

Gauging the Economic and Political Costs to China of Article 13(b) Referrals of Sudan and Myanmar to the International Criminal Court

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Encouraging reports of dramatic reforms in Myanmar since late 2011 hide an ugly past. Until the recent developments, numerous allegations of government-perpetrated war crimes and crimes against humanity had evoked growing support for a U.N.-led commission of inquiry and a potential referral of Myanmar to the International Criminal Court. Perhaps the largest perceived obstacle to invoking these international justice mechanisms was the anticipated opposition of China, a veto-wielding member of the U.N. Security Council and longstanding ally of Myanmar. This article argues that, to the contrary, there is strong evidence that China would not block international efforts to prosecute Myanmar perpetrators of grave crimes. The combination of three factors in particular support this proposition: first, China's voting record on the U.N. Security Council reflects a strong reluctance to use its veto power; second, economic growth, political stability, and international prestige—instead of the defense of other countries' sovereignty—have become paramount to China's foreign policy; and third, in 2004 and 2005, China declined to veto a Commission of Inquiry and referral to the ICC of Sudan, another important ally. The article suggests that China would also be unlikely to exercise its veto power in connection with Myanmar because the economic and political costs of permitting a Commission of Inquiry and referral to

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the ICC of Myanmar are no greater than those that were associated with Sudan. While recognizing that economic and political costs are not the only factors that influence China's decisions on the U.N. Security Council, and that the political environments and nature of crimes in Sudan and Myanmar are different, the article's comparative analysis seeks to demonstrate how "no" votes on investigating and prosecuting crimes in Myanmar would nevertheless be out of character for China.

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I. INTRODUCTION

Since late 2011, there have been reports of “almost unimaginable change” to the political environment in Myanmar.¹ Censorship has been relaxed, a number of political prisoners have been released, exiles have been invited to return, and a law permitting independent trade unions has been adopted.² These changes have captured recent headlines, at least momentarily obscuring the government atrocities that have been reported over the past several decades. Yet reports from Myanmar indicate that governmental violations of human rights continue,³ some still rising to the level of international crimes.⁴

¹ Amy Kazmin, *Burma: At Freedom's Gate*, FIN. TIMES, Oct. 24, 2011, <http://www.ft.com/cms/s/0/5576df62-fb37-11e0-8df6-00144feab49a.html#axzz1c8GcN6rG>. See also Grant Peck, *Myanmar Change Is 'Dramatic,' Senior U.S. Diplomat Says*, JOURNALGAZETTE.NET, Oct. 10, 2011, <http://www.journalgazette.net/article/20111010/NEWS0402/111019972/1179>. Burma was renamed Myanmar in 1989 by its military leaders. Political opponents and some governments, including the United States, have not accepted the change. Here the names are used without political connotation. To avoid confusion, in this article “Myanmar” is used as the name of the country. “Burmese” is used for the country’s citizens, for its language, and as an adjective. “Burman” is used for the majority ethnic group.

² Kazmin, *supra* note 1. Some skeptically view these changes as a mere ploy to warm international relations. See, e.g., Camilla Buzzi, *Norwegian Naïveté in Burma?*, THE IRRAWADDY, Oct. 17, 2011, http://www2.irrawaddy.org/article.php?art_id=22269&page=1; Daniel Schearf, *Burma Announces Mass Prisoner Release Amid Skepticism, Caution*, VOICE OF AM., Oct. 10, 2011, <http://www.voatibetanenglish.com/content/article--burma-announces-mass-prisoner-release-amid-skepticism-caution-131512053/1266592.html>; see also *Myanmar Changes Confuse Observers*, CHINA POST, Sept. 23, 2011, available at <http://www.chinapost.com.tw/commentary/the-china-post/special-to-the-china-post/2011/09/23/317553/Myanmar-changes.htm>.

³ See, e.g., PHYSICIANS FOR HUMAN RIGHTS, BITTER WOUNDS AND LOST DREAMS: HUMAN RIGHTS UNDER ASSAULT IN KAREN STATE, BURMA (2012), available at https://s3.amazonaws.com/PHR_Reports/burma-karen-rpt-ltr-2012.pdf (documenting recent human rights abuses in Karen State); HUMAN RIGHTS WATCH, ‘THE GOVERNMENT COULD HAVE STOPPED THIS’: SECTARIAN VIOLENCE AND ENSUING ABUSES IN BURMA’S ARAKAN STATE (2012), available at <http://www.hrw.org/sites/default/files/reports/burma0812webwcover.pdf> (reporting military abuses during sectarian violence in Rakhine—or Arakan—State).

⁴ See, e.g., Trent Franks, *Franks: Obama Must Use Burma Visit to Push for Reform: Atrocities Still Occurring Under Vicious Army*, WASH. TIMES, Nov. 19, 2012, available at <http://www.washingtontimes.com/news/2012/nov/19/obama-must-use-burma-visit-to-push-for-reform> (noting that “atrocities committed against the Kachin by the Burma Army may amount to war crimes or crimes against humanity”); Human Rights Watch, ‘Untold Miseries’: Wartime Abuses and Forced Displacement in Burma’s Kachin State, 2012, available at http://www.hrw.org/sites/default/files/reports/burma0312ForUpload_1_0.pdf (suggesting that the Burmese Army’s abuses in Kachin State may be war crimes); ALTSEAN–BURMA, THE WAR IN KACHIN STATE: A YEAR OF MORE DISPLACEMENT AND HUMAN RIGHTS ABUSES (2012), available at <http://www.altsean.org/Docs/PDF%20Format/Thematic%20Briefers/The%20war%20in%20Kachin%20State%20->

Before the recent reforms, influential organizations and powerful governments were beginning to form a consensus that an international commission of inquiry was needed to investigate crimes in Myanmar. In late 2011, the highly regarded international human rights organizations Human Rights Watch and Amnesty International continued to insist that the Myanmar government be held accountable at the international level for its crimes.⁵ In May and September 2011, the U.N. Special Rapporteur on the situation of human rights in Myanmar, Tomás Ojea Quintana, reported

%20A%20year%20of%20more%20displacement%20and%20human%20rights%20abuses. pdf (arguing that Burmese army atrocities in Kachin State are war crimes and crimes against humanity); KACHIN WOMEN'S ASS'N THAILAND, ONGOING IMPUNITY: CONTINUED ARMY ATROCITIES AGAINST THE KACHIN PEOPLE (2012), available at http://www.kachinwomen.com/images/stories/publication/ongoing_impunity%20.pdf (noting that as of June 2012, little had changed since reports of war crimes and crimes against humanity first emerged after the start of conflict in 2011). In late 2011, some even noted an increase in government atrocities. See, e.g., *UN General Assembly Fails to Act on Crimes Against Humanity in Burma*, BURMA CAMPAIGN UK, Nov. 4, 2011, <http://www.burmacampaign.org.uk/index.php/news-and-reports/news-stories/un-general-assembly-fails-to-act-on-crimes-against-humanity-in-burma> (“[H]uman rights abuses which may constitute war crimes and crimes against humanity have significantly increased in the past year.”); *US Urged on UN-Led Probe into Myanmar Atrocities, as Rapes Escalate*, TAMIL GUARDIAN, Sept. 27, 2011, <http://www.tamilguardian.com/article.asp?articleid=3556> (reporting that military fighting had actually increased since 2010).

⁵ Francis Wade, *Burma Seeing ‘Rapid’ Reform: Think Tank*, DEMOCRATIC VOICE OF BURMA, Sept. 23, 2011, <http://www.dvb.no/news/burma-seeing-%E2%80%99rapid%E2%80%99-reform-think-tank/17799> (noting that Human Rights Watch questions whether the Myanmar National Human Rights Council could handle war crimes enquiries, implying that international justice mechanisms must be triggered); see also Benjamin Zawacki, *The Good, Bad and Ugly in Myanmar*, ASIA TIMES ONLINE, Nov. 8, 2011, http://www.atimes.com/atimes/Southeast_Asia/MK08Ae01.html (arguing that despite some positive political and economic changes, a Commission of Inquiry is still needed in Myanmar). In March 2011, Human Rights Watch called for an international commission of inquiry regardless of government reforms due to the duration and severity of the alleged atrocities and in its World Report 2012 appeared to express frustration that no country had taken leadership at the U.N. to make the commission of inquiry a reality. See Human Rights Watch, *Burma: Q&A on an International Commission of Inquiry*, Mar. 24, 2011, <http://www.hrw.org/news/2011/03/24/burma-q-international-commission-inquiry> (“Even if [the Burmese government] was undertaking reforms, a CoI would be necessary given the length and scale of serious abuses.”); HUMAN RIGHTS WATCH, WORLD REPORT 2012: EVENTS OF 2011 (2012), at 300, available at <http://www.hrw.org/sites/default/files/reports/wr2012.pdf> (“Despite support from 16 countries for a proposed United Nations commission of inquiry on serious violations of international humanitarian law by all parties to Burma’s internal armed conflicts, no country took leadership at the UN to make it a reality. Foreign government officials expressed their optimism about government reforms despite abundant evidence of continuing systematic repression.”). Even in late 2012, Human Rights Watch has reported that the Myanmar’s army is “just as abusive as it was two years ago.” See David Scott Mathieson, *A Bridge Too Far for Obama, Crossed Too Early, in Myanmar*, HUMAN RIGHTS WATCH, Nov. 18, 2012, <http://www.hrw.org/news/2012/11/18/bridge-too-far-obama-crossed-too-early-myanmar>.

continued widespread violence and abuse, reiterating his call for a U.N. Commission of Inquiry to investigate state crimes.⁶ Supporters also included Paulo Sérgio Pinheiro, a previous U.N. Human Rights Special Rapporteur for Myanmar,⁷ and the governments of the United Kingdom,⁸ Australia,⁹ the United States,¹⁰ France,¹¹ Slovakia,¹² Canada,¹³ New Zealand,¹⁴ Hungary,¹⁵ the Netherlands,¹⁶ Ireland,¹⁷ Lithuania,¹⁸ the Czech

⁶ Tomás Ojea Quintana, Special Rapporteur on the Situation of Human Rights in Myanmar, *Report of the Special Rapporteur on the Situation of Human Rights in Myanmar*, ¶ 74, U.N. Doc. A/66/365 (Sept. 16, 2011); *Myanmar: Situation of Ethnic Minority Groups Restricts Transition to Democracy—UN Special Rapporteur*, UNITED NATIONS OFFICE OF THE HIGH COMMISSIONER FOR HUMAN RIGHTS, May 23, 2011, <http://www.ohchr.org/en/NewsEvents/Pages/DisplayNews.aspx?NewsID=11048&LangID=E>.

⁷ Paulo Sérgio Pinheiro, *End Burma's System of Impunity*, N.Y. TIMES, May 27, 2009, http://www.nytimes.com/2009/05/28/opinion/28iht-edpineiro.html?_r=2.

⁸ Simon Tisdall, *UK Backs Move to Refer Burma's Leaders to War Crimes Tribunal*, THE GUARDIAN, Mar. 25, 2010, <http://www.guardian.co.uk/world/2010/mar/25/uk-backs-case-against-burma>.

⁹ Human Rights Council, *Human Rights Council Considers Human Rights Situations in Democratic People's Republic of Korea and Myanmar*, U.N. OFFICE OF THE HIGH COMMISSIONER FOR HUMAN RIGHTS, Mar. 15, 2010, <http://www.ohchr.org/en/NewsEvents/Pages/DisplayNews.aspx?NewsID=9909&LangID=E>.

¹⁰ Kelley Currie, *Commissioning Justice for Burma*, WALL ST. J., Aug. 25, 2010, <http://online.wsj.com/article/SB30001424052748703846604575448423918526854.html>.

¹¹ Thomas Muang Shwe, *France Joins Calls for UN Inquiry into Burma Abuses*, MIZZIMA, Sept. 23, 2010, <http://www.mizzima.com/news/world/4391-france-joins-calls-for-un-inquiry-into-burma-abuses.html>.

¹² *Commission of Inquiry Inches Closer to Realization*, MIZZIMA, June 10, 2010, <http://www.mizzima.com/news/world/4019-commission-of-inquiry-inches-closer-to-realization-.html>.

¹³ Lee Berthiaume, *Canada Throws Support Behind Burma Inquiry*, EMBASSY, Sept. 8, 2010, <http://www.embassymag.ca/page/view/burma-09-08-2010>.

¹⁴ Burma Campaign New Zealand, *Burma Campaign New Zealand Welcomes the New Zealand Government's Endorsement of a Commission of Inquiry on Burma*, BURMA PARTNERSHIP, Sept. 21, 2010, <http://www.burmapartnership.org/2010/09/burma-campaign-new-zealand-welcomes-the-new-zealand-governments-endorsement-of-a-commission-of-inquiry-on-burma>.

¹⁵ *European MPs Welcome Hungary Support for Burma Crimes Inquiry*, BURMA CAMPAIGN UK, Sept. 6, 2010, <http://www.burmacampaign.org.uk/index.php/news-and-reports/news-stories/european-mps-welcome-hungary-support-for-burma-crimes-inquiry/142>.

¹⁶ *Netherlands Supports UN Burma Crimes Inquiry*, BURMA CAMPAIGN UK, Sept. 21, 2010, <http://www.burmacampaign.org.uk/index.php/news-and-reports/news-stories/netherlands-supports-un-burma-crimes-inquiry/142>.

