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## Seeking Global Reform: The United Nations Security Council, the International Criminal Court, and Emerging Nations

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**Ezequiel Jimenez**

*It is impossible to know a man's soul, both the wit and the will, before he writes laws and enforces them. I believe that he who rules in a state and fails to embrace the best men's councils, but stays locked in silence and vague fear is the worst man there.*<sup>1</sup>

Sophocles

*It is time for political actors to adjust to the law. We have no police and no army, but we have legitimacy. We will prevail.*<sup>2</sup>

Luis Moreno-Ocampo, International  
Criminal Court Prosecutor

### I. Introduction

In 1919, the Treaty of Versailles created an international tribunal in order to prosecute Kaiser Wilhelm II for initiating the First World War.<sup>3</sup> However, the Kaiser sought refuge in the Kingdom of the Netherlands and Queen Wilhelmina Helena Pauline Maria refused to cooperate with the new tribunal or surrender her cousin to the Allied Powers.<sup>4</sup> Much has changed in the Netherlands since. As a pioneer country in the advancement of human rights, the Netherlands has participated actively in the development and enforcement of multiple treaties and conferences

hosted by the United Nations. Today, the city of The Hague is proud to call itself an “international city of Peace and Justice.”<sup>5</sup> Indeed, The Hague is the host of multiple international courts,<sup>6</sup> evidencing the Netherlands commitment to protect human rights. The International Criminal Court (ICC) is one of the most prominent institutions the Netherlands honorably hosts.

In July 1998, after the creation of the ICC, then-U.N. Secretary-General Kofi Annan affirmed that, “the Court is a giant step forward in the march towards universal human rights and the rule of law.”<sup>7</sup> The Rome Statute, ICC prosecutor Luis Moreno-Ocampo argues, “is an innovative legal design, a twenty-first century institution modeled to address the threats and challenges of the twenty-first century.”<sup>8</sup> The creation of a permanent court dealing with the most horrific crimes in the world, according to legal scholar and Judge Antonio Cassese, “signals the will of the international community to break with the past, by punishing those who have deviated from acceptable standards of human behavior.”<sup>9</sup> However, in the context of accelerated globalization and the increasingly popular rhetoric of human rights protection as stipulated in international law,<sup>10</sup> the interaction of the Court with highly politicized organizations such as the United Nations Security Council has been detrimental for global justice.<sup>11</sup> Three out of the five permanent members of the Council have not joined the ICC but still can veto any decision related to the court. This act by the Security Council lacks substantial legitimacy to guard global justice. As in the case of Darfur, the Council’s involvement with the Court has considerably undermined the impartiality and legality of the proceedings.<sup>12</sup> Unfortunately, as First Registrar of the International Tribunal for the Former Yugoslavia Theo van Boven<sup>13</sup> notes, “The ICC is a step forward, but it is certainly not yet functioning as a guardian of global justice.”<sup>14</sup>

Nonetheless, backed by their economic prowess and determination to support the project of global justice based on the fulfillment of human rights, emerging nations might promote reform. Nations like Brazil, Russia, India, and China (BRIC) could play an active role in rebalancing the current world order<sup>15</sup> to achieve future reform of old centers of power.<sup>16</sup> Although it is clear that both Russia and China need to improve their human rights records, their support of an agenda of global rebalancing could change the current status quo. In this vein, this essay argues that backed by the BRIC’s conglomerate, Brazil’s multilateralism<sup>17</sup> might foster the reform of the Security Council and subsequently the needed restructuring of the ICC.

This essay will focus on two main questions. First, it will explore how and through which mechanisms the interaction between the ICC and the Security Council undermines global justice and maintains the current delegitimized dominant order. Here, the essay will address the Council’s Darfur Resolution 1593. Secondly, it will analyze and localize the increasing role that emerging nations have in connection to institutional reform, especially with the case of BRIC and more specifically, Brazil. These two questions are of crucial importance, as the ICC will undergo a change of leadership by the end of 2011.<sup>18</sup> After a decade of slow and meticulous work, this might be an opportunity for the Court to reassess its actions. In addition, as the Court becomes increasingly recognized internationally, the role of emerging nations in an ever-changing geopolitical scenario could trigger the desired change.

This essay first discusses the notion of global justice in an effort to locate and define the debates about the ICC and the current world order. It then draws upon an interview with Professor Emeritus of International Law at Maastricht University and head of the Dutch delegation to the Rome Conference, Theo van Boven. As a fundamental actor in the negotiations representing the Dutch interests, this interview will provide a detailed background about the Rome Statute negotiations and early controversies on the role of the Security Council. To demonstrate the Security Council’s detrimental influence on the Court, the essay examines the ways in which the Council manipulated judicial mechanisms in the case of Darfur through

Resolution 1593. Finally, the essay will assess the role emerging nations might play in reshaping global justice.

## II. Seeking Global Justice

This section deals with the *problematique* of defining global justice in the context of accelerated globalization and expanding inequalities. Departing from ethical definitions of global justice coined by authors such as Thomas Pogge, Peter Singer, and Richard Miller, I will seek to explain the importance of rebalancing international politics with specialized institutions insofar as they practice “justice,” in the Rawlsian sense, as “the first virtue of social institutions.”<sup>19</sup> To reach this Rawlsian vision of global justice, the United Nations Security Council and the ICC must undergo deep institutional reforms.

The configuration of the Security Council not only mirrors the political and economic reality of 1945, but it is also an increasingly delegitimized center of power. On the other hand, the ICC’s lack of total independence from politicization as well as statutory limitations threatens its primary objective of protecting individuals from abuse of power.<sup>20</sup> Therefore, these two global institutions urgently need to reform their backward and obsolete interpretation of power that only perpetuates the status quo.<sup>21</sup> In seeking transcendental reform for the sake of global justice, the role of emerging nations, especially the BRIC contingent explored later in this article, must be taken into careful consideration.<sup>22</sup> However, first we need to explain the role the ICC plays in enhancing global justice.

