsels that large and diverse coalitions should recognize that negotiations conducted in the Security Council do not privilege the US as much as traditionally believed.[194] Both the need for legitimacy and the interest in avoiding a deadlocked Council impose costs

[190] Weschler, *supra* note 170, at 103.

[191] *Id.*

[192] Using the UN scale of due assessment, Broomhall estimates the EU's 78% share of the ICC budget would shrink by about 27% were the U.S. to join. BROOMHALL, *supra* note 61, at 164.

[193] 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 backer, the court has been able to launch a number of investigations and has recently begun its second prosecution, this time against Congolese warlords Germain Katanga and Mathieu Ngudjolo. From an operational perspective, the Court has not been perfect, but it has remained on its feet without the U.S., surviving the growing pains any international tribunal encounters.

[194] This observation supports the claims of Benvenisti and Downs, who suggest that fragmentation actually favors the larger states in the system. Eyal Benvenisti & George W. Downs, *The Empire's New Clothes:*

on the US use of its veto, to the point that forcing issues in the Security Council can lead the US to compromise in unexpected ways.[195] Future coalitions may take heart in the fact that the veto is in practice not the trump card one might predict in theory.

**C. Coalitional Behavior: Principled Flexibility**

In addition to size and diversity, some observers have suggested that an important new mindset, what some have described as a "new diplomacy," explains why the LMG ultimately rejected US demands and thereby eschewed hegemonic support.[196] William Pace, for instance, argues that LMG states eschewed old Cold War principles of "lowest common denominator" agreements, instead concluding an effective treaty that lacks the support of some important countries is preferable to an inefficient regime with universal support.[197] Some scholars go further, suggesting that the outcome of the Rome conference was defined by a new chapter in commonality and principled debate.[198] Such a principled impetus precluded the coalition from compromising its core beliefs in a way that US demands would require. Perhaps the most extreme declaration of a new diplomacy came from Bassiouni's declaration that "sacrific[ing] justice at the altar of political settlements, is no longer accepted."[199]

The phenomenon that Bassiouni and others describe all fit within a central paradigm best described as *idealpolitik*. The term, coined by Peter Wallensteen, refers to circumstances where state behavior is dictated by "principles of legitimacy," and conditions where normative principles are privileged over simple power politics.[200] *Idealpolitik* does not merely describe international relations at a systemic

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*Political Economy and the Fragmentation of International Law*, 60 Stan. L. Rev. 595 (2007).

[195] 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.

[196] *See* Christine Fehl, *Explaining the International Criminal Court: A 'Practice Test' for Rationalist and Constructivist Approaches*, 10 EUR. J. INT'L REL. 357, 381 (2003) (reviewing new diplomacy literature).

[197] William R. Pace, *The Relationship between the International Criminal Court and Non-Governmental Organizations*, *in* REFLECTIONS ON THE INTERNATIONAL CRIMINAL COURT: ESSAYS IN HONOUR OF ADRIAAN BOS 189, 205 (Herman von Hebel ed. 1999)

[198] David Wippman, *International Criminal Court*, IN THE POLITICS OF INTERNATIONAL LAW 152–53 (Christian. Reus-Smit ed. 2004) ("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.").

[199] BASSIOUNI, *supra* note 62, at 121.

[200] Wallensteen, *supra* note **Error! Bookmark not defined.**, at 75.

level—it is equally useful in describing heuristics of certain coalitions. While a coalition operating under an assumption of *realpolitik* approaches negotiations with a disinterested rationality similar to that of *homo economicus*, a coalition influenced by *idealpolitik* evaluates proposals through a normative lens that asks whether justice or other ideological variables are satisfied.

The normative heuristic can be incredibly important in the outcome of negotiations. On the one hand, the normative principles underpinning an *idealpolitik* coalition increase the group's cohesiveness, because the coalition represents the "right" position on the issue negotiated. States are less interested in the carrots and sticks traditionally used by larger states to induce defections, since security and wealth maximization were not the original goals to begin with. Immune to traditional tools used to break a coalition, defection from the group is unlikely.

At the same time, idealism can just as easily be a coalition's downfall. *Idealpolitik* coalitions operate within a smaller range of possible outcomes than *realpolitik*. The presence of normative beliefs can make some mutually beneficial possibilities so unattractive that they cannot be considered as possible outcomes of negotiations.[201] In this way, the normatively driven coalition can be less flexible than an interest-based coalition, limiting the opportunity to reach an agreement with others. Recent history reveals a number of coalitions that remained cohesive during negotiations but nonetheless failed to reach an agreement with other nations because the coalition, influenced by normative principles, refused to compromise at critical moments.[202] These examples show how inflexibility can be extremely detrimental to a coalition. If a coalition fails to persuade other nations that its position is right and it lacks the power

[201] To illustrate, consider that during negotiations between two parties, three possible outcomes arise, with their respective payoffs as (5, 1), (4, 2), and (3,3), whereas the result of non-cooperation is (0, 0). If Actor 2 was a "rational" actor, meaning that she was uninfluenced by normative principles, she would be open to all three solutions because she stands to gain from any of them. By contrast, if the actor was influenced by a certain conception of equality, the solutions (5, 1) and (4, 2) might be unacceptable, leaving only (3, 3) as a possible solution.