¹⁷ Thomas Muang Shwe, *Ireland Weighs in on UN Inquiry into Burma Abuses*, MIZZIMA, Sept. 25, 2010, <http://www.mizzima.com/news/world/4405-ireland-weighs-in-on-un-inquiry-into-burma-abuses.html>.

¹⁸ Thea Forbes, *Lithuania Joins Chorus Seeking UN Inquiry on Burma Abuses*, MIZZIMA, Sept. 29, 2010, <http://www.mizzima.com/news/world/4412-lithuania-joins-chorus-seeking-un-inquiry-on-burma-abuses.html>.

Republic,¹⁹ Denmark,²⁰ Belgium,²¹ Estonia,²² and Latvia.²³ In-depth reports by the International Human Rights Clinic at Harvard Law School, Physicians for Human Rights, and Amnesty International, and a joint study by the International Federation for Human Rights, ALTSEAN-Burma,²⁴ and the Burma Lawyers' Council, all concluded that evidence of grave crimes in Myanmar warrants criminal accountability measures at the international level.²⁵ The Burmese democracy leader, Nobel Peace Prize winner, and current member of Myanmar's Parliament, Aung San Suu Kyi, also expressed support for a Commission of Inquiry on government crimes.²⁶

The recent political developments in Myanmar, however, have led some to soften their stance. In March 2012, Special Rapporteur Quintana emphasized that primary responsibility for investigating and prosecuting serious violations of international humanitarian law and international human rights law belongs to the Myanmar government, and that "the international commission of inquiry is only one option for ensuring that justice is dispensed, accountability is established and impunity is

¹⁹ Simon Roughneen, *Czech Supports UN War Crimes Inquiry on Burma*, THE IRRAWADDY, Apr. 8, 2010, http://www2.irrawaddy.org/article.php?art_id=18242.

²⁰ Thomas Maung Shwe, *Denmark, Latvia Support UN Commission of Inquiry*, MIZZIMA, Mar. 11, 2011, <http://www.mizzima.com/news/world/4998-denmark-latvia-support-un-commission-of-inquiry.html>.

²¹ Thomas Maung Shwe, *Belgium Supports Burma UN Commission of Inquiry*, MIZZIMA, Feb. 4, 2011, <http://www.mizzima.com/news/world/4844-belgium-supports-burma-un-commission-of-inquiry.html>.

²² European Parliamentary Caucus on Burma, *European MPs Welcome Estonia Support for Burma Crimes Inquiry*, BURMA PARTNERSHIP, Oct. 8, 2010, <http://www.burmapartnership.org/2010/10/european-mps-welcome-estonia-support-for-burma-crimes-inquiry>.

²³ Thomas Maung Shwe, *supra* note 20.

²⁴ The Alternative ASEAN Network on Burma (ALTSEAN-Burma) is "a network of organizations and individuals based in ASEAN member states working to support the movement for human rights and democracy in Burma." *About Us*, ALTSEAN-BURMA, <http://www.altsean.org/Aboutus.htm> (last visited July 23, 2012).

²⁵ AMNESTY INT'L, *CRIMES AGAINST HUMANITY IN EASTERN MYANMAR* 47-49, 55 (2008), available at <http://www.amnesty.org/en/library/asset/ASA16/011/2008/en/72d2e8c2-b9ce-4afb-91c6-ba3391ed41e5/asa160112008en.pdf>; INT'L FED'N FOR HUMAN RIGHTS ET AL., *BURMA/MYANMAR: INTERNATIONAL CRIMES COMMITTED IN BURMA: THE URGENT NEED FOR A COMMISSION OF INQUIRY* 25-27 (2009), available at <http://www.fidh.org/IMG/pdf/bu08.pdf>; INT'L HUMAN RIGHTS CLINIC AT HARVARD LAW SCH., *CRIMES IN BURMA* 91-92 (2009), available at <http://www.law.harvard.edu/programs/hrp/documents/Crimes-in-Burma.pdf>; PHYSICIANS FOR HUMAN RIGHTS, *LIFE UNDER THE JUNTA: EVIDENCE OF CRIMES AGAINST HUMANITY IN BURMA'S CHIN STATE* 59 (2011), available at https://s3.amazonaws.com/PHR_Reports/life-under-the-junta-burma-chin-state.pdf.

²⁶ Ko Htwe & Lalit K. Jha, *Suu Kyi Urges US Support for CoI*, THE IRRAWADDY, June 23, 2011, http://www2.irrawaddy.org/article.php?art_id=21551.

averted.”²⁷ U.S. Secretary of State Hillary Clinton and Amnesty International agreed, suggesting that a domestic judicial process could be appropriate.²⁸ Whether other supporters similarly have a change of heart remains to be seen.

Under normal circumstances, commencing a criminal case does not require the support of powerful countries, U.N. officials, or human rights groups.²⁹ Instead, allegations are simply brought to a prosecutor who determines whether sufficient evidence exists to proceed. At the International Criminal Court (“ICC”), for instance, the Prosecutor typically will begin an investigation based on the request of a country that is a member of the ICC,³⁰ or based on information received from

²⁷ Tomás Ojea Quintana, Special Rapporteur on the Situation of Human Rights in Myanmar, *Progress Report of the Special Rapporteur on the Situation of Human Rights in Myanmar*, ¶ 74, U.N. Doc. A/HRC/19/67 (Mar. 7, 2012).

²⁸ *Press Availability in Rangoon, Burma*, U.S. DEP’T OF STATE, Dec. 2, 2011, available at <http://www.state.gov/secretary/rm/2011/12/178103.htm> (quoting Secretary Clinton as saying, “[w]ith regard to the Commission of Inquiry, we always and consistently support accountability for human rights violations, and we are looking for ways to support the changes that are underway [sic] here because we hope that there will be an internal mechanism accountability”); AMNESTY INT’L, MYANMAR: REVISITING HUMAN RIGHTS IN MYANMAR, May 25, 2012, at 5, available at <http://www.amnesty.org/zh-hant/library/asset/ASA16/003/2012/en/62cc4319-a779-4c9e-93c8-0a3945203411/asa160032012en.pdf> (“So long as its independence and impartiality are assured, a domestic process *could* be as appropriate as an international mechanism, including a UN-established Commission of Inquiry, for which Amnesty International advocated exclusively in 2010 and 2011.” (emphasis in original)).

²⁹ Forming a Commission of Inquiry is not the equivalent of opening a case at the International Criminal Court (the “ICC”), but it is widely acknowledged as the first investigative step towards a legal case. An ICC referral is not the only course of action that the United Nations could take. In the past, the U.N. Security Council has established ad hoc tribunals such as the International Criminal Tribunal for the former Yugoslavia and the International Criminal Tribunal for Rwanda, after investigations by Commissions of Experts. *See generally Tribunals and Other Mechanisms*, UNITED NATIONS RULE OF LAW, http://www.unrol.org/article.aspx?article_id=18 (describing the varied judicial and quasi-judicial “processes and mechanisms” employed at the United Nations, and listing some of the hybrid tribunals and investigatory commissions that have been established to date); *About the Court*, INT’L CRIMINAL COURT, <http://www2.icc-cpi.int/Menus/ICC/About+the+Court/> (detailing in brief the creation of the ICC, after “[a] general agreement [was reached] that an independent, permanent criminal court was needed” to address international crimes of genocide, crimes against humanity, war crimes and the crime of aggression).

³⁰ Situations in Uganda, the Democratic Republic of Congo, Mali, and the Central African Republic have all been referred by countries that are “States Parties,” i.e., members of the ICC. *See All Situations*, INT’L CRIMINAL COURT, <http://www2.icc-cpi.int/Menus/ICC/Situations+and+Cases/Situations> (listing all situations which have currently been referred to the ICC and providing information on the referring parties); *Mali Crisis: ICC Launches Inquiry into ‘Atrocities’*, BBC NEWS, July 18, 2012, <http://www.bbc.co.uk/news/world-africa-18893233> (reporting the request by the Malian government to investigate atrocities allegedly committed in rebel-held areas).

individuals or organizations.³¹ No U.N. involvement or stamp of approval is necessary.

Myanmar, however, is not a typical case because it has not ratified the Rome Statute, the founding statute of the ICC. Thus, the ICC has no jurisdiction in Myanmar. Importantly, however, the drafters of the Rome Statute made one crucial exception to the ICC's lack of jurisdiction over non-signatories: the U.N. Security Council, acting pursuant to its Chapter VII powers relating to international peace and security, can "refer" situations in non-signatory countries, like Myanmar, to the ICC.³² While this exception provides a loophole for those seeking justice in Myanmar, it also politicizes the case. Before anyone can even imagine Myanmar's notorious former ruler, Senior General Than Shwe, on trial at the ICC, the U.N. Security Council must first be convinced to exercise its referral power.³³ This is an enormous political hurdle that most observers believe is too high.³⁴ Each of the five permanent members of the U.N. Security Council (the United States, the United Kingdom, China, Russia, and France) has the power to veto non-procedural matters, such as an ICC referral. The consensus is that China and Russia would almost certainly block such a referral.³⁵ In fact, both China and Russia have spoken

³¹ This is called an investigation *motu proprio* (of one's own motion or accord). Investigations of situations in Kenya and Côte d'Ivoire began as investigations *motu proprio*. See, e.g., Manuel Ventura, *Proprio Motu Investigation by the ICC Prosecutor: Under What Circumstances Can the Prosecutor Initiate Investigations Proprio Motu?*, PEACE & JUSTICE INITIATIVE, <http://www.peaceandjusticeinitiative.org/implementation-resources/proprio-motu-investigation-by-the-icc-prosecutor>.

³² Rome Statute of the International Criminal Court, art. 13(b), *opened for signature* July 17, 1998, 2187 U.N.T.S. 90, available at <http://www2.icc-cpi.int/NR/rdonlyres/ADD16852-AEE9-4757-ABE7-9CDC7CF02886/283503/RomeStatutEng1.pdf>. Thus far, only the situations in Sudan and Libya have been referred by the U.N. Security Council to the ICC.

³³ While a variety of U.N. actors can initiate commissions of inquiry, such as the U.N. Secretary-General, the U.N. Human Rights Council, the U.N. General Assembly, and the U.N. Security Council, only the Security Council has the power to refer to the ICC the case of a non-signatory country. See Agence France-Presse & Democratic Voice of Burma, *US Backs UN Inquiry in Burma*, DEMOCRATIC VOICE OF BURMA, Aug. 18, 2010, <http://www.dvb.no/news/us-backs-un-inquiry-in-burma/11323>; Mark L. Goldberg, *Commissions of Inquiry, the Human Rights Council and the ICC*, U.N. DISPATCH, Aug. 18, 2010, <http://www.undispatch.com/commissions-of-inquiry-the-human-rights-council-and-the-icc>; Amnesty International Public Statement: *Myanmar: UN General Assembly Should Call for Commission of Inquiry*, AMNESTY INT'L (Sept. 3, 2010), <http://www.amnesty.org/en/library/asset/ASA16/011/2010/en/f47ea10e-e9fe-460d-996c-bd476d242173/asa160112010en.html>.

³⁴ This comment is based on the author's conversations and attendance in meetings with colleagues and NGO employees working on Myanmar issues.

³⁵ See, e.g., Tisdall, *supra* note 8 (reporting that, according to Britain's Ambassador to the United Nations Sir Mark Lyall Grant, the U.N. Security Council's five permanent members were "not sufficiently unanimous" on the question of referral). For views that China or Russia would veto a referral, see, for example, Mark L. Goldberg, *Momentum for Burma Commission of Inquiry Seeming to Falter*, U.N. DISPATCH, Oct. 25, 2010,

directly on the issue, strongly denouncing all efforts to commence a U.N. Commission of Inquiry in Myanmar.³⁶

This article concludes that, contrary to conventional wisdom, China may not be such a sure “no” vote. In 2005, observers similarly claimed that China would not permit a U.N. Security Council referral of the situation in Darfur, Sudan, to the ICC.³⁷ Like Myanmar, Sudan had not ratified the ICC’s Rome Statute.³⁸ Yet in 2005, in a historic moment for the ICC, the U.N. Security Council made its first referral to the Prosecutor of the ICC.³⁹ Eleven members voted in favor, including Russia, none against, and Algeria, the United States, Brazil, and China abstained.⁴⁰ The referral’s approval was a “shock” to the international

<http://www.undispatch.com/momentum-for-burma-commission-of-inquiry-seeming-to-falter>; Kevin J. Heller, *UK: Send Burma to the ICC*, OPINIO JURIS, Mar. 26, 2010, <http://opiniojuris.org/2010/03/26/uk-send-burma-to-the-icc>; David S. Mathieson, *Commission of Inquiry for Burma is Long Overdue*, THE BANGKOK POST, Mar. 28, 2010; John Pomfret, *U.S. Supports Creation of UN Commission of Inquiry into War Crimes in Burma*, WASH. POST, Aug. 18, 2010, <http://www.washingtonpost.com/wp-dyn/content/article/2010/08/17/AR2010081706026.html>; Simon Roughneen, *Quintana Recommends UN War Crimes Commission on Burma*, THE IRRAWADDY, Mar. 11, 2010, http://www2.irrawaddy.org/article.php?art_id=18013; Benjamin Zawacki, *Amnesty Int’l Myanmar Researcher, Remarks at Royal Inst. of Int’l Affairs, Myanmar’s 2010 Elections: A Human Rights Perspective*, May 11, 2010, <http://www.amnesty.org/en/library/asset/ASA16/007/2010/en/38ec32d1-d538-45df-8359-fd09cbe84373/asa160072010en.html>.