### A. The Current World Order: The Age of Transition

According to Immanuel Wallerstein, the international order is in the midst of an age of transition.<sup>23</sup> The so-called A-phase, or *les trente glorieuses*, of a Kondratieff cycle<sup>24</sup> has been completed.<sup>25</sup> The United States’ dominance over both the order of international organizations and international politics is threatened by a severe crisis inside capitalism.<sup>26</sup> Beginning with the establishment of the “Washington Consensus,” trade liberalization and free market economies, vast inequalities, and financial crises have weakened the current world-system. Wallerstein argues, therefore, for the creation of a new system intrinsically related to human intervention and creativity,<sup>27</sup> a system, which “will be significantly more democratic and more egalitarian.”<sup>28</sup>

Wallerstein’s argument is intimately related to the production and reproduction of global injustice rendered by economic transactions. Keith Griffin, a development economist, notes that the penetration of market forces into every domain, including politics, culture, and even our global climate, has only impaired the bottom million’s ability to escape poverty.<sup>29</sup> For example, in the period from 1980 to 1991, 14 percent of the world’s population accounted for 80 percent of investment flows and in 1992, for 70 percent of the world’s trade.<sup>30</sup> Griffin further argues that even in times of accelerated globalization, our ability to fulfill the “unmet responsibilities”<sup>31</sup> toward those who are being exploited are ineffective and precarious.<sup>32</sup> Globalization is uneven; it does not refer to a global level playing field of symmetrical international relations, but a scheme of exploitation exercised by the few and imposed on the many.

In this context, the enhancement of basic and universal human rights is central to protect those disadvantaged by the current political and economical system. As political theorist David Held and international law expert Antonio Franceschet argue, equality, respect for the law, and democracy can only be achieved in a post-Westphalian world that guarantees freedoms and rights for all, irrespective of nationality or origin.<sup>33</sup> In this framework, heightened inequality

violates social and political rights. Insofar as international treaties and conventions are “rarely enforced for their own sake, governments will be tempted to violate, abrogate or reinterpret them.”<sup>34</sup> Hence, a future world order must be closely related to a cosmopolitan project based on shared values with enforceable mechanisms. Thomas Pogge, therefore, argues for a rights-based approach to both institutional reform and an inclusive international *modus vivendi*.

The *Universal Declaration of Human Rights*, Article 28,<sup>35</sup> vows to create a world order in which all clauses stipulated in the Declaration are effectively enforced. Hence, if the “institutional order avoidably fails to fulfill human rights, then those of its members who do not support the requisite of institutional reform are violating a negative duty of justice: the duty not to cooperate in the imposition of an unjust institutional order.”<sup>36</sup> What Article 28 and the human rights approach arrive at is the need for a strong political will for a world order that supports the emergence and stability of democratic, rights-respecting, and peaceful regimes. A qualitatively new regime could effectively reduce radical deprivations and inequalities.<sup>37</sup> Therefore, the notion of global justice as human rights protection practiced by the ICC should be strengthened in order to achieve a new international order.

## **B. The International Criminal Court: Towards Global Justice?**

The Rome Statute of the ICC upholds the responsibility to pursue justice when the most brutal crimes against humanity occur. The ICC Statute pledges: “The most serious crimes of concern to the international community must not go unpunished.”<sup>38</sup> The novel mechanism to exert jurisdiction over state parties to the treaty intends to enforce international law to protect human rights. Nonetheless, the ICC’s ability to pursue its objectives remains tethered to politicization and dependency. The United Nations Security Council, explored later in this essay, can limit the ICC’s scope when investigating gross human rights violations. However, the creation of the Court is an important achievement of international law. The Court has the potential to materialize the project of global justice, imparting and defending human rights in states incapacitated or unwilling to protect individuals within their borders.<sup>39</sup> However, the element of power politics embedded in states’ interests might cripple the ICC’s objectives.

Franceschet’s critical model, originated from Marxist thought, offers useful mechanisms to transcend power politics. The model seeks to determine both the source of oppression and the relationship between dominant legal norms and emancipatory politics.<sup>40</sup> The recognition of the marriage between high politics and the reform of the world order is evident in the workings of the Court. However, the ICC as an institution of global justice should utilize its capacity to influence the exercise of politicized justice into an emancipatory project for equality. Indeed, the Court’s practice of international law as a regulative idea can engender a new world order. The Court’s application of international law and juridical decisions can help the law evolve to the point of “supporting different political orientations towards world order.”<sup>41</sup> Therefore, the ICC is also a reflection of “changing perceptions of how the rule of law relates to larger problems of global inequality.”<sup>42</sup> Thus, the ICC’s role in reforming world order by protecting human rights and changing the practice of international law moves humanity closer to the condition of global justice.

In addition, the ICC as an institution for global justice can advance a cosmopolitan project. The Court vows to eliminate the disorder and violence caused by “structural pathologies”<sup>43</sup> in international relations that threaten human rights. During the negotiation of the Rome Statute, multiple actors engaged in consultations to curb human rights violations. Non-governmental and international organizations, together with states, actively participated in all debates over disputed

clauses.<sup>44</sup> Although some states had a greater capacity to influence the final text,<sup>45</sup> the process of negotiation was overall open and frank.<sup>46</sup> It drew upon the active participation of diverse actors and was later ratified by willing states.<sup>47</sup>

The ICC, therefore, reinforces the idea that “peace and legal order must guide interstate politics rather than merely a balance of power and realpolitik.”<sup>48</sup> The ICC as a global institution bears the unique mandate to embody the needed reform in the current world order as reflected in the Rome Statute’s preamble. However, political will must accompany the ICC’s effort to protect human rights. An inadequate response by global leaders to urgent reform could be noted as “the ultimate crime against peace and justice.”<sup>49</sup> In this context, world leaders gathered in Rome sought to create the first permanent international criminal court to guarantee justice.