[202] For example, inflexibility defined the largely unsuccessful Third World coalitions formed in the 1980s. Amrita Narlikar & Diana Tussie, *The G20 at the Cancun Ministerial: Developing Countries and their Evolving Coalitions in the WTO*, 27 WORLD ECONOMY 947, 957 (2004). 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, believing 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. *Id.* at 958.

to impose its will on that competitor, some level of compromise is usually the only solution for an agreement.[203]

Because shared normative values have a direct relationship to cohesiveness and an inverse relationship with negotiating space, an optimum coalition operates within a hybrid paradigm of *idealpolitik* and *realpolitik*.[204] While the presence of few bonds increases the coalition's flexibility, it leads to larger number of defectors from the group; an extremely orthodox alliance, by contrast, affords negotiators little leeway during negotiations, thus reducing the chance for agreements with outside parties. A maximally efficient coalition hopes to satisfy both objectives. The goal is to establish fundamental inter-member bonds that discourage defections without engendering a fundamentalism that precludes compromise under any circumstances.

Since Rome, the ICC coalition has maintained an effective balance of cohesiveness and flexibility. The principled element of the ICC coalition—its commitment to a strong, independent judiciary—has allowed it to maintain a firm line against US pressure and bear the costs of its defiance.[205] As the ICC has continued to form, the coalition also likely has developed a sense of ownership about the Court that increases the cohesiveness amongst its members. At the same time, the ICC coalition has compromised at critical moments with the US and other states. This is partially because the ICC coalition minimized the principles that it would consider inviolable. Entering Rome, for instance, the group agreed to limit its focus to the four "cornerstone positions" noted above.[206] This limited scope allows the

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[203] Going back to the hypothetical above, a weaker coalition may have to accept (5, 1) and (4, 2) solutions if the other actor finds (3, 3) unacceptable and is in a position to dominate negotiations.

[204] Narlikar and Tussie have previously referred to this mindset as a "smart" coalition. *Id.*

[205] 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, as explored below, 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 and Guy Dinmore, *U.S. Backs Japan but not Germany for UN Place*, FIN. TIMES, June 17, 2005, at 11.

[206] GLASIUS, *supra* note 50.

coalition wide leeway to offer incentives and concessions in exchange for other states' support.[207] A stricter agenda, by contrast, would have greater difficulty winning allied support. Flexibility has also allowed the ICC coalition to navigate past potential deadlocks with opponents, particularly with the US When the coalition's pure strength is insufficient to dictate one institutional form, flexibility has allowed the coalition to relax terms and the form of the institution to a less ambitious level. In the case of the ICC, flexibility has proven critical in skirting past impasses, whether on the issue of exemptions or the referral of Darfur. Where the alliance has not been able to coerce the US to accept the Court fully, often difficult given the US' hegemonic position, this ability to compromise has allowed cooperation that, while not ideal for the coalition, is preferential to the alternative of continued stalemates.[208]

In sum, the recent success of the ICC coalition suggests that Wippman, Bassiouni, and others who have focused on the ideological tenets of the Court's coalition have highlighted an important point but failed to contextualize it properly. Complete orthodoxy to normative principles would have left the Court and the international legal system that it embodies comparatively underdeveloped, and it may have spurred more aggressive political tactics with more collateral damage (for instance, peacekeeping missions being halted). The recent track record of the ICC coalition suggests that coalitions must balance their principles with an understanding of the realities of the political system, a delicate balance that requires the keenest of diplomatic sensibilities.

## CONCLUSION

The first years of the ICC shows that *realpolitik* is alive and well in the international system and continues to dictate the form of international legal regimes. At the same time, the success of the ICC

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[207] France, for instance, joined the LMG after the drafters agreed to include a provision permitting states to observe a seven-year transition period for the acceptance of ICC jurisdiction over war crimes committed by a party's nationals or on its territory, a provision to avoid prosecutions of French nationals in its former African colonies. Ruth Wedgwood, *The Irresolution of Rome*, 64 LAW & CONTEMP. PROBS. 193, 203 (2001).

[208] When the coalition has *not* compromised due to ideological concerns, it has sometimes been ultimately paid a significant strategic price. For instance, the unwillingness to compensate the ACP states certainly permitted the US to extract Article 98 concessions that it otherwise could not obtained. *See supra* note 112 (discussing European refusal to compensate ACP states for lost funds).

coalition in shepherding and sheltering the young Court for the entirety of the Bush Administration shows how international law can still be the product of a democratic movement when the legal regime has a deep and wide-ranging well of support.[209] The ICC case indicates that *realpolitik* explanations of the international system need not be as pessimistic as some often suggest they are,[210] and it reveals some of the mechanisms by which smaller states may exercise power in international negotiations over international law. Above all, the ICC coalition indicates that international law is not a handmaiden to any one state, despite old theories of regimes being nothing more than the will of the strong. Rather, international law reflects the distribution of power in subtle and sophisticated ways, allowing coalitions, negotiations, and other processes to shape the content of the determinative rules of the international system.

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[209] Indeed, the success of the ICC coalition was conceded by American diplomats as early as 2005. After the Darfur referral, 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 ST. J., June 14, 2006. The Obama administration has voiced support for the Court.

[210] *Cf.* Charles L. Glaser, *Realists as Optimists*. 19 INT'L SEC. 50 (1994) (discussing non-fatalistic predictions in realism).