³⁶ Colum Lynch, *China Campaigning Against International Probe of Possible War Crimes in Burma*, WASH. POST, Oct. 25, 2010, <http://www.washingtonpost.com/wp-dyn/content/article/2010/10/25/AR2010102503168.html>.

³⁷ See, e.g., Robert Cryer, *Sudan, Resolution 1593 and International Criminal Justice*, 19 LEIDEN J. INT’L L. 195, 203–04 (2006); Jack Goldsmith, *Support War Crimes Trials for Darfur*, WASH. POST, Jan. 24, 2005, at A5; Renee Dopplick, *UN Acts on Sudan but Ignores Darfur*, INSIDE JUSTICE, Mar. 24, 2005, <http://cyberwonders.com/law/index.php/intl/2005/03/24/icc>; Eric Reeves, *‘At this Moment, Terrible Things Are Happening Today in Darfur, Sudan’—Kofi Annan, January 24, 2005, to the UN General Assembly*, SUDANREEVES.ORG, Jan. 27, 2005, <http://www.sudanreeves.org/2005/01/27/at-this-moment-terrible-things-are-happening-today-in-darfur-sudan---kofi-annan-january-24-2005-to-the-un-general-assembly-january-24-2005/>; Brian Smith, *Conflict over Sudan on United Nations Security Council*, WORLD SOCIALIST WEB SITE, Feb. 28, 2005, <http://www.wsws.org/articles/2005/feb2005/sudnf28.shtml>; Adam Wolfe, *Trying Times in Darfur and the Establishment of International Criminal Law*, GLOBAL POL’Y FORUM, Mar. 4, 2005, <http://www.globalpolicy.org/component/content/article/164/28502.html>.

³⁸ See Ayad Derbal, *The ICC’s Involvement in the Situation in Darfur: Not a Threat to Peace 2* (Univ. of Notre Dame Ctr. for Civil & Human Rights, Working Paper No. 1, 2008), available at http://www.nd.edu/~ndlaw/cchr/papers/ayad_The_ICC_and_Darfur.pdf (noting that Sudan has signed but not ratified the Rome Statute).

³⁹ Press Release, Sec. Council, Security Council Refers Situation in Darfur, Sudan, to Prosecutor of Int’l Criminal Court, U.N. Press Release SC/8351 (Mar. 31, 2005).

⁴⁰ *Id.*

community.⁴¹ In 2011, further demonstrating China's willingness to overlook the sovereignty concerns of an ally, the U.N. Security Council unanimously referred the situation in Libya, another non-signatory, to the ICC.⁴² No country abstained.

This article seeks to evaluate what China's abstention on the referral of Sudan may mean for the possibilities of a Commission of Inquiry or of an eventual referral of Myanmar to the ICC.⁴³ In particular, this article examines the economic and political risks that China had to accept in order to abstain on Sudan, and speculates as to how those risks would compare if China abstained on Myanmar.⁴⁴ China's evolving foreign policy objectives, its voting history on the U.N. Security Council, and its economic and political relationships with Sudan and Myanmar all indicate that today, the opposite of 2005 is true: rather than an abstention surprising anyone, it would be more surprising to see China veto a Commission of Inquiry regarding or an ICC referral of Myanmar.

A preliminary word of caution: Sudan and Myanmar are vastly different nations. They have different relationships with China. They are viewed differently by the international community. Myanmar in 2012 is not Sudan in 2005. Despite these differences, there is much to be learned from China's abstentions on Sudan and its relationships with Sudan and Myanmar. Through an evaluation of these relationships and China's recent behavior on the U.N. Security Council, this article seeks to unearth the fundamental considerations of China's current foreign policy and extrapolate how China would evaluate a vote relating to crimes in Myanmar.

As background, Part II of this article describes China's voting history on the U.N. Security Council and its primary foreign policy motives, revealing that China rarely uses its veto power and that it has shifted away from protecting national sovereignty, tending to place more value on international prestige.

⁴¹ Rosanna Lipscomb, *Restructuring the ICC Framework to Advance Transitional Justice: A Search for a Permanent Solution in Sudan*, 106 COLUM. L. REV. 182, 185 n.22 (2006).

⁴² S.C. Res. 1970, U.N. Doc. S/RES/1970 (Feb. 26, 2011).

⁴³ While this article focuses on Sudan, China's relationship with Libya could be viewed similarly to support the inference of a potential Chinese abstention on Myanmar. *See infra* Part IV (discussing briefly the Libya referral).

⁴⁴ For an extensive analysis of China's U.N. Security Council voting record, see Joel Wuthnow, *Beyond the Veto: Chinese Diplomacy in the United Nations Security Council 18–19* (2011) (unpublished Ph.D. dissertation, Columbia University), *available at* <http://academiccommons.columbia.edu/catalog/ac%3A132019> (arguing that "China will be more likely to cooperate with the U.S. [on Security Council action] when: (1) alternative dispute resolution mechanisms, such as UN mediation, have failed; (2) the U.S. has made concessions or side-payments that limit the risks of agreement for China; (3) Washington has applied high-level diplomatic pressure on Beijing; (4) Russia's position has shifted towards the U.S.; and (5) regional stakeholders have endorsed the U.S. position").

Part III traces the development of the U.N.'s Commission of Inquiry regarding and its ICC referral of Sudan, focusing on China's role, Sudan's reaction to China's abstentions, and the tensions between the two nations that the referral generated.

Part IV briefly discusses the referral of Libya to the ICC, and China's role in those deliberations.

Part V explains the basis for a Commission of Inquiry regarding Myanmar and possible referral to the ICC, tracing the proposal from its roots to the international stage.

Since continued domestic economic growth and political stability are the primary drivers of China's foreign policy, Parts VI and VII examine China's economic relationships with Sudan and Myanmar, while Parts VIII and IX evaluate these nations' political relationships. Part X, the conclusion, sums up the analysis advanced in this article and briefly notes possible accountability mechanisms other than the ICC.

The analysis reveals some startling facts. For instance, contrary to what one might expect based on population and proximity, China is much more economically dependent on Sudan than it is on Myanmar. Furthermore, China depends on Sudan and Myanmar for less than one percent of its overall trade, while for Sudan and Myanmar, China is respectively one's largest and the other's second-largest trading partner. These facts suggest the enormous disparity of economic power that China wields over these two allies. The same is true for political leverage. As rogue regimes facing constant pressure from the West, Sudan and Myanmar need China's political support much more than China needs them. Perhaps most notably, diplomatic relations between China and Sudan actually *improved* following the ICC referral, demonstrating Sudan's inability to retaliate against China for betrayal on the referral vote. These observations by no means guarantee that China would vote to approve a Commission of Inquiry on crimes in Myanmar or a referral of Myanmar's former leaders to the ICC, but they cast doubts on the assumption that China would exercise its veto power to prevent such actions.

II. MODERN MOTIVATIONS FOR CHINA'S FOREIGN POLICY

A. *China's Voting History on the U.N. Security Council*

An examination of China's voting history on the U.N. Security Council indicates that, perhaps surprisingly, China is one of the Council's most cooperative members. China has to a large extent adopted an abstention strategy, by which it attempts to please both its allies and its rivals. Since the creation of the Security Council in 1945, China has in fact rarely voted "no." From the P.R.C.'s ascension to the United Nations

in November 1971 through October 2011, a period of 40 years, China voted “no” only seven times.⁴⁵ This is in comparison to 127 “no” votes by the Soviet Union and Russia, 83 by the United States, 32 by the United Kingdom, and 18 by France.⁴⁶

China’s recent voting history illustrates that its reputation as a principal adversary to Western objectives is misplaced.⁴⁷ Indeed, the Security Council is more collegial than is often thought: from 1999 to 2009, 98% of all resolutions passed, and only 5% had any abstentions.⁴⁸ China used three vetoes (one on Myanmar) and sixteen abstentions (five on Sudan) during this period.⁴⁹ China was thus only the third-most frequent veto user and the second-most frequent abstainer among the Council’s permanent members.⁵⁰ Out of the five permanent members, during this period, China never used its veto power without an ally, and was third most likely to be the lone abstention.⁵¹

In fact, since the Security Council began to meet in 1946, only two of China’s “no” votes have been *liberum* vetoes that single-handedly caused resolutions to fail.⁵² Instead of using its veto power, China

⁴⁵ See Report of the Open-Ended Working Grp. on the Question of Equitable Representation on and Increase in the Membership of the Sec. Council and Other Matters Related to the Sec. Council 13–17, U.N. Doc. A/58/47; GAOR, 58th Sess., Suppl. No. 47 (2004); *Changing Patterns in the Use of the Veto in the Security Council*, GLOBAL POL’Y FORUM, <http://www.globalpolicy.org/component/content/article/102/32810.html> (last visited July 23, 2012); *United Nations Documentation: Research Guide*, DEP’T OF PUB. INFO., DAG HAMMARSKJÖLD LIBRARY, <http://www.un.org/depts/dhl/resguide/scact.htm> (last visited July 23, 2012). From 1946 to 1971, China’s vote in the United Nations was controlled by the Republic of China, now based in Taiwan. The R.O.C. made one negative vote during this period, blocking in 1955 Mongolia’s admission to the United Nations; this stance was reversed in 1960 due to Soviet pressure. *China and the United Nations—Definition*, WORDIQ.COM, http://www.wordiq.com/definition/China_and_the_United_Nations (last visited July 23, 2012). These statistics do not include negative votes on specific paragraphs.

⁴⁶ *Changing Patterns in the Use of the Veto in the Security Council*, *supra* note 45; *United Nations Documentation: Research Guide*, *supra* note 45. The vast majority of “no” votes among all the permanent members were made before 1995. It should be noted that these figures include “no” votes from the entire period of the U.N.’s existence, including the years between 1946–71 before the P.R.C. joined. *Id.*

⁴⁷ Katie Lynch, *China and the Security Council: Congruence of the Voting Between Permanent Members*, 5 CHINA PAPERS 3 (2009) (“China is simply not the recalcitrant antagonist on the Security Council that it is sometimes portrayed to be.”). *But see Syria Conflict: West ‘Appalled’ by Russia China UN Veto*, BBC NEWS, July 19, 2012, <http://www.bbc.co.uk/news/world-middle-east-18914578> (reporting that China recently joined Russia in three vetoes over the situation in Syria).

⁴⁸ *Id.* at 2.

⁴⁹ *Id.* at 3–4.

⁵⁰ *Id.* at 3.

⁵¹ *Id.* at 9.

⁵² Yitzhak Shichor, *China’s Voting Behavior in the UN Security Council*, CHINA BRIEF, Sept. 6, 2006,

consistently abstains on matters that it considers to interfere in other countries' internal affairs or to undermine national sovereignty; before its most recent veto on a resolution that would have threatened international sanctions on Syria's leadership, it had never affirmatively voted against the imposition of sanctions or the use of force.⁵³ This practice has been explained as a way of keeping friends and avoiding making enemies: "[i]n this way—typical of Beijing's behavior in the UN as well as reflecting its cultural legacies—the Chinese are able to send a message and yet avoid the necessity of taking sides and alienating allies."⁵⁴ The selectivity with which China uses its veto appears intended to maximize its self-interest:

[A]bstention has become a kind of normative veto, an expression of "principled opposition" without standing in the way of the majority will. . . . The most obvious explanation for such behavior is the desire to retain maximum leverage as part of its indeterminate strategy of becoming all things to all nations on many issues intruding on the Security Council agenda.⁵⁵

While China's voting record does not tell us how it would vote on a referral of Myanmar to the ICC, it clearly indicates that China is reluctant to use its veto power and that it carefully weighs a number of competing foreign policy interests when deciding how to vote. This article will now turn to a discussion of those interests.

B. China's Evolving Foreign Policy Concerns

China's current foreign policy interests further support the notion that China is far from an automatic "no" vote on a Commission of Inquiry or a referral of Myanmar to the ICC. Today, China's foreign policy reflects its desires for political stability, economic prosperity, and international prestige. Its modern-day decision-makers have become more and more practical, and rather than taking entrenched ideological positions have favored cooperation and compromise in order to fuel their nation's continued rise. Significantly, this pragmatic approach to foreign policy

http://www.jamestown.org/programs/chinabrief/single/?tx_ttnews%5Btt_news%5D=32007&tx_ttnews%5BbackPid%5D=196&no_cache=1.

⁵³ *Id.* Shichor's article does not account for China's 2007 "no" vote on the draft resolution on the situation in Myanmar.

⁵⁴ *Id.*

⁵⁵ Samuel S. Kim, *China and the United Nations*, in *CHINA JOINS THE WORLD: PROGRESS AND PROSPECTS* 42, 61–62 (Elizabeth Economy & Michel Oksenberg eds., 1999).

has eroded China's traditional position of defending sovereignty at all costs.