### III. The Establishment of the International Criminal Court

The creation of the International Criminal Court was a tedious process. The creation of an international criminal court that ultimately culminated in the Rome Conference faced much resistance by geopolitical realities adverse to the idea of global justice. Finally, in 1998, the member states gathered in Rome enacted the ICC Statute, but it was not without flaws. This section explores the complicated history of the 1998 Rome Conference.

#### A. The Road to Rome

The *Rome Statute* came into force on July 1, 2002, after sixty countries ratified the treaty, giving the International Criminal Court enough signatory members to become operational.<sup>50</sup> As of January 2012, the *Rome Statute* counts 119 states.<sup>51</sup> However, the establishment of a world criminal court did not commence in 1998. In 1872, Gustave Moynier, one of the founders of the International Committee of the Red Cross, envisaged a court to deter violations of the First Geneva Convention related to the amelioration of the condition of the wounded in armies in the field.<sup>52</sup> In 1919, as explained in the introduction, the ad hoc tribunal created by the Allied powers failed.<sup>53</sup> After the Second World War, the International Military Tribunal in Nuremberg and for the Far East in Japan prosecuted major Nazi and Japanese officials for war crimes, crimes against peace, and crimes against humanity.<sup>54</sup> However, despite the adherence of the other nineteen countries, only the four victor powers took part in the prosecution and punishment.<sup>55</sup>

On December 8, 1948, a few days before the adoption of the *Universal Declaration of Human Rights*, the United Nations General Assembly passed a resolution requiring the International Law Commission (ILC) to study the establishment of a “Criminal Chamber of the International Court of Justice”<sup>56</sup> in response to an “increasing need of an international judicial organ.”<sup>57</sup> In 1951 and 1953, two successive ad hoc committees submitted to the General Assembly drafts of a permanent criminal court, but the Cold War’s escalating political and military tensions closed the window of opportunity to adopt any draft.<sup>58</sup> In 1989, after the fall of the Berlin Wall and before the imminent collapse of the Soviet Union, President Arthur Napoleon Raymond Robinson of Trinidad and Tobago renewed the call on the international community to establish a permanent criminal court.<sup>59</sup> The proposal was welcomed as an attempt to transcend the ideological debate and to tackle ethnic tensions arising from the collapse of the U.S.S.R.<sup>60</sup>

The General Assembly required the ILC to study the situation, but the rising escalation of violence in Yugoslavia and subsequently Rwanda demanded an immediate response. Thus, the international community created two ad hoc tribunals under Chapter VII of the United Nations Charter. In 1994, the General Assembly decided to pursue work towards a permanent criminal court as it tackled multiple legal and political issues with the Yugoslav and Rwandan tribunals.

The ILC draft for a permanent international criminal court concluded, “The new court was to conform to principles and rules that would ensure the highest standard of justice.”<sup>61</sup> In 1995, the General Assembly decided to form the Preparatory Committee (PrepCom), inviting member states and non-governmental and international organizations to plan for a Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court. In 1998, the PrepCom presented to the General Assembly the “Zutphen Draft,” carrying all the amendments to the ILC draft that opened the way for a high-level meeting during the summer of 1998 in Rome.

The making of the ICC is the result of a historical process marked by frustration, power politics, and impotence. The 1998 Rome Statute<sup>62</sup> is, as Antonio Cassese argues, “a revolutionary institution that intrudes into state sovereignty by subjecting states’ nationals to an international criminal jurisdiction.”<sup>63</sup>

## **B. The Rome Conference**

The United Nations Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court was a unique forum for deliberation. According to Theo van Boven, the interaction between member states’ delegates, international organizations, and non-governmental agencies was “enriching.”<sup>64</sup> Furthermore, the unique urgency of the conference facilitated compromise for the final establishment of the Court.<sup>65</sup> In his opening statement, Secretary-General Kofi Annan called on states “not to flinch from creating a Court strong and independent enough to carry out its task.”<sup>66</sup>

However, issues concerning the Court’s independence from the U.N. Security Council and the role of the prosecutor threatened the conference with failure.<sup>67</sup> The political initiative of the “Like-Minded-Group,”<sup>68</sup> led principally by the conference’s Bureau of the Whole Chair Philippe Kirsch,<sup>69</sup> successfully articulated contested articles into solutions supported by most states. Diplomats from the Netherlands particularly pushed for concessions representing the overall agreement among nations. Without the stewardship of the Netherlands, the conference could have failed. The final package, presented the last day of the conference, tried to bridge disagreements over the Court’s jurisdiction and the role of the prosecutor.<sup>70</sup> Envisaged in Article 13 of the Rome Statute, the Court’s jurisdictional trigger mechanisms included a referral by the Security Council and parties to the Statute. In addition, it gave the prosecutor the ability to start his or her own investigation, also known as the *proprio motu* clause.<sup>71</sup> Departing radically from proposed Article 23,<sup>72</sup> in the 1994 ILC draft, the Security Council no longer had the sole discretionary power to refer a matter to the Court.