China's foreign policy decisions reflect both a grand strategy for building the country's wealth and power, and a domestic strategy for maintaining the rule of the Communist Party.⁵⁶ To that end, Chinese leaders promote stable international and regional environments in which their country's economy can thrive and its position of power can improve.⁵⁷ As the Chinese people's belief in Marxism has deteriorated, China's domestic strategy for Communist Party survival has focused on rapid economic growth and a rise in living standards.⁵⁸

To maintain international stability, China's foreign policy principles have increasingly reflected pragmatic concerns. China is now "interested in maintaining normal relationships with as many countries as possible, in order to maximize the substantial economic benefits it receives from current levels of involvement in the world economy."⁵⁹ Its policies vis-à-vis other countries now depend to a great extent on the prospects for advantageous trade with them, with expectations for positive economic outcomes reflected in cooperative diplomatic behavior.⁶⁰ Moving away from its past ideological concerns, China now adopts international norms when they benefit the nation's foreign policy goals, but strongly rejects them when they interfere with China's vital interests.⁶¹ While China's rhetoric on international issues is often strong and uncompromising, its actions, in contrast, are restrained and accommodating.⁶²

This shift away from ideology has made China's position on state sovereignty more flexible. During the 1980s, China's position was that sovereignty was a "sacred right."⁶³ Since the Tiananmen killings in 1989, however, China has become increasingly cooperative when state sovereignty is at issue, evidenced by a significant increase in its

⁵⁶ PHILLIP C. SAUNDERS, INST. FOR NAT'L STRATEGIC STUD., CHINA'S GLOBAL ACTIVISM: STRATEGY, DRIVERS, AND TOOLS 3 (2006).

⁵⁷ *Id.*

⁵⁸ *Id.* at 3–4.

⁵⁹ Barry Naughton, *The Foreign Policy Implications of China's Economic Development Strategy*, in CHINESE FOREIGN POLICY: THEORY AND PRACTICE 47, 66 (Thomas W. Robinson & David Shambaugh eds., 1994).

⁶⁰ Rex Li, *Security Challenge of an Ascendant China—Great Power Emergence and International Stability*, in CHINESE FOREIGN POLICY: PRAGMATISM AND STRATEGIC BEHAVIOR 23, 24 (Suisheng Zhao ed., 2004).

⁶¹ Suisheng Zhao, *Chinese Foreign Policy: Pragmatism and Strategic Behavior*, in CHINESE FOREIGN POLICY: PRAGMATISM AND STRATEGIC BEHAVIOR, *supra* note 60, at 3, 4–5.

⁶² *Id.* at 6.

⁶³ Allen Carlson, *More than Just Saying No: China's Evolving Approach to Sovereignty and Intervention Since Tiananmen*, in NEW DIRECTIONS IN THE STUDY OF CHINA'S FOREIGN POLICY 217, 221 (Alastair Iain Johnston & Robert S. Ross eds., 2006).

involvement in international interventions.⁶⁴ Influential Chinese foreign policy elites and international relations experts helped to effect gradual change, as they came to understand how participation in international interventions could benefit China's global image.⁶⁵ China's approaches to sovereignty and intervention are widely misunderstood: although in its words China proclaims its official support of sovereignty and non-intervention, in its actions it generally agrees to humanitarian interventions in times of crisis, and has even begun to support such missions actively.⁶⁶ China's support of the referral of Libya to the ICC is concrete evidence of this trend.

China has also become more concerned with its image in recent years.⁶⁷ Chinese leaders are "eagerly seeking stature, acceptance, honor, and respect everywhere on the world stage."⁶⁸ As China has become more focused on global social recognition and on "externally based political legitimacy," its international cooperation has increased.⁶⁹ In fact, since the mid-1990s, international status has appeared to be the *overriding* motivating factor in Chinese international relations—even more important than power.⁷⁰

In sum, Chinese foreign policy is more supportive of international cooperation than is generally acknowledged. However, this increased willingness to intervene in what are often arguably internal affairs should not be overstated. China's 2007 "no" vote to stop a Security Council resolution pushing Myanmar towards democracy, primarily due to concerns for state sovereignty, is a vivid reminder that respect for

⁶⁴ *Id.* at 218. In 1990, for example, China supported the Security Council's condemnation of Iraq's invasion of Kuwait, and joined in the demand that Iraq withdraw. *Id.* at 221–22; see also Chengqiu Wu, *Sovereignty, Human Rights, and Responsibility: Changes in China's Response to International Human Rights Crises*, 15 J. CHINESE POL. SCI. 71 (2010).

⁶⁵ Carlson, *supra* note 63, at 218, 225–26.

⁶⁶ *Id.* at 234. Research focusing on China's position on intervention in conflict situations indeed reveals that China evolved from principled opposition and non-participation in the 1970s, to support and non-participation in the 1980s, to support and participation in the 1990s. Jonathan Holslag, *China's Diplomatic Victory in Darfur*, 2.4 BRUSSELS INST. OF CONTEMPORARY CHINA STUD. (BICCS) ASIA PAPERS 2 (2007), http://www.oxfamsol.be/nl/IMG/pdf/Rap_China_Darfur.pdf. This change has been explained in a variety of ways, including China's purported recognition that its interests can be advanced through utilization of the Security Council, its realization that cooperation is necessary to co-exist with the West, its economic and security interdependence and maturation as a world power, and its socialization and learning after decades as a member of the Security Council. *Id.*

⁶⁷ Zhao, *supra* note 61, at 14.

⁶⁸ Fei-Ling Wang, *Beijing's Incentive Structure: The Pursuit of Preservation, Prosperity and Power*, in CHINA RISING: POWER AND MOTIVATION IN CHINESE FOREIGN POLICY 19, 39 (Yong Deng & Fei-Ling Wang eds., 2005).

⁶⁹ Yong Deng & Fei-Ling Wang, *Introduction*, in CHINA RISING, *supra* note 68, at 1, 11.

⁷⁰ Yong Deng, *Better than Power: 'International Status' in Chinese Foreign Policy*, in CHINA RISING: POWER AND MOTIVATION IN CHINESE FOREIGN POLICY, *supra* note 68, at 51–52, 62.

sovereignty remains a vital component in China's foreign policy considerations.⁷¹

III. THE REFERRAL OF SUDAN TO THE INTERNATIONAL CRIMINAL COURT

The U.N. Security Council's proposed referral in 2005 of the situation in Darfur, Sudan, to the ICC was an important litmus test for China. How would it balance, on one hand, its own economic interests in Sudan and its longstanding view that internal matters are not appropriate for U.N. Security Council action, and on the other hand its increased interest in enhancing its international image and in cooperating in international coalitions?

A. *The Conflict in Darfur*

The roots of the conflict that led to the crisis in Darfur date back to at least 1955, when disagreements over unification of the southern (predominantly Christian and Animist) and northern (predominantly Arab and Muslim) parts of the country led to a mutiny by southern army units.⁷² In 1972, the two sides reached a cease-fire agreement that led to a ten-year hiatus in the conflict.⁷³ However, the leader of Sudan, a born-again Muslim who came to power in 1969 by military coup, steadily reduced the South's autonomy, as part of his goal of creating an Islamic state.⁷⁴ Hostilities resumed between the North and the South in 1983.⁷⁵ In 1989, Omar Hassan Ahmad al-Bashir, a little-known brigadier in the Sudanese Army, led a military coup that overthrew the government.⁷⁶ In 1993, he dissolved the ruling military junta and appointed himself president.⁷⁷ Fighting between North and South would last for twenty-two years and take almost two million lives.⁷⁸ In 2005, a peace agreement was finally

⁷¹ For a discussion of China's vote, see *infra* Part IX.

⁷² MOHAMED H. FADLALLA, *SHORT HISTORY OF SUDAN* 140–41 (2004).

⁷³ *Id.* at 142–43.

⁷⁴ FRANCIS MADING DENG, *WAR OF VISION: CONFLICT OF IDENTITIES IN THE SUDAN* 12 (1995).

⁷⁵ MILLARD BURR & ROBERT O. COLLINS, *DARFUR: THE LONG ROAD TO DISASTER* 239 (2006).

⁷⁶ DIANA CHILDRESS, *OMAR AL-BASHIR'S SUDAN* 9 (2010).

⁷⁷ *FACTBOX—Sudan's President Omar Hassan al-Bashir*, REUTERS, July 14, 2008, <http://www.reuters.com/article/2008/07/14/uk-warcrimes-sudan-bashir-profile-idUKL1435274220080714>.

⁷⁸ Peter Walker, *Profile: Omar al-Bashir*, THE GUARDIAN, July 14, 2008, <http://www.guardian.co.uk/world/2008/jul/14/sudan.warcrimes3>.

signed between the Southern rebels and the Northern-oriented national government.⁷⁹

Since the 1980s, while the conflict between North and South Sudan raged on, ethnic rebels in Darfur, a region of Western Sudan, had also been fighting against Arab militias supported by the central Sudanese government.⁸⁰ Triggering the crisis that would make the Darfur situation known worldwide, in 2003, rebels claiming economic marginalization attacked government troops.⁸¹ In response, the government-supported Arab Janjaweed militia began ethnic cleansing of local tribes.⁸² Inter-rebel fighting, and the outbreak of hostilities in 2005 across Sudan's border with Chad, which borders Darfur to the west, compounded what became a humanitarian crisis,⁸³ indeed, the conflict in Darfur has been described as "one of the worst humanitarian crises in the world."⁸⁴ Refugees reported that government air raids preceded slaughtering, raping, and pillaging carried out by the Janjaweed.⁸⁵ On September 9, 2004, U.S. Secretary of State Colin Powell announced that genocide had been committed in Darfur, based upon a consistent and widespread pattern of atrocities that included killings, rapes, and the burning of villages.⁸⁶

Powell's statement coincided with U.S. efforts to establish a U.N. Commission of Inquiry to determine whether the Sudanese government

⁷⁹ *Sudan's Comprehensive Peace Agreement: The Long Road Ahead*, INT'L CRISIS GROUP (Afr. Report No. 106, Mar. 31, 2006), <http://www.crisisgroup.org/en/regions/africa/horn-of-africa/sudan/106-sudans-comprehensive-peace-agreement-the-long-road-ahead.aspx>.

⁸⁰ Lipscomb, *supra* note 41, at 188.

⁸¹ U.S. State Dep't Bureau of Democracy, Human Rights, and Labor & Bureau of Intelligence and Research, *Documenting Atrocities in Darfur*, in 2 AN ORAL AND DOCUMENTARY HISTORY OF THE DARFUR GENOCIDE 163, 168 (Samuel Totten ed., 2011).

⁸² Nick Meo, *Sudanese Government Backed Darfur Attacks, Says Janjaweed Commander*, THE TELEGRAPH, (Jul. 12, 2008, 10:22 PM), <http://www.telegraph.co.uk/news/worldnews/africaandindianocean/sudan/2403635/Sudanese-government-backed-Darfur-attacks-says-Janjaweed-commander.html>; *see also* Dwight D. Murphey, 'Do Something About Darfur': A Review of the Complexities, 33 J. SOC., POL. & ECON. STUD. 229 (2008) (arguing that the Darfur conflict was caused by a complex set of factors including demographics, geography, history, economics, and factionalism); *Q&A: Sudan's Darfur Conflict*, BBC NEWS, Feb. 23, 2010, <http://news.bbc.co.uk/1/hi/world/africa/3496731.stm> (reporting that the government of Sudan denies that it is allied with the Janjaweed).

⁸³ *See, e.g.*, Human Rights Watch, 'They Came Here to Kill Us': Militia Attacks and Ethnic Targeting of Civilians in Eastern Chad, at 6, HUMAN RIGHTS WATCH (Jan. 9, 2007), <http://www.hrw.org/node/11075/section/1> (describing the deterioration in Sudan-Chad relations after "Sudanese government officials suspicious of Chadian support to the Darfur rebels began to provide material backing to [rebel movements in Chad,]" and the humanitarian crises engendered by the conflict on both sides of the border).

⁸⁴ *Sudan: Humanitarian Situation in Darfur One of Worst in the World—UN Officials*, U.N. NEWS CENTRE, May 4, 2004, <http://www.un.org/apps/news/story.asp?NewsID=10615&Cr=sudan&Cr1=>.

⁸⁵ *Q&A: Sudan's Darfur Conflict*, *supra* note 82.

⁸⁶ *Powell Calls Sudan Killings Genocide*, CNN NEWS, Sept. 9, 2004, <http://www.cnn.com/2004/WORLD/africa/09/09/sudan.powell>.

and militia were responsible for genocide.⁸⁷ At that time, Security Council members Germany, Spain, and the United Kingdom backed the resolution, but China warned that it might veto it.⁸⁸ Thus began Sudan's journey towards the ICC.