Despite strong opposition from the United States, Russia, and China, the role of an independent prosecutor was backed by most countries in order to enable the Court to remain apolitical. According to Dutch political scientist Marlies Glasius at the University of Amsterdam, the role of an independent prosecutor was one of the victories of the Rome Conference.<sup>73</sup> The *proprio motu* clause guaranteed the Court’s independence and aimed to investigate suspected individuals from state parties to the Statute without interference from the Security Council. Still, pressure from the Security Council’s five permanent members (P-5) succeeded in including Article 16, the power to defer any investigation by the prosecutor for twelve months, with a renewal possibility each year with a resolution under Chapter VII.<sup>74</sup>

This move was strongly rejected by the Non-Aligned Group, led by India, Egypt, and Mexico. These states were suspicious and unwilling to subject the Court to the Security Council, “which they believed could not be relied upon to administer justice in an impartial manner.”<sup>75</sup> On June

17, 1998, Dilip Lahiri, head of the Indian delegation, warned against the preponderant role of the Security Council. For Lahiri, the role of the Council represented a “violation of equality before the law because the five veto-wielding States are above the law and thus possess *de jure* impunity from prosecution, while individuals in all other states are presumed to be prone to committing such international crimes.”<sup>76</sup> Indeed, under Article 16, the veto-wielding members of the Security Council can defer a situation indefinitely to protect their interests, or in the case of the United States, their military personnel abroad.<sup>77</sup> At the same time, as in the case of Darfur, the Council can refer a case to the ICC’s prosecutor under Article 13 even if the referred state is not a signatory party of the Rome Statute. However, for the conference not to fail, the Bureau of the Whole had to compromise its political positions in the last draft. On July 18, 1998, the Rome Statute was enacted by a vote of 120 countries in favor, 7 opposed, and 21 abstained.<sup>78</sup>

The Court became operational in 2003 and opened its first case in 2004, after Uganda referred the situation of the Lord’s Resistance Army to the court. In March 2012, the Court delivered its first verdict finding Thomas Lubanga of the Democratic Republic of Congo guilty of conscripting child soldiers.<sup>79</sup> Nevertheless, while recognizing that this Court is a historic step forward for international justice, organizations such as Amnesty International agreed that, “the statute still requires radical surgery to ensure that the court will be just, relevant and effective.”<sup>80</sup> Indeed, for the Court to envisage global justice, its relationship with the Security Council must be revised in order to avoid a future situation of “dual justice,” as seen in the case of Darfur.

#### **IV. The International Criminal Court and the Security Council: The Case of Darfur**

After the Court became operational, the process of case initiation through trigger mechanisms became complex and politically sensitive.<sup>81</sup> The self-referral of Uganda and the Democratic Republic of Congo in 2004 and that of the Central African Republic in 2005<sup>82</sup> served as tests of the Court’s functioning. Acting under Article 15 of the Rome Statute, the prosecutor, Luis Moreno-Ocampo, started his own investigations indicting various political leaders, such as Joseph Kony,<sup>83</sup> head of the Lord’s Resistance Army in Uganda. However, with Resolution 1593, the case of Darfur became the first situation referred by the Security Council under Article 13 of the Rome Statute, in accordance with Chapter VII of the U.N. Charter.

##### **A. Background: The Cassese Report and Recent Developments**

In January 2005, pursuant to Security Council Resolution 1564, the International Commission of Inquiry on Darfur, chaired by Antonio Cassese, recommended that the Council refer the case (under Article 13) to the ICC on the grounds of gross violation of international humanitarian law.<sup>84</sup> The Commission found that, “Government forces and militias conducted indiscriminate attacks...on a widespread and systematic basis” amounting to crimes against humanity.<sup>85</sup> However, the Commission did not accuse parties to the conflict of pursuing a policy of genocide,<sup>86</sup> recognizing that this was a “determination that only a competent court can make on a case by case basis.”<sup>87</sup>

Therefore, the Security Council, with Resolution 1593, referred the situation of Darfur to the prosecutor of the ICC.<sup>88</sup> In 2008 and 2009, the prosecutor, although facing accusations of being exceedingly “prudent,”<sup>89</sup> submitted an application for an arrest warrant for President Omar Hassan al-Bashir.<sup>90</sup> In 2009 and 2010, the ICC Pre-Trial Chamber I charged Sudan’s President with genocide, crimes against humanity, and war crimes.<sup>91</sup> President al-Bashir became the first head of state indicted by the ICC, discarding official immunity as protection against prosecution.<sup>92</sup> Despite criticism by African leaders and the subsequent call for the Security

Council to defer the case against Sudan under Article 16,<sup>93</sup> the Pre-Trial Chamber I issued two arrest warrants for President al-Bashir, exhorting state parties to cooperate with his capture.<sup>94</sup> Nevertheless, al-Bashir has been able to travel to countries that are state parties to the ICC without facing any attempted arrests. This situation led the ICC prosecutor, in his bi-annual report to the Security Council in December 2010, to call for enforcement measures to bring al-Bashir into custody.<sup>95</sup> Recently, the Pre-Trial Chamber I required Malawi to explain its failure to arrest Sudan's President after he visited on October 15, 2011.<sup>96</sup>

## **B. Resolution 1593: Exclusive Jurisdiction and Victor's Justice**

The inherent problem with the case of Darfur is not the lack of an enforcement mechanism by the Court, but the legitimacy and validity of Security Council Resolution 1593, referring Sudan to the ICC. Despite the responsibility of the Security Council to maintain international peace and security, certain elements of the political manipulation of judicial mechanisms (under paragraph 6 of the Resolution) could reveal a situation of "victor's justice." Resolution 1593 is a clear example of the Council's *ultra vires* action disregarding norms of international law.<sup>97</sup>

Paragraph 6 of the Resolution purports to exclude jurisdiction of the ICC over "nationals, current or former officials or personnel from a contributing state outside Sudan which is not a party to the Rome Statute."<sup>98</sup> The inclusion of this provision, sponsored by the United States,<sup>99</sup> precludes the jurisdiction of any court other than one in the suspect's nation-state to investigate and prosecute crimes under international law. In other words, for example, U.S. personnel accused of war crimes, genocide, or crimes against humanity (among other norms of *jus cogens*) can only be held accountable by a domestic court in the United States. Therefore, Resolution 1593 is a mixed blessing. It creates space for the Court to protect human rights,<sup>100</sup> but in a rather selective and biased manner.

The inclusion of Paragraph 6 conflicts with the ICC mission on two levels. First, it is crucial to understand that under Article 13, the Security Council creates jurisdiction for the court to investigate any crimes committed in the country at issue, regardless of whether it is a member of the ICC. In this respect, the ICC is in the position to investigate and prosecute any suspected individual in Sudan, irrespective of nationality, due to the jurisdiction created by the Security Council resolution, also known as *ratione loci* jurisdiction under Article 12.<sup>101</sup> This means that military personnel involved in the situation of Sudan, such as U.S. soldiers, are technically under the jurisdiction of the Court since they are present in a state's territory where the ICC has jurisdiction.

Secondly, this provision, also used in the case of Liberia in 2003,<sup>102</sup> is contrary to customary law, which is binding upon all members of the United Nations including the United States (also known as *jus cogens* norms). For example, as legal scholar William Schabas demonstrates, the four Geneva Conventions<sup>103</sup> oblige state parties to "search for persons alleged to have committed or to have ordered to be committed, grave breaches and to bring such persons, regardless of their nationality, before its own courts."<sup>104</sup> The four Geneva Conventions included in the Rome Statute would allow the Court to exercise jurisdiction in accordance with Article 12. Yet Resolution 1593 indicates the opposite.

Regardless of some doubts expressed in Security Council meetings in relation to Paragraph 6, questions remain about how much political interference the ICC can tolerate.<sup>105</sup> Countries like Brazil argued that Paragraph 6 was "a legal exception that is inconsistent with international law."<sup>106</sup> On the other hand, Mrs. Patterson, the United States' Ambassador, defended the resolution indicating that it "provides clear protections for United States persons. No United

States person supporting the operations in the Sudan will be subjected to investigation or prosecution because of this resolution.”<sup>107</sup> Indeed, the implications of Paragraph 6 will not legally affect any national of the United States, Russia, China, Israel, or any other non-signatory state nationals in Sudan. However, it damages the principles of international law and effective protection of human rights. It is also a setback to the ICC’s legitimacy since the correct functioning of the Rome Statute is corrupted by national interest and realpolitik by the permanent members of the Security Council and their allies.

While Resolution 1593 does create jurisdiction for the ICC to prosecute those responsible for human rights violations in Darfur, Paragraph 6 undermines the *de facto* independence of the ICC. The prosecutor, to whom the deferral is delivered, had the responsibility to challenge the validity of the Resolution in light of Paragraph 6.<sup>108</sup> His incompetence and failure to note the exclusion of *ratione loci* jurisdiction from the resolution and to disagree over the referral jeopardizes the credibility of the Court and its independence from the Security Council. Indeed, Resolution 1593 is incompatible with the Rome Statute and its provisions, making the referral of Sudan illegal.

Hence, serious concerns about the relationship between the Court and the Security Council remain unanswered. Despite progress made at the Rome Conference, the political status quo abrogates human rights protection mechanisms; this creates another situation of victor’s justice with which international tribunals continue to be associated.<sup>109</sup> As legal scholar Cherif Bassiouni asserts, “The principal obstacles to the effectiveness of the ICC will always be realpolitik and states’ interests. Even in the era of globalism and the emergence of an influential international civil society.”<sup>110</sup> If the ICC engages in investigations in which the jurisdictional questions are not resolved first, it could threaten all the progress made in the last fifty years and further fail to protect victims of oppressive regimes. “It is high time,” Cassese argues, “for the ICC to become more alert to the current and pressing demands of international justice.”<sup>111</sup>

Therefore, for the ICC to become a true enforcer of global justice, it must become independent of national interests. The role of emerging nations, as with the case of Brazil, might help to rebalance the current world order into one that fosters the ICC’s values accordingly.

## V. Seeking Global Reform: The Role of Emerging Nations

The call for reforming international organizations is not new. The last reform made to the United Nations Security Council occurred in 1965, when the number of members expanded from eleven to fifteen.<sup>112</sup> In 1997, former United Nations Secretary-General Kofi Annan envisioned reforming the United Nations, but had little political support.<sup>113</sup> However, the geopolitical status quo has changed in the last ten years. The capitalist crisis in the United States and Europe has weakened the position that these hegemonic powers exerted in the past.

In this context, Brazil, Russia, India, and China appear as major world players in a shifting political scenario thanks to their emerging economic power.<sup>114</sup> According to Goldman Sachs’ Jim O’Neil (creator of the acronym BRIC), China could overtake the United States by 2027 and the BRICs combined could overtake the G7 by 2032.<sup>115</sup> At the BRIC Sanya Summit in April 2011, it was reported by envoys of these nations that BRICs’ leaders have consulted on major international issues, seeking to have a “common voice on some urgent problems ahead of the world community.”<sup>116</sup>

Recently, the BRIC nations have acted jointly on two decisive instances. On February 27, 2011, the BRICs, represented in their totality in the Security Council, agreed to refer Libya’s situation to the ICC.<sup>117</sup> In the last days of September 2011, China and Brazil offered to buy part of the sovereign debt of debt-troubled European countries.<sup>118</sup> In addition, the BRICs have

indicated their willingness to flow capital to the International Monetary Fund (IMF). These actions are a clear sign of international repositioning in the world-system. In the context of the G-20, the BRICs have called repeatedly for the reformation of the IMF and the World Bank. Brazil has also pointed out its intention to win a permanent seat on the Security Council.<sup>119</sup> Similarly, India's desires to be a permanent member of the Council were endorsed by President Obama during his visit in November 2010.<sup>120</sup>

Therefore, new international actors have the ability to rebalance the current world order and trigger reform in international institutions, such as the United Nations, its Security Council, and the ICC. Global reform could detach the ICC completely from the Security Council, which proved detrimental in the case of Darfur. As seen during the negotiations of the ICC, a coalition of like-minded states<sup>121</sup> might foster reform. The BRICs, especially Brazil, might lead the way to future global rebalancing that prioritizes global justice.