B. The Commission of Inquiry on Darfur

On September 18, 2004, the U.N. Security Council adopted Resolution 1564, determining that the situation in Darfur was a threat to international peace and security, and requesting that the Secretary-General establish an international commission of inquiry for the purpose of investigating reports of violations of humanitarian and human rights law in Darfur.⁸⁹ No members voted against the Resolution; China, Russia, Pakistan, and Algeria abstained.⁹⁰ China's abstention from Resolution 1564 and its comments thereon were consistent with the pattern described *supra* in Part II of this article: with its words, China supported and defended Sudan, but with its deeds, it declined to stop Security Council action that adversely affected its ally. Behaving typically, China's Ambassador to the United Nations in his comments on Resolution 1564 dodged the Commission of Inquiry topic and instead complimented Sudan and the African Union, calling on fellow countries to support diplomatic efforts.⁹¹

Beginning its work on October 25, 2004, the Commission made two evidence-gathering missions to Sudan, and visited refugees in neighboring Chad, Eritrea, and Ethiopia.⁹² Three months later, the Commission issued its report, which concluded that the Janjaweed and the Sudanese government had violated human rights and humanitarian laws.⁹³ Their crimes included the burning of villages, the mass murder of civilians, widespread and systematic rape, torture, forcible displacement, and enforced disappearances; to the extent that these crimes were carried out on a discriminatory basis and in a systematic and widespread manner, they

⁸⁷ Glenn Kessler & Colum Lynch, *U.S. Calls Killings in Sudan Genocide*, WASH. POST, Sept. 10, 2004, at A01, available at <http://www.washingtonpost.com/wp-dyn/articles/A8364-2004Sep9.html>.

⁸⁸ *Id.*

⁸⁹ S.C. Res. 1564, U.N. Doc. S/RES/1564 (Sept. 18, 2004).

⁹⁰ Press Release, Sec. Council, Security Council Declares Intention to Consider Sanctions to Obtain Sudan's Full Compliance with Security, Disarmament Obligations on Darfur, U.N. Press Release SC/8191 (Sept. 18, 2004).

⁹¹ *Id.*

⁹² Report of the Int'l Comm'n of Inquiry on Darfur to the United Nations Sec'y-Gen., U.N. Doc. S/2005/60 (Feb. 1, 2005); John L. Washburn & Wasana Punyasena, *The Commission of Inquiry on Darfur: A United Nations Success Story*, 10 UNA-USA POLICY BRIEF 3 (2005).

⁹³ Report of the Int'l Comm'n of Inquiry on Darfur to the United Nations Sec'y-Gen., *supra* note 92, at ¶ 630.

also constituted crimes against humanity.⁹⁴ While the Commission did not find evidence that the Sudanese government intended to commit genocide, it nonetheless recognized that individual government officials might have acted with genocidal intent.⁹⁵ Concluding that many of the alleged crimes “meet all the thresholds of the Rome Statute for the International Criminal Court,” the Commission strongly recommended that the Security Council refer the situation to the ICC pursuant to Article 13(b) of the Rome Statute.⁹⁶

C. ICC Jurisdiction over Non-Signatory Countries

Article 13(b) of the Rome Statute,⁹⁷ the legal authority for bringing the situation in Darfur before the ICC, has been the subject of considerable controversy.⁹⁸ In essence, it empowers the U.N. Security Council to grant jurisdiction to the ICC over situations in any country, *even those countries that have not ratified the Statute*.⁹⁹ This Section (C) introduces Article 13(b) and briefly addresses questions of its legitimacy.

As a general rule of international law, a country that does not ratify a treaty is not bound by it.¹⁰⁰ Neither rights nor obligations arise for non-signatories.¹⁰¹ The Rome Statute, however, contemplates a deviation from this axiom. *In general*, Article 12(2) of the Rome Statute¹⁰² provides that either of two preconditions must exist for the ICC to exercise jurisdiction over a crime: (a) the crime must have been committed in the territory of a state that is a party to the Rome Statute, or that has accepted the jurisdiction of the Court, or (b) the person accused of the crime must be a national of such a state. In other words, the ICC cannot act in a country, or against a citizen from a country, that has not either ratified the Rome Statute or consented to the ICC’s jurisdiction. *However*, critically,

⁹⁴ *Id.* at ¶¶ 631–38.

⁹⁵ *Id.* at ¶¶ 640–41.

⁹⁶ *Id.* at ¶ 647.

⁹⁷ Rome Statute of the International Criminal Court, *supra* note 32, art. 13(b).

⁹⁸ See Chris Gallavin, *Prosecutorial Discretion Within the ICC: Under the Pressure of Justice*, 17 CRIM. L. F. 47 (2006) (noting that the relationship between the Security Council and the ICC was one of the top three issues debated in 1988 during the Rome Conference where the Rome Statute was adopted).

⁹⁹ See BRUCE BROOMHALL, *INTERNATIONAL JUSTICE AND THE INTERNATIONAL CRIMINAL COURT: BETWEEN SOVEREIGNTY AND THE RULE OF LAW* 79 (2003) (noting that Security Council referrals to the ICC were originally justified because they allowed the ICC to act in lieu of ad hoc tribunals).

¹⁰⁰ MALCOLM N. SHAW, *INTERNATIONAL LAW* 90 (5th ed. 2003). An exception to the rule: where a treaty codifies customary law, a non-signatory remains bound. *Id.* There is little basis to argue, however, that the Rome Statute reflects customary law.

¹⁰¹ Monika Lueke & Chanaka Wikremasinghe, *Analytical Report*, in *TREATY MAKING—EXPRESSION OF CONSENT BY STATES TO BE BOUND BY A TREATY* 1, 8 (Council of Europe ed., 2001).

¹⁰² Rome Statute of the International Criminal Court, *supra* note 32, art. 12(2).

these two Article 12(2) jurisdictional preconditions *only* apply to: (a) situations referred to the ICC Prosecutor by a State Party, and (b) situations in which the Prosecutor's office has initiated investigations itself. They do not apply to Article 13(b) situations, i.e., situations referred to the ICC by the U.N. Security Council acting under Chapter VII of the U.N. Charter.¹⁰³ Thus, when Articles 12(2) and 13(b) are read in conjunction, it becomes clear that lying between these two subsections is a loophole that permits jurisdiction over non-signatory nations, because the preconditions of Article 12(2), which require ratification or consent, do *not* apply to referrals by the U.N. Security Council to the ICC. This boils down to the following: the ICC may prosecute nationals of states that are not parties to the Rome Statute, such as Sudan and Myanmar, for crimes committed in those countries, if and when the U.N. Security Council so decides.¹⁰⁴

The power of the U.N. Security Council to refer non-signatory states under Article 13(b) has been hotly criticized as a violation of basic principles of international law.¹⁰⁵ Analysts have pointed out, however, that these referrals can be viewed as reflections of the Security Council's powers under the U.N. Charter, to which all U.N. members are bound.¹⁰⁶

¹⁰³ *Id.* art. 13(b). Chapter VII of the U.N. Charter gives the Security Council authority to act in cases involving threats to international peace and security.

¹⁰⁴ *Cf.* HÉCTOR OLÁSULO, THE TRIGGERING PROCEDURE OF THE INTERNATIONAL CRIMINAL COURT 92 (2005) (noting that as a precondition to referral, the Security Council must determine that the situation poses a threat to international peace, is a breach of the peace, or is an act of aggression); Philippe Kirsch et al., *International Tribunals and Courts, in THE UN SECURITY COUNCIL: FROM THE COLD WAR TO THE 21ST CENTURY* 281, 288 (David Malone ed., 2004) (discussing important limitations on Article 13(b) referrals).

¹⁰⁵ *See, e.g.*, HANS KÖCHLER, THE SECURITY COUNCIL AS ADMINISTRATOR OF JUSTICE? 49–55 (2011) (arguing that Article 13(b) referral power contradicts the norm of sovereign equality, undermines the legitimacy of jurisdiction under the Rome Statute, and weakens international criminal justice because of the political nature of referrals); John Laughland, *The ICC and Universal Jurisdiction: 'Ubi Lex Voluit, Dicit; Ubi Noluit, Tacit'*, ICC WATCH (Mar. 2009), http://www.iccwatch.org/article_Mar09.html (arguing that jurisdiction over non-parties is not expressly granted in the Rome Statute, and that Article 13(b) should be interpreted narrowly to apply only to situations involving nationals of state parties in the territories of state parties); ALEXANDER MEZYAEV, INST. OF DEMOCRACY & COOPERATION, THE LEGALITY OF THE INDICTMENT OF PRESIDENT BASHIR: INTERNATIONAL LEGAL ASPECTS OF THE ICC PRE-TRIAL CHAMBER DECISION ON THE ARREST WARRANT AGAINST THE PRESIDENT OF SUDAN, Apr. 6, 2009, <http://www.idc-europe.org/en/The-legality-of-the-ICC-indictment-of-President-Bashir> (arguing that the Security Council can only act pursuant to the U.N. Charter, which does not allow for referrals relating to non-signatories); *cf.* Robert Cryer, *International Criminal Law vs State Sovereignty: Another Round?*, 16 EUR. J. INT'L L. 979 (2005) (discussing the interplay between the ICC and sovereignty).

¹⁰⁶ *See, e.g.*, GIDEON COPPLE, THE AM. NON-GOV'TAL ORG. COAL. FOR THE INT'L CRIM. COURT, QUESTIONS AND ANSWERS ON THE ICC DARFUR INVESTIGATION, June 6, 2007, <http://www.amicc.org/docs/Darfur%20Q&A.pdf>; Vera Gowlland-Debas, *The Relationship Between the Security Council and ICC*, GLOBAL POLICY FORUM, 2001, <http://www.globalpolicy.org/component/content/article/164/28588.html>.

Hence, under certain conditions, the ICC's jurisdiction derives its legitimacy not from treaty obligations but by virtue of Security Council action.¹⁰⁷ One commentator has argued that because Sudan was represented in the 2003 and 2004 meetings of the U.N. General Assembly, when the relationship between the United Nations and the ICC was established, implying the acceptance of Article 13(b) by the member states of the United Nations, it cannot object to ICC and United Nations coordination on referrals.¹⁰⁸ From a practical perspective, the argument against ICC jurisdiction over non-states parties referred by the U.N. Security Council is now of merely academic interest: the Security Council has recognized that jurisdiction exists, making use of it in its Sudan and Libya referrals, and the judges of the ICC have accepted review of the Darfur situation, concluding that it falls within the jurisdiction of their court.¹⁰⁹

D. *The Referral of the Situation in Darfur to the ICC*

Turning back to Darfur: on March 31, 2005, a little over three months after the issuance of the Commission of Inquiry's report, the U.N. Security Council referred the situation in Darfur to the ICC.¹¹⁰ Resolution 1593, introduced by Britain and Northern Ireland, was approved with eleven votes in favor, none against, and abstentions by China, the United States, Brazil, and Algeria.¹¹¹

In China's sixteen-sentence statement accompanying the vote, only one sentence provided any support for the Resolution: "[L]ike other

¹⁰⁷ Dapo Akande, *The Legal Nature of Security Council Referrals to the ICC and its Impact on Al Bashir's Immunities*, 7.2 J. INT'L CRIM. JUST. 333 (2009); Max du Plessis & Christopher Gevers, *Darfur Goes to the International Criminal Court (Perhaps)*, 14.2 AFR. SEC. REV. 23 (2005), available at <http://www.iss.co.za/pubs/ASR/14No2/F2.pdf>.

¹⁰⁸ Innocent Mawire, *Darfur and the International Criminal Court: Some Jurisdictional Issues*, INT'L LAW OBSERVER, Oct. 15, 2008, <http://internationallawobserver.eu/2008/10/15/darfur-and-the-international-criminal-court-some-jurisdictional-issues>.

¹⁰⁹ ICC, Office of the Prosecutor, *Fifth Report of the Prosecutor of the International Criminal Court to the UN Security Council Pursuant to UNSCR 1593 (2005)*, at 8–9 (June 7, 2007), available at http://www.icc-cpi.int/NR/rdonlyres/CE794D3B-ED91-4D86-A28E-3F61E6C44083/277796/OTP_ReportUNSC5Darfur_English.pdf. The ICC would have jurisdiction over crimes committed in Myanmar by a citizen of a signatory even without a referral. For example, Htoo Htoo Han, now an Australian citizen, admitted to committing war crimes as an officer in Myanmar's military intelligence. However, his crimes were committed prior to 2002, the effective date of the Rome Statute. See Mike Hedge, *Australian Admits War Crimes in Burma*, SYDNEY MORNING HERALD, July 18, 2011, ng-news-national/australian-admits-war-crimes-in-burma-20110718-1hkug.html (reporting on executions of anti-government student leaders in which Htoo Htoo Han was involved during Myanmar's 1988 student uprising).

¹¹⁰ S.C. Res. 1593, U.N. Doc. S/RES/1593 (Mar. 31, 2005).

¹¹¹ U.N. SCOR, 60th Sess., 5158th mtg. at 2, U.N. Doc. S/PV.5158 (Mar. 31, 2005).

members of the international community, we deeply deplore the gross violations of international humanitarian and human rights law in Darfur.”¹¹² The remainder of the statement expressed support for attempts to settle the situation in Darfur under the auspices of the African Union, concern that efforts be made to ensure that the ICC case not negatively impact movement towards peace, and a preference that any trial take place within the Sudanese judicial system.¹¹³ Noting China’s strong disagreement over the referral, Chinese Ambassador Wang Guangya added: “We cannot accept any exercise of the ICC’s jurisdiction against the will of non-State parties, and we would find it difficult to endorse any Security Council authorization of such an exercise of jurisdiction by the ICC.”¹¹⁴ So if China strongly opposed the referral, why did it abstain, rather than exercise its veto? In fact, China had reportedly assured Sudanese officials that it would not permit Resolution 1593 to pass.¹¹⁵

Answering the above question requires a great deal of speculation, as, unfortunately, there are no statements from the Chinese government that directly and candidly answer it.¹¹⁶ Analysts seem to cluster around the theory that international political pressure was too great for a veto. Mayank Bubna speculates that the referral went through because the Security Council was facing increasing political isolation and public activism.¹¹⁷ Claudio Guler hypothesizes that “normative pressures” likely convinced China to abstain.¹¹⁸ Josh Kurlantzick argues that China worries little about freedom or human rights, but instead cares most about stability for its economic interests, its reputation as a responsible actor on the world

¹¹² *Id.* at 5.

¹¹³ See Derbal, *supra* note 38, at 5–11 (noting that Sudan’s domestic justice system appears neither willing nor able to adequately prosecute the alleged crimes); Julie B. Martin, *The International Criminal Court: Defining Complementarity and Divining Implications for the United States*, 4 LOY. U. CHI. INT’L L. REV. 107, 115 (2006) (observing that the ICC Prosecutor determined that the Sudanese justice system was unwilling or unable to genuinely prosecute the most egregious offenders in the Darfur conflict).

¹¹⁴ U.N. Doc. S/PV.5158, *supra* note 111, at 5.

¹¹⁵ *China Defends Decision Not to Veto Darfur ICC Referral*, SUDAN TRIB., Nov. 11, 2009, <http://www.sudantribune.com/spip.php?article33085>.

¹¹⁶ See *id.* (relating how, when asked directly as to why China declined to “give full support to Africa” on the question of referral, Chinese Prime Minister Wen Jiabao sidestepped the ICC aspect of the question, instead addressing how China supported increased African representation on the Security Council).

¹¹⁷ Mayank Bubna, *The ICC’s Role in Sudan: Peace Versus Justice*, EURASIA REV., Apr. 28, 2010, <http://www.eurasiareview.com/2010/04/iccs-role-in-sudan-peace-versus-justice.html>.

¹¹⁸ Claudio Guler, *Slow Dancing with Sudan*, INT’L REL. & SEC. NETWORK, May 8, 2009, <http://www.isn.ethz.ch/isn/Current-Affairs/Security-Watch/Detail/?ots591=4888caa0-b3db-1461-98b9-e20e7b9c13d4&lng=en&id=100004>.

stage, and to some extent the safety of its citizens abroad.¹¹⁹ Christine Chaumeau asserts that the political cost of threatening a veto was too high for China, given the grave nature of the alleged crimes.¹²⁰ Jonathan Holslag writes that China believed that the ICC referral would not threaten Sudanese officials because the court's work would depend on cooperation from the Sudanese government.¹²¹

The truth probably lies somewhere among all of these answers. Surely China's longstanding practice of trying to please all sides must have played some role in its decision to abstain. Its newfound preoccupation with international prestige was also likely a factor, particularly after the United States began calling the situation "genocide." Probably, China attempted to weigh the cost of abstention against its benefit. China probably determined, based on the foreign policy motivations outlined in Part II, that the potential political and economic detriment to its relationship with Sudan that would be caused by an abstention was outweighed by the benefit of aligning with the international community by implicitly supporting action against patent atrocities.

E. Post-Referral Fallout

Sudan's response to the referral tested whether China had calculated its benefits and detriments correctly. The government of Sudan was clearly angry over the referral and over China's refusal to exercise its veto power.¹²² The National Islamic Front, the political organization controlling the Sudanese government, immediately rejected Resolution 1593.¹²³ President al-Bashir took an oath three times that he would never hand anyone over to the Court.¹²⁴ Some feared that foreigners would

¹¹⁹ Josh Kurlantzick, *China, Burma and Sudan: Convincing Argument*, NEW REPUBLIC ONLINE, May 11, 2006, available at <http://www.carnegieendowment.org/publications/index.cfm?fa=view&id=18329>.

¹²⁰ HUMAN RIGHTS FIRST, INVESTING IN TRAGEDY: CHINA'S MONEY, ARMS, AND POLITICS IN SUDAN 18, n. 177 (2008) (explaining China's failure to veto resolution 1593 as a result of a belief that 'doing so would have carried too high a political cost, given the gravity of the crimes in question,' and citing Christine Chaumeau's article, "Beijing's Calculated Prudence," in the *International Justice Tribune* (Oct. 23, 2006)), available at <http://www.humanrightsfirst.org/wp-content/uploads/pdf/080311-cah-investing-in-tragedy-report.pdf>.

¹²¹ Holslag, *supra* note 66, at 7.

¹²² Chris Buckley, *China Has 'Grave Concerns' over ICC Sudan Decision*, REUTERS, July 15, 2008, <http://www.reuters.com/article/idUSPEK27439220080715?pageNumber=2>.

¹²³ Eric Reeves, *Darfur and the International Criminal Court*, MIDDLE E. RESEARCH & INFO. PROJECT, Apr. 29, 2005, <http://www.merip.org/mero/mero042905>.

¹²⁴ *Id.*

become targets of violence.¹²⁵ Atrocities temporarily increased.¹²⁶ Some Westerners even criticized the referral as taking attention away from humanitarian assistance.¹²⁷

Something of a test of wills then began between the ICC and the Sudanese government. First, the government of Sudan refused to allow the ICC Prosecutor's team to open an office in Sudan, instead establishing its own Special Criminal Court for Events in Darfur.¹²⁸ Then, in April 2007, after the ICC Pre-Trial Chamber issued arrest warrants for Sudan's former Minister of State for the Interior, who was responsible for recruiting, funding, and arming the Janjaweed militia, and for a militia leader who was allegedly involved in a string of massacres and other violations, including widespread rape, the Sudanese government continued to resist. It kept the Minister in his new position as Minister of State for Humanitarian Affairs, and even appointed him to lead an inquiry into allegations of human rights abuses in Darfur.¹²⁹ A formal request by the ICC to the Sudanese government to hand over the two men was met with defiance.¹³⁰

Predictably, China continued to publicly support Sudan, and behind the scenes worked to protect its ally. After the ICC Prosecutor delivered a report describing Sudan's uncooperativeness, China, along with Qatar, reportedly undermined the U.N. Security Council's efforts to issue a Presidential Statement in response.¹³¹ In July 2008, a British-

¹²⁵ "Far from providing a deterrent effect, the ICC referral poses readily discernible dangers to both civilians and humanitarian aid workers. How could it be otherwise when those effectively indicted, and thus faced with extradition, still control Sudan? Who could imagine that senior members of the NIF would ever subject themselves to the authority of international justice? . . . Knowledgeable Darfuris in exile and regional intelligence sources speak urgently of the strong sense within the humanitarian aid community that, in the event of an ICC referral, the [J]anjaweed will be encouraged by Khartoum to escalate attacks on foreigners, especially aid workers. These concerns were partly confirmed in an April 25 Washington Post dispatch from the Nyala region." *Id.*

¹²⁶ Nick Grono & David Mozersky, *Sudan and the ICC: A Question of Accountability*, INT'L CRISIS GRP., Jan. 31, 2007, <http://www.crisisgroup.org/en/regions/africa/horn-of-africa/sudan/op-eds/sudan-and-the-icc-a-question-of-accountability.aspx>.

¹²⁷ *See, e.g.*, Reeves, *supra* note 123 ("So exclusively was the focus on achieving an ICC referral that the morally more immediate and compelling need for humanitarian intervention and civilian protection received only an advocacy nod.").

¹²⁸ Alex de Waal, *Darfur, the Court and Khartoum: The Politics of State Non-Cooperation*, in *COURTING CONFLICT? JUSTICE, PEACE AND THE ICC IN AFRICA* 29, 30 (Nicholas Waddell & Phil Clark eds., 2008).

¹²⁹ *Id.*

¹³⁰ *Id.* at 31.

¹³¹ *China Shields Sudan in the Security Council After ICC Prosecutor's Report*, HUMAN RIGHTS FIRST, Dec. 17, 2007, <http://www.humanrightsfirst.org/media/darfur/2007/alert/181/index.htm>. A Presidential Statement is a statement issued by the President of the Security Council on behalf of the Council. *See, e.g.*, Sec. Council Presidential Statement 2012/5, U.N. Doc. S/PRST/2012/5 (Mar. 6, 2012) (condemning violence between Sudan and South Sudan, and urging both

drafted Presidential Statement on Sudan was also withdrawn after Chinese opposition.¹³²

China continued voicing support for Sudan when the ICC Prosecutor announced genocide, crimes against humanity, and war crimes charges against Sudanese President al-Bashir.¹³³ During a trip to Sudan in the fall of 2008, China's special envoy and Assistant Foreign Minister emphasized China's "consistent position": support of the resolution of the Darfur issue through political means.¹³⁴

The ICC's issuance of an arrest warrant for President al-Bashir in March 2009 on charges of crimes against humanity and war crimes brought additional tension. Al-Bashir reportedly retorted that the ICC could eat the warrant, and he danced in front of thousands of supporters who burned an effigy of the ICC Chief Prosecutor.¹³⁵ Some were concerned that the indictment would damage the peace process.¹³⁶ China opposed it, saying that it would not contribute to peace and stability,¹³⁷ and China's Foreign Ministry spokesman expressed China's "regret and worries."¹³⁸

Although China faced a great deal of pressure to respond to Sudan's defiance, it continued to remain passive and non-committal. In January 2010, China's Ambassador to Sudan said that China would adopt a "clear and suitable stance" if the ICC were to "issue a decision against

countries to reach a border demarcation agreement and to "implement and respect . . . their 10 February Memorandum of Understanding on Non-Aggression and Cooperation"), available at <http://www.un.org/News/Press/docs/2012/sc10568.doc.htm>. "The Presidency of the Security Council is held in turn by the members of the Security Council in the English alphabetical order of their names. Each President holds office for one calendar month." *Members*, U.N. SEC. COUNCIL, <http://www.un.org/sc/members.asp> (last visited July 24, 2012).

¹³² TED DAGNE, *SUDAN: THE CRISIS IN DARFUR AND THE STATUS OF THE NORTH-SOUTH PEACE AGREEMENT* 12 (2010).

¹³³ Peter Walker & James Sturcke, *Darfur Genocide Charges for Sudanese President Omar al-Bashir*, *THE GUARDIAN*, July 14, 2008, <http://www.guardian.co.uk/world/2008/jul/14/sudan.warcrimes1>.

¹³⁴ *Special Envoy of the Chinese Government and Assistant Foreign Minister Zhai Jun Visits Sudan Successfully*, MINISTRY OF FOREIGN AFFAIRS OF THE PEOPLE'S REPUBLIC OF CHINA (Sept. 4, 2008), <http://www.fmprc.gov.cn/eng/wjb/zzjg/xybfs/gjlb/2883/2885/t511195.htm>.

¹³⁵ *Warrant Issued for Sudan's Leader*, *BBC NEWS*, Mar. 4, 2009, <http://news.bbc.co.uk/2/hi/7923102.stm>.

¹³⁶ See, e.g., Marlise Simons & Neil MacFarquhar, *Court Issues Arrest Warrant for Sudan's Leader*, *N.Y. TIMES*, Mar. 5, 2009, at A6 (noting that United Nations diplomats, the Arab League, the African Union, and some humanitarian organizations were concerned that the arrest warrant would threaten peace talks).

¹³⁷ *China Opposes ICC Warrant for Sudan's President*, *VOICE OF AM.*, Nov. 2, 2009, <http://www.voanews.com/content/a-13-2009-03-05-voa9-68812787/412939.html>.

¹³⁸ *Foreign Ministry Spokesperson Qin Gang's Regular Press Conference on March 5, 2009*, *EMBASSY OF THE PEOPLE'S REPUBLIC OF CHINA IN THE U.K.*, Mar. 7, 2009, <http://www.chinese-embassy.org.uk/eng/zt/fyrth/t540975.htm>.

Al-Bashir.”¹³⁹ Commenting on the possible application of Article 16 of the Rome Statute,¹⁴⁰ which allows the U.N. Security Council to freeze ICC action on referral cases for up to twelve months, the Ambassador was reported as merely confirming “extensive consultations” and indicating support for Sudanese sovereignty.¹⁴¹ China’s strategy of providing moral support for Sudan during the ICC proceedings, while refraining from using its considerable power to protect Sudan directly, reinforces the notion that it seeks to be a friend to all:

China has distanced itself from the recent warrant debate altogether, although it condemned al-Bashir’s original arrest warrant when it was first issued. China is in a difficult position regarding the ICC charges; while it wants to portray itself as a “team player” and a benevolent power, China has substantial oil assets in Sudan. Backing out is China’s best course of action because it neither condemns the ICC’s new warrant—an action that would sour its relations with the West—nor does it demand al-Bashir’s arrest, which could hinder its oil supply from Sudan.¹⁴²

In April 2010, Sudan held its first open presidential election in twenty-four years. The ICC remained a “looming shadow” over the election.¹⁴³ “To the Hague” was scribbled on six ballots in a small town in western Sudan.¹⁴⁴ On April 26, al-Bashir was announced the winner, having received 68% of the vote.¹⁴⁵ Although he had hoped the election results would help him defy the ICC warrant, the election was tainted by accusations of widespread fraud and other irregularities.¹⁴⁶ In July 2010, the ICC issued a second arrest warrant for al-Bashir, this time for

¹³⁹ Embassy of the Republic of Sudan in London, *Sudan and ICC: Chinese Ambassador Says China Will Adopt Clear Stance if ICC Issues Decision Against President Al-Bashir*, http://www.sudan-embassy.co.uk/index.php?option=com_content&view=article&id=253%3Asudan-and-icc&Itemid=100146&lang=en (last visited July 24, 2012).