## **VI. Reshaping Global Justice: For a Multipolar Platform**

The emergence of new geopolitical actors, such as the BRIC nations, has influenced international relations considerably. The prowess and strength of their economies have obliged influential nations to pay special attention to them.<sup>122</sup> According to the U.S. National Intelligence Council, "in terms of size, speed, and directional flow, the transfer of global wealth and economic power now under way, roughly from West to East, is without precedent in modern history."<sup>123</sup> Indeed, Goldman Sachs forecasts that, "in less than 40 years, the BRICs' economies together could be larger than the G-6 in US dollar terms."<sup>124</sup> One sign of the BRICs' clear path to economic power is their crucial role in the current world economic recovery efforts.<sup>125</sup> The BRICs have led the way on financial recovery, providing "45% of economic growth worldwide"<sup>126</sup> since the financial crises began in 2007. Consequently, Robert Zoellick, president of the World Bank, affirmed that, "The developing world is becoming the driver of the global economy."<sup>127</sup> China, India, and Brazil returned to the trend of growth more rapidly than most emerging and developed markets.<sup>128</sup> However, the power and unity of the BRICs is not solely economic.

Since 2006, the BRICs have consulted on major international issues aiming at a process of global rebalancing. As Jan Nederveen Pieterse of Maastricht University argues, the BRICs, as countries representing the majority of the world population present at the global head table, could lead to a form of emancipatory politics.<sup>129</sup> In other words, a scenario of multipolarity could provoke economic and political compromises, sharing the decision-making power with the South and East. In the economic realm, according to BRICs expert Cynthia Roberts, "all four rising powers have resisted requirements imposed by Western institutions."<sup>130</sup> They have pushed an agenda of "democratization of international relations,"<sup>131</sup> calling for IMF and World Bank reform.<sup>132</sup>

On the other hand, in the political arena, the BRIC nations in the Security Council supported resuming Palestinian-Israeli negotiations "aiming at the establishment of an independent Palestinian State."<sup>133</sup> However, the approach of noninterference<sup>134</sup> in respect to the situation in Syria and Iran has disappointed many human rights practitioners. The Chinese and Russian officials have been reticent in allowing the Security Council to pass a resolution invoking Chapter VII mechanisms in both cases. It is still unclear what the position of the BRICs would be if conditions continue to deteriorate in the Middle East. Nonetheless, the Security Council referral of Libya to the ICC could be seen as a positive achievement of a multipolar world-system. Given that both China and Russia have veto powers, the BRIC's agreement in upholding

international law punishing perpetrators could yield an important precedent in their relationship with the ICC.

In this context, Brazil, as the only ICC member of the BRICs, can lead the process strengthening the independence of the Court. As a result of the strong leadership of former President Ignacio Lula Da Silva and Foreign Minister Celso Amorin, Brazil is recognized today as an important global actor.<sup>135</sup> Thanks to an intense diplomatic activism that opened more than 33 embassies since 2003,<sup>136</sup> Brazil has built relationships with the South American region<sup>137</sup> as well as with African and Asian countries.<sup>138</sup> Brazil's multilateral policies are also present within the structure of the U.N. Responding to the earthquake in Haiti, Brazil showed strong leadership in the humanitarian mission and efforts to rebuild the Caribbean nation.<sup>139</sup> In addition, Brazil has historically pursued the reformation of the Security Council to obtain a permanent seat.<sup>140</sup> Current President Dilma Rousseff made this clear at the 66th U.N. General Assembly, demanding that the Council "reflects contemporary realities"<sup>141</sup> and asserting that, "Brazil is ready to shoulder its responsibilities as a permanent member of the Council."<sup>142</sup>

The combination of Brazil's membership in the ICC, active involvement in multilateral relations, U.N. actions, and objective to reform the Security Council can foster conditions that are in line with the founding values of the ICC. Brazil's involvement in international politics at the level of the Security Council and other U.N. agencies brings the concerns of emerging nations onto the agenda. Backed by the BRICs' Security Council veto-members and other emerging nations, Brazil could exert political pressure and undertake a process of revision of the current structure of the Security Council. This could detach the Council from the workings of the ICC. Ideally, a review conference on the Rome Statute would revise the agreement between the Court and the U.N. Security Council. Correcting loose judicial mechanisms open to political manipulation would strengthen the International Criminal Court's independence in protecting international human rights law.

## **VII. Lessons and Final Remarks**

The delicate relationship between the ICC and the Security Council examined in this essay shows the detrimental effects of power politics in the realm of international law and the enforcement of human rights. The case of Darfur's Resolution 1593 is a clear example of politicized justice contrary to a cosmopolitan model advanced by the idea of global justice. As Franceschet argues, a cosmopolitan model supported by emerging nations envisages the "responsibility of an international community enforcing international law against (would-be) violators that abuse their sovereign prerogatives"<sup>143</sup> As stated by the ICC prosecutor, states must adapt to new developments in international norms to guarantee the protection of basic human rights and international security as pursued by the ICC. Improved notions of international law should guide the global community in ensuring the punishment and prosecution of violations of human rights. The cosmopolitan model based on global justice might be possible with the detachment of the ICC from politicized institutions such as the Security Council. Committed human rights respecting nations, such as the Netherlands, might join emerging governments, such as Brazil, in pushing forward an agenda of global justice reform based on a cosmopolitan model. Therefore, looking at the project of global justice and cosmopolitanism advanced by the ICC and emerging nations, the foregoing analysis leads to several lessons.

First, Resolution 1953 does not operate in a socio-political vacuum. The current world order allows mass atrocities to remain unpunished and unresolved. As explained in this study, the uneven processes of globalization widen inequalities, ranging from economic and social to

political deprivations, which undermine the respect for human rights. Stipulated in Article 28 of the Universal Declaration of Human Rights, the current world order has not been a viable environment for global justice. In fact, institutions such as the ICC, entrusted with the project of global justice, are vulnerable to political manipulation by old centers of power resisting reform, like the U.N. Security Council. The manipulation of the judicial mechanism by the Security Council illustrated in the case of Resolution 1593 has impeded the Court from functioning efficiently to enhance global justice.

Secondly, despite political interference, the ICC role in fostering international peace and security has become more evident. Libya's referral to the Court, backed by emerging nations such as Brazil and India, is an indicator of the ICC's validity in international politics. Moreover, the Court's efforts are widely seen by emerging nations as a positive force for global justice. For example, Brazil's objection to Resolution 1593 (calling it contrary to international law) shows the willingness to reform the current political order. In addition, at the moment of this writing, a Kenyan High Court has ordered the government to enforce the arrest warrant on Omar al-Bashir if he ever enters Kenyan territory.<sup>144</sup> Therefore, despite issues of obstruction, the ICC has an intact potential to become the guardian of global justice if state parties align themselves with the objective of ending impunity,<sup>145</sup> as recently deceased Antonio Cassese promoted throughout his life.<sup>146</sup>

The third lesson is concerned with the urgent need to reform the current world-order and its institutions, such as the Security Council. Here, the role of emerging nations is crucial in pushing for improvement and enhancing a process of global rebalancing. The BRICs, with Brazil leading, have the capacity to forge structural changes inside the Security Council thanks to their economic power and multilateral policies. This, in addition to the recent developments on the election of a new prosecutor for the ICC,<sup>147</sup> could be a starting point to revise and open new opportunities for reform.

These lessons shed some light on one of the many facets of achieving global justice; however, several avenues remain open for future research. One such question is exploring future amendments to the Rome Statute. The Kenyan government has initiated a process of revising Article 16 of the Statute to allow giving the prerogative to the General Assembly to defer a case when the Security Council cannot reach agreement.<sup>148</sup> Although the author completely disagrees with the proposed reform, he finds the initiative positive because the relationship with the Security Council is addressed at some level. Examining the possibility of a complete detachment of the Court from the United Nations system is an opportunity for further research.

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## Notes

1. Sophocles, *Antigone*, quoted in Roach 2006, p. 1.
2. Moreno-Ocampo 2008, pp. 224–225.
3. Bassiouni 1997, p. 18.
4. *Ibid.*, pp. 14–15.
5. *Ibid.*
6. The City of Den Haag (The Hague) is the host of the International Court of Justice, International Tribunal for the Former Yugoslavia, and the Special Tribunal for Lebanon, as well as multiple international non-governmental organizations.
7. Annan 1998.
8. Moreno-Ocampo 2008, p. 215.
9. Cassese 2001, p. 15.
10. Violations of human rights listed under Article 5 of the *Rome Statute*.
11. Miller 2010.
12. Jain 2005.
13. Theo van Boven is a Professor Emeritus of International Law at Maastricht University, former U.N. Director of the Human Rights Division (1977–1986), U.N. Special Rapporteur on the right to reparations for victims of gross violations of human rights (1986–1991), U.N. Special Rapporteur on torture (2001–2004), and the first registrar of the International Criminal Tribunal for the former Yugoslavia (1994) and head of the Dutch delegation to the Rome Conference (1998).
14. Interview of Theo van Boven by E. Jimenez, 1 November 2011.
15. Escobar 2011.
16. Turzi 2010.
17. Brookings Institution 2007.

18. Goldston 2011.
19. Pogge 1988, p. 228.
20. Glasius 2006, p. xiii.
21. Weiss 2003, p. 149.
22. Turzi 2010, p. 10.
23. Wallerstein 2000, pp. 251–267.
24. In the 1920s, the Russian economist Nicholas Kondratieff discovered a pattern of recurring 50-year megacycles in the economies of Germany, France, Great Britain, the United States and pre-socialist Russia. Each cycle is characterized by four distinct phases: (1) a growth period culminating in an inflationary peak; (2) a short-lived primary depression; (3) a plateau phase, and (4) a long period of economic stagnation including a secondary depression (Kaiser 1979, p.1.) For a current analysis of a Kondratieff cycle, see also Crichton 2009.
25. Wallerstein 2000, p. 253.
26. *Ibid.*, p. 254–256.
27. *Ibid.*, p. 267.
28. *Ibid.*
29. Griffin 1999, p. 4.
30. Pieterse 2009, p. 13.
31. Miller 2010, p. 1.
32. Griffin 1999, p. 18.
33. Held 2005, p. 9; and Franceschet 2004, p. 36.
34. Pogge 1987, p. 426.
35. “Everyone is entitled to a social and international order in which the rights and freedoms set forth in this Declaration can be fully realized” (United Nations 2010).
36. Pogge 2000, p. 54.
37. *Ibid.*, p. 55.
38. International Criminal Court 1998, p. 1.