¹⁴⁰ Rome Statute of the International Criminal Court, *supra* note 32, art. 16.

¹⁴¹ See Embassy of the Republic of Sudan in London, *Sudan and ICC*, *supra* note 139 (erroneously referencing Article 16 of the U.N. Charter).

¹⁴² Christian Pelfrey, *In Focus: Sudan—The Global Fight for (and Against) al-Bashir’s Arrest*, PULITZER CTR. ON CRISIS REPORTING, July 26, 2010, <http://pulitzercenter.org/blog/news-points/focus-sudan-global-fight-and-against-icc>.

¹⁴³ Mohammed Abdulrahman, *ICC Looms over Sudan Election*, 104 INT’L JUST. TRIB. 1, Apr. 21, 2010, available at <http://sites.rnw.nl/pdf/ijt/IJT104.pdf>.

¹⁴⁴ *Id.*

¹⁴⁵ *Sudan Elects Wanted Bashir as President*, REUTERS, Apr. 26, 2010, <http://www.reuters.com/article/idUSTRE63P1P220100426>.

¹⁴⁶ *Id.*

genocide.¹⁴⁷ African and Arab governments, as well as China, lobbied for postponement of the indictment.¹⁴⁸ On March 1, 2012, the ICC issued a warrant for the arrest of Abdelrahim Mohamed Hussein, Sudan's current defense minister, who is accused of crimes against humanity and war crimes.¹⁴⁹

As of the end of 2012, all four Sudanese suspects remained at large.¹⁵⁰ Despite the ongoing nature of their cases, at this time it is clear that, for the most part, China's abstentions paid off. While the indictments presumably caused acute diplomatic headaches for China, its primary interests of increasing trade with Sudan, promoting political stability in the region, and attaining prestige through international cooperation were all satisfied. Today, China's trade with Sudan continues to blossom;¹⁵¹ while Sudan remains one of the world's most challenging environments, it is relatively stable;¹⁵² and China can legitimately claim that it did not prevent the pursuit of justice in reaction to the situation in Darfur. If the ICC's involvement in Sudan had caused additional instability and damaged China's economy, the prospects for a Commission of Inquiry in Myanmar would be less viable. The arguably benign impact (to China) of China's abstentions on Sudan, however, has helped pave the way for a U.N. investigation into crimes in Myanmar and a possible referral to the ICC.

¹⁴⁷ *Darfur Warrant for Sudan's Bashir: ICC Adds Genocide*, BBC NEWS, July 12, 2010, <http://www.bbc.co.uk/news/10603559>.

¹⁴⁸ *Id.*

¹⁴⁹ *ICC Issues Sudan Defence Minister Warrant Over Darfur*, BBC NEWS, Mar. 1, 2012, <http://www.bbc.co.uk/news/world-africa-17226952>.

¹⁵⁰ In 2009, the ICC issued summonses to appear to three Sudanese rebel leaders. All three appeared. One case was dropped due to a lack of evidence while the court approved trials for the other two suspects. *See Darfur: Sudan Rebels to Face ICC War Crimes Trial*, BBC NEWS, Mar. 8, 2011, <http://www.bbc.co.uk/news/world-africa-12682611>. Trial dates have not yet been set.

¹⁵¹ *See infra* Part VI.

¹⁵² Stability for Sudan should be understood within the context of its history of almost constant turmoil. Sudan has been plagued with internal war for 38 of its 55 years as an independent nation. RICHARD DOWNIE & BRIAN KENNEDY, CTR. FOR STRATEGIC & INT'L STUD., SUDAN: ASSESSING RISKS TO STABILITY 1 (2011), *available at* http://csis.org/files/publication/110623_Downie_Sudan_Web.pdf. Downie and Kennedy, while not optimists about future stability in Sudan, note that the main source of conflict in the country ended with the Comprehensive Peace Agreement in 2005. They argue that future stability will depend largely on the abilities of North and South Sudan to manage their separation, internal political turmoil in al-Bashir's party, and the spillover effects of recent protests and uprisings in the Middle East, Tunisia, and Egypt. Somewhat surprisingly, they also comment that al-Bashir has been a "force for stability . . . albeit a brutal, repressive stability" and that his departure "would unleash unpredictable forces." *Id.* at 11. The ICC indictment has apparently strengthened his resolve to remain in office, because his position gives him added protection against arrest; ironically this may result in additional stability for Sudan. *See id.*

IV. THE REFERRAL OF LIBYA TO THE INTERNATIONAL CRIMINAL COURT

On February 26, 2011, the U.N. Security Council referred Libya to the ICC, its second Chapter VII referral.¹⁵³ All of the members of the Security Council, including China, approved.¹⁵⁴ In a brief statement, the Chinese representative noted the “special circumstances” in Libya, citing bloodshed, violence, civilian casualties, and safety of foreign nationals in Libya.¹⁵⁵

As with Sudan, China’s responses to the situation in Libya were characterized by vocal resistance to U.N. action mixed with tacit approval at the time of voting. At the outset, China resisted U.N. Security Council action in Libya, for example in blocking a no-fly zone over Libya.¹⁵⁶ Although China did not use its veto to stop NATO bombing, it later condemned the bombing.¹⁵⁷ Reportedly, China was also the only country to initially reject the idea of referring Libya to the ICC, although apparently a letter from the Libyan ambassador condemning Libyan leader Muammar Gaddafi persuaded it otherwise, leading to the unanimous approval.¹⁵⁸ As in the Darfur situation, China’s pattern of vocal resistance

¹⁵³ S.C. Res. 1970, *supra* note 42; *see also* Louis Charbonneau, *EU, U.S. to Urge U.N. Sanctions on Syria, ICC Referral*, REUTERS, Aug. 22, 2011, <http://www.reuters.com/article/2011/08/22/us-syria-un-sanctions-idUSTRE77L6MX20110822> (reporting that a referral of Syria, another non-signatory of the Rome Statute, may soon be on the agenda of the Security Council).

¹⁵⁴ S.C. Res. 1970, *supra* note 42. The ICC has issued warrants for the arrest of three Libyan suspects. Libyan authorities arrested two of the suspects but have refused to surrender them to ICC authorities. The warrant for the arrest of Muammar Gaddafi was dropped following his death in 2011. *Cases and Situations: Libya*, COALITION FOR THE INT’L CRIM. COURT, <http://www.iccnw.org/?mod=libya> (describing the history of the ICC’s involvement in Libya) (last visited Dec. 16, 2012).

¹⁵⁵ Press Release, Sec. Council, In Swift, Decisive Action, Security Council Imposes Tough Measures on Libyan Regime, Adopting Resolution 1970 in Wake of Crackdown on Protesters, U.N. Press Release SC/10187/Rev.1 (Feb. 26, 2011). These comments did not necessarily refer to the referral itself, as the resolution contained other actions, such as an arms embargo, a travel ban, and an asset freeze. *See also* Editorial, *Libya Sanctions: China’s New Role at the UN*, CHRISTIAN SCI. MONITOR, Feb. 28, 2011, <http://www.csmonitor.com/Commentary/the-monitors-view/2011/0228/Libya-sanctions-China-s-new-role-at-the-UN> (reporting that approximately 30,000 Chinese, working primarily in Libyan oil fields, had to flee the violence).

¹⁵⁶ Editorial, *Libya Sanctions: China’s New Role at the UN*, *supra* note 155.

¹⁵⁷ Michael Martina & Chris Buckley, *China Urges Libya to Protect Investments*, REUTERS, Aug. 23, 2011, <http://www.reuters.com/article/2011/08/23/us-china-libya-oil-idUSTRE77M0PD20110823>.

¹⁵⁸ Mark Kersten, *China, the ICC and Libya: A New Level of Hypocrisy?*, JUSTICE IN CONFLICT, Mar. 2, 2011, <http://justiceinconflict.org/2011/03/02/china-the-icc-and-libya-a-new-level-of-hypocrisy/>; *UNSC Refers Situation in Libya to ICC, Sanctions Gaddafi & Aides*, SUDAN TRIB., Feb. 27, 2011, <http://www.sudantribune.com/UNSC-refers-situation-in-Libya-to,38116>.

to U.N. action combined with abstention or approval of U.N. measures at the time of voting reflects its strategy of avoiding alienation of friends and foes, and supports the argument that China's strong verbal support for Myanmar does not necessarily mean that it would veto a Commission of Inquiry.¹⁵⁹

There are some important differences between the Sudanese and Libyan referrals. First, China not only permitted the Libyan referral through abstention, it affirmatively approved it, signaling a growing acceptance by China of Article 13(b). Second, the referral of Libya was not preceded by a U.N. Commission of Inquiry,¹⁶⁰ indicating China's trust in the ICC's ability to investigate.

The referral of Libya appears to reflect a shift towards increased use of the ICC by the Security Council, particularly because of the way the referral was unanimously approved and because of the speed, only eleven days after the outbreak of violence, with which the Security Council was willing to get involved.¹⁶¹ Before the Libya referral, it would have been reasonable to think that there might be no additional Article 13(b) referrals for a long time to come, due to the difficulty of arresting and prosecuting the indicted Sudanese officials, which undermined the ICC's authority (and, indirectly, the Security Council as well). Instead, the Libya referral reconfirmed the Security Council's confidence in the ICC.

V. CALLS FOR A COMMISSION OF INQUIRY AND THE POSSIBLE REFERRAL OF MYANMAR TO THE INTERNATIONAL CRIMINAL COURT

The seeds of conflict in Myanmar were planted even before the country's independence from Britain in 1948.¹⁶² After independence, Myanmar (then named Burma) had a parliamentary form of government.¹⁶³ Outside the capital, however, communists and rebel insurgents exercised considerable authority.¹⁶⁴ In this context, the army regarded its role to be the principal defender of a Burman state.¹⁶⁵

¹⁵⁹ Libya is a relatively important trade partner for China, exporting 3% of China's overall oil imports, equivalent to about 10% of Libya's oil exports. Martina & Buckley, *supra* note 157.

¹⁶⁰ *UNSC Refers Situation in Libya to ICC, Sanctions Gaddafi & Aides*, SUDAN TRIB., *supra* note 158.

¹⁶¹ The protests in Libya began on February 15, and the referral was made on February 26. See S.C. Res. 1970, *supra* note 42, at ¶ 4.

¹⁶² Tin Maung Maung Than, *Dreams and Nightmares: State Building and Ethnic Conflict in Myanmar (Burma)*, in *ETHNIC CONFLICTS IN SOUTHEAST ASIA* 65, 70–71 (Kusuma Snitwongse & W. Scott Thompson eds., 2005).

¹⁶³ ASHLEY SOUTH, *ETHNIC POLITICS IN BURMA: STATES OF CONFLICT* 27 (2008).

¹⁶⁴ *Id.*

¹⁶⁵ *Id.*

Veterans of independence, recalling divisive colonial leadership and anarchic wars, were determined to maintain national unity.¹⁶⁶ Meanwhile, ethnic minorities, called “ethnic nationalities,”¹⁶⁷ complained of marginalization¹⁶⁸ and began to claim social and political autonomy.¹⁶⁹ Many began armed struggles, prompted by, inter alia, the desire for self-determination, the underdevelopment of outlying minority areas, and the unequal distribution of wealth and power as compared to central Myanmar.¹⁷⁰ Claiming a threat of civil war, in 1958 military leaders seized power through a coup consented to by the civilian government, and governed for eighteen months.¹⁷¹ After handing the reins of leadership to a civilian government for two years, the military determined that existing leaders were incapable of resolving the country’s political and economic problems.¹⁷² In 1962, a second military coup led to twenty-six years of absolute rule by General Ne Win, under the military Revolutionary Council; in 1974, his Burma Socialist Programme Party was institutionalized in the Constitution as the country’s sole legitimate political entity.¹⁷³ Ethnic rebellions continued.¹⁷⁴ In 1988, in response to economic failures and civil oppression, protesters took to the streets.¹⁷⁵ Under new leadership, the military once more took the reins of power, promising multi-party elections while cracking down on students and other activists, some of whom fled to border areas to join ethnic rebel groups.¹⁷⁶ Hopes for reform were dashed when the junta refused to transfer its power after the main opposition parties won nearly 90% of the parliamentary seats in the 1990 military-sponsored elections.¹⁷⁷ Beginning in 1992, the government began organizing a National Convention to draft a new constitution that was eventually approved in a National Referendum in 2008.¹⁷⁸ In November 2010, parliamentary elections were held, and, in March 2011, a new President was chosen.¹⁷⁹

¹⁶⁶ *Id.*

¹⁶⁷ Burmese usually use the term “ethnic nationalities” to refer to ethnic populations other than the Burman majority. The terms “ethnic minorities” and “ethnic groups” are often used outside Myanmar to describe ethnic populations. See SOUTH, *supra* note 163, at xv (finding that elites within ethnic populations prefer the term “ethnic nationalities” because it confers greater political status and legitimacy).

¹⁶⁸ Tin Maung Maung Than, *supra* note 162, at 73–74.

¹⁶⁹ SOUTH, *supra* note 163, at 29.

¹⁷⁰ Seng Raw, *Views from Myanmar: An Ethnic Perspective*, in BURMA: POLITICAL ECONOMY UNDER MILITARY RULE 159, 159–60 (Robert H. Taylor ed., 2001).

¹⁷¹ DAVID I. STEINBERG, BURMA: THE STATE OF MYANMAR 13 (2001).

¹⁷² *Id.*

¹⁷³ See *id.* at 13–14.

¹⁷⁴ Tin Maung Maung Than, *supra* note 162, at 76.

¹⁷⁵ *Id.*

¹⁷⁶ *Id.* at 76–77.

¹⁷⁷ *Id.* at 77.

¹⁷⁸ See *Burma ‘Approves New Constitution’*, BBC NEWS, May 15, 2008, <http://news.bbc.co.uk/2/hi/asia-pacific/7402105.stm>; HUMAN RIGHTS WATCH,

Decades of conflict between the military and the ethnic nationalities has led to multitudes of reports of widespread government-perpetrated rape, torture, forced displacement, and other crimes, forming the evidentiary basis for a Commission of Inquiry and potential referral of Myanmar to the ICC.¹⁸⁰ In June 2008, Amnesty International released *Crimes Against Humanity in Eastern Myanmar*, which focused on violations of international human rights law and humanitarian law

CHRONOLOGY OF BURMA'S CONSTITUTIONAL PROCESS 3 (2008), available at www.hrw.org/reports/2008/burma0508/burma0508chronology.pdf. The National Convention and National Referendum were heavily criticized for their lack of transparency, participation, and fairness. See, e.g., *Vote to Nowhere*, HUMAN RIGHTS WATCH (May 1, 2008), www.hrw.org/en/node/62239/section/1; THE PUB. INT'L LAW & POL'Y GRP., BURMESE CONSTITUTIONAL REFERENDUM: NEITHER FREE NOR FAIR (2008), available at http://www.burmalibrary.org/docs5/PILPG_Report_Burmese_Constitutional_Referendum_Neither_Free_Nor_Fair-11_May_2008.pdf.

¹⁷⁹ Kocha Olarn, *Myanmar Swears in New President*, CNN NEWS, Mar. 30, 2011, http://articles.cnn.com/2011-03-30/world/myanmar.new.government_1_prime-minister-thein-sein-military-junta-military-rule?_s=PM:WORLD.

¹⁸⁰ See, e.g., ASSISTANCE ASS'N FOR POLITICAL PRISONERS (BURMA), THE DARKNESS WE SEE: TORTURE IN BURMA'S INTERROGATION CENTERS AND PRISONS (2005), available at www.aappb.org/tortour_report.pdf (detailing torture of political prisoners by government authorities); KAREN HUMAN RIGHTS GRP., FORCED LABOUR, MOVEMENT AND TRADE RESTRICTIONS IN TOUNGOO DISTRICT (2010), available at <http://www.khrg.org/khrg2010/khrg10f2.pdf> (documenting forced labor conscriptions by the military between June 2009 and January 2010); KAREN WOMEN'S ORG., SHATTERING SILENCES: KAREN WOMEN SPEAK OUT ABOUT THE BURMESE MILITARY REGIME'S USE OF RAPE AS A STRATEGY OF WAR IN KAREN STATE (2004), available at http://www.peacewomen.org/assets/file/Initiatives/kwo_shatteringsilences_april2007.pdf (documenting widespread and systematic rape by the Burmese military); ID., STATE OF TERROR: THE ONGOING RAPE, MURDER, TORTURE AND FORCED LABOUR SUFFERED BY WOMEN LIVING UNDER THE BURMESE MILITARY REGIME IN KAREN STATE (2007), available at www.karenwomen.org/Reports/state%20of%20terror%20report.pdf (reporting forced labor, forced portering, rape, torture, and other crimes committed by the Burmese military against the Karen ethnic population); ASHLEY SOUTH ET AL., DISPLACEMENT AND DISPOSSESSION: FORCED MIGRATION AND LAND RIGHTS IN BURMA (2007), available at http://www.ashleysouth.co.uk/files/COHRE_November_2007.pdf (focusing on land confiscation by government officials, leading to forced displacement). Forced labor in which the oppressor exercises "any or all of the powers attaching to the right of ownership over a person" is—pursuant to Rome Statute art. 7(2)(c)—the prosecutable crime of slavery. See Rome Statute of the International Criminal Court, *supra* note 32, art. 7(2)(c). But see Trevor Wilson, *Judging Burma's Human Rights Abuses: Is There a Role for a Commission of Inquiry?*, at 2, available at <http://asiapacific.anu.edu.au/blogs/asiarights/files/2011/12/Burma-Human-Rights.pdf>, (claiming that Myanmar army abuses "often occur in random, isolated incidents rather than on a mass level," that "few [human rights incidents], if any, have been independently verified," and that "many organisations producing [human rights] reports are not independent, and not necessarily objective" (emphasis in original)). In response to questions regarding the quality of the documentation of crimes in Myanmar, it is important to remember that one of the primary purposes of a commission of inquiry is to impartially investigate whether violations have occurred.

committed in Kayin (or “Karen”) State and Bago Division of Myanmar from 2005 to 2007. It found that, unlike in previous offensives, the Myanmar army was primarily targeting civilians as part of official government policy:

The following human rights violations have all taken place on a widespread and systematic basis during the military offensive: unlawful killings; torture and other ill-treatment of detainees and prisoners; enforced disappearances and arbitrary arrests; the imposition of forced labour, portering, and displacement; and the destruction or confiscation of crops and food-stocks and other forms of collective punishment. These violations, targeting civilians or carried out indiscriminately, have been preceded or accompanied by consistent threats and warnings by the *tatmadaw* [Myanmar army] that such would occur, and by statements by Myanmar government officials. Amnesty International is concerned that these practices have been the result of official government and *tatmadaw* policy, and amount to crimes against humanity.¹⁸¹

Amnesty International concluded that, based on testimonies and information collected, the “weight of evidence suggests that some of these violations constitute crimes against humanity” as defined by the Rome Statute.¹⁸² At the time of the report, Amnesty International did not specifically call for a Commission of Inquiry or an ICC referral.¹⁸³ In 2010, it changed its position to full-fledged support of a Commission and, should the Commission conclude that crimes have been committed, an ICC referral.¹⁸⁴ Most recently, in 2012, Amnesty International has suggested that a Myanmar domestic judicial process, in lieu of a U.N. commission, could be appropriate.¹⁸⁵

Additional evidentiary and analytical support for a Commission of Inquiry was provided by *Crimes in Burma*, a May 2009 report by the International Human Rights Clinic at Harvard University. Relying exclusively on U.N. documents for its research, the Clinic concluded that “there is a *prima facie* case of international criminal law violations that

¹⁸¹ AMNESTY INT’L, *supra* note 25, at 2.

¹⁸² *Id.* at 5.

¹⁸³ Zawacki, *supra* note 35 (noting that at that time, political realities militated against the likelihood of seeing a Commission of Inquiry established).

¹⁸⁴ *Id.*; see also *Myanmar: UN General Assembly Should Call for Commission of Inquiry*, AMNESTY INT’L, Sept. 6, 2010, <http://www.amnesty.org.nz/news/myanmar-un-general-assembly-should-call-commission-inquiry>.

¹⁸⁵ See MYANMAR: REVISITING HUMAN RIGHTS IN MYANMAR, *supra* note 28, at 5.

demands U.N. Security Council action to establish a Commission of Inquiry to investigate these grave breaches further.”¹⁸⁶ Notably, the report found that U.N. officials were using precisely the language of the ICC statute to describe the crimes in Myanmar and tying the crimes to government policy: the forced relocation was “widespread and ‘part of a deliberate strategy,’”¹⁸⁷ abuses including sexual violence were “widespread and systematic,”¹⁸⁸ and extrajudicial killings were “a deliberate strategy” and also “widespread and systematic.”¹⁸⁹ The report further found that the situation in Myanmar met the elements of a threat to peace¹⁹⁰ and that the Myanmar government had failed to hold the perpetrators accountable,¹⁹¹ clearing the path for a U.N. Security Council referral and ultimately for ICC jurisdiction.¹⁹²

It is unclear exactly when the connection between Myanmar and the ICC was first made. Two of the earlier published analyses were made by the Burma Lawyers’ Council, a group of Burmese lawyers in exile, and by the Global Justice Center, a U.S.-based human rights organization, in September 2007.¹⁹³ A partnership was formed in that month between the two groups with a view towards obtaining a U.N. Security Council resolution forming an international Commission of Inquiry on human rights violations and grave crimes.¹⁹⁴ Subsequent months saw a number of

¹⁸⁶ INT’L HUMAN RIGHTS CLINIC AT HARVARD LAW SCH., *supra* note 25, at 3.

¹⁸⁷ *Id.* at 48 (quoting Special Rapporteur on the Situation of Human Rights in Myanmar, *Rep. of the Special Rapporteur on the Situation of Human Rights in Myanmar*, ¶ 47, U.N. Doc. A/61/369 (Sept. 21, 2006), available at <http://daccess-dds-ny.un.org/doc/UNDOC/GEN/N06/530/70/PDF/N0653070.pdf?OpenElement>). Ostensibly to avoid creating threshold tests, few have tried to compare the atrocities in Myanmar and in Darfur. The Harvard clinic reports that the number of destroyed villages is comparable. INT’L HUMAN RIGHTS CLINIC AT HARVARD LAW SCH., *supra* note 25, at iii, iv, 2, 88.

¹⁸⁸ *Id.* at 62.

¹⁸⁹ *Id.* at 71.

¹⁹⁰ *Id.* at 89–90.

¹⁹¹ *Id.* at 75–76.

¹⁹² *Id.* at 92 (“[T]he Security Council should be prepared to act upon findings and recommendations made by such a Commission, including a potential referral to the International Criminal Court.”); see also *Burma Briefing—The United Nations General Assembly and Crimes in Burma*, BURMA CAMPAIGN U.K., July 25, 2010, at 1, available at <http://burmacampaign.org.uk/images/uploads/2-UNGA-and-Burma.pdf> (finding that past General Assembly resolutions regarding Myanmar have related to “at least 15 possible war crimes and crimes against humanity”); cf. INT’L FED’N FOR HUMAN RIGHTS ET AL., *supra* note 25, at 25 (concluding that despite the difficulty in gathering evidence of crimes, publicly-available sources reveal “a consistent pattern of widespread and systematic human rights violations which constitute crimes against humanity and war crimes, as defined under Articles 7 and 8 of the Rome Statute”).

¹⁹³ Janet Benshoof, *The Changing Landscape of International Law: The Global Responsibility to Persecute Perpetrators of Grave Crimes Inflicted on the People of Burma*, 27 LAWKA PALA 37 (2007); Burma Lawyers’ Council, *Legal Analysis of the Burma Lawyers’ Council on Heinous Crimes in Burma*, 27 LAWKA PALA 34 (2007).

¹⁹⁴ Burma Lawyers’ Council & Global Justice Ctr., *Extracts from MOU of BLC and GJC for Joint Efforts of Criminal Accountability*, 28 LAWKA PALA 32 (2007).

statements by both organizations calling for criminal accountability in Myanmar.¹⁹⁵ By August 2008, key Burmese opposition groups such as the National Council for the Union of Burma, Network for Human Rights Documentation–Burma, and the Women’s League of Burma, as well as international human rights organizations such as the International Federation for Human Rights, the U.K.-based Burma Justice Committee, and Christian Solidarity Worldwide, had either endorsed or joined in the effort.¹⁹⁶

As of September 2008, however, the interest of the international community in bringing Myanmar before the ICC was still “lukewarm.”¹⁹⁷

¹⁹⁵ See, e.g., Burma Lawyers’ Council, *Burma Lawyers’ Council Urges the United Nations Security Council to Refer the Heinous Crimes in Burma to the International Criminal Court*, 30 LAWKA PALA 7 (2008); Burma Lawyers’ Council, *Daw Aung San Suu Kyi’s Detention Should Be Added to the List of the SPDC’s Crimes Against Humanity*, 30 LAWKA PALA 9 (2008); Burma Lawyers’ Council & Global Justice Ctr., *International Lawyers Call for Criminal Accountability for Myanmar Regime*, 28 LAWKA PALA 35 (2007); Global Justice Ctr. et al., *In the Wake of Historic Resolution 1820 on Sexual Violence in Armed Conflict Women of Burma and International Lawyers Call on the Security Council to Refer the Situation in Burma to the International Criminal Court*, 30 LAWKA PALA 24 (2008); Int’l Fed’n for Human Rights et al., *Catastrophe in Burma a Wake Up Call to the International Community: Time to End Impunity for Heinous Crimes by the Military Regime*, 30 LAWKA PALA 22 (2008).

¹⁹⁶ Burma Lawyers’ Council, *Burma Lawyers’ Council Report on the Campaign for Criminal Accountability