39. Franceschet 2004, p. 25.
40. Ibid., p. 28.
41. Ibid., p. 23.
42. Ibid., p. 24.
43. Franceschet 2009, p. 188.
44. Glasius 2006, p. 117.
45. van Boven 2011.
46. Ibid.
47. Franceschet 2009, p. 198.
48. Ibid., p. 203.
49. Pogge 1987, p. 437.
50. International Criminal Court.
51. Ibid.
52. Glasius 2006, p. 6.
53. Bassiouni 1997, pp. 14–15.
54. Schabas 2007, p. 5.
55. Ibíd., p. 6.
56. Pella 1950, p. 37.
57. Ibid.
58. Glasius 2006, p. 8.
59. Kirsch and Holmes 2004, p. 5.
60. Ibid.
61. Schabas 2007, p. 14.

62. United Nations 1998.
63. Cassese 1999, p. 145.
64. van Boven 2011.
65. Ibid.
66. *TerraViva*, “Annan Throws Down Gauntlet” (16 June 1998).
67. Kirsch and Holmes, 2004, p. 18.
68. This group comprised Argentina, Canada, and Norway, among others. See Kirsch and Holmes 2004, pp. 8–9; and Glasius 2006, pp. 22–23.
69. Legal Adviser to the Canadian Department of Foreign Affairs.
70. Kirsch and Holmes 2004, p. 30.
71. International Criminal Court 1998; *Rome Statute*, Articles 13–15.
72. International Law Commission 1994, p. 75.
73. Glasius 2006, pp. 56–57.
74. Schabas 2001, pp. 75–77.
75. Kirsch and Holmes 2004, p. 9.
76. *TerraViva*, “India Blasts Special Treatment for Security Council” (17 June 1998).
77. Glasius 2006, pp. 16–21.
78. Kirsch and Holmes 2004, p. 35.
79. International Criminal Court.
80. Amnesty International 1998.
81. Williams and Schabas 2008, p. 563.
82. Cassese 2006, p. 436.
83. International Criminal Court.
84. United Nations 2005, pp. 571–572.

85. *Ibíd.*, p. 3.
86. Condorelli and Ciampi 2005, p. 591.
87. United Nations 2005, p. 4.
88. United Nations Security Council 2005.
89. Cassese 2006, p. 438.
90. International Criminal Court.
91. “The Prosecutor vs. Omar Hassan Ahmad al-Bashir” (2009), p. 3.
92. Dworkin and Iliopoulos 2009.
93. International Center for Transitional Justice 2009, p. 2.
94. “The Prosecutor vs. Omar Hassan Ahmad al-Bashir” (2009), p. 9.
95. International Criminal Court 2010, p. 5.
96. “Decision requesting observations about Omar Al-Bashir's recent visit to Malawi” (2011), p. 5.
97. Schabas 2007, p. 159.
98. United Nations Security Council 2005.
99. Sluiter 2008, p. 879.
100. van Boven 2011.
101. International Criminal Court 1998, Article 12.
102. Williams and Schabas 2008, p. 571.
103. *Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field*, 75 U.N.T.S 31 (1949), Article 49; *Convention the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea*, 75 U.N.T.S.85 (1950), Article 50; *Convention Relative to the Treatment of Prisoners of War*, 75 U.N.T.S 135 (1950), Article 129; and *Convention Relative to the Protection of Civilian Persons in Time of War*, 75 U.N.T.S, 287 (1950), Article 146.
104. Williams and Schabas 2008, p. 571.
105. Sluiter 2008, p. 880.

106. United Nations Security Council 2005, p. 11.
107. *Ibid.*, p. 4.
108. Schabas 2007, p. 157.
109. Sluiter 2008, p. 881.
110. Bassiouni 2006, pp. 426–427.
111. Cassese 2006, p. 441.
112. Kirgis 1995, p. 147.
113. Annan 1997.
114. Turzi 2010, p. 17.
115. O’Neil 2007, p. 153.
116. People’s Republic of China Embassy in India (2011).
117. Fritz 2011.
118. Escobar, “BRICs Plan to Revive the Global Economy” (2011).
119. Amorin 2001.
120. *BBC* 2010.
121. van Boven 2011.
122. Escobar, “It’s Pentagon/NATO versus the BRICS” (2011).
123. Roberts 2011, p. 6.
124. Wilson and Purushothaman, 2003, p. 4.
125. Cheng, Gutierrez, Mahajan, Shachmurove, and Shahrokhi, 2007, p. 145.
126. Pieterse 2011, p. 23.
127. *Ibid.*, p. 24.
128. Yamakawa and Kelston 2009, p. 3.

129. Pieterse, 2011, p. 27.
130. Roberts 2011, p. 5.
131. Turzi 2010, p. 95.
132. Krakowiak 2011.
133. Ministry of Foreign Affairs of the Russian Federation (2011).
134. Ibid.
135. Rothkopf 2011.
136. Hurrell 2010, p. 1.
137. Marthoz, 2011, p. 12. As with the case on Mercado Comun del Sur (MERCOSUR), Union de Naciones Suramericanas (UNASUR) and Comunidad de Estados Latinoamericanos y Caribeños (CELAC).
138. Brookings Institution 2007, p. 10. For example IBSA: India-Brazil-South Africa.
139. Almeida 2007, p. 7.
140. Ibid., pp. 1–4.
141. Federative Republic of Brazil, 2011, p. 6.
142. Ibid.
143. Franceschet 2007, p. 7.
144. *Reuters*, p. 28.
145. African Union 2011.
146. *New York Times* 2011.
147. Secretariat of the Assembly of States Parties (2011).
148. Akande, du Plessis, and Chernor Ja 2010.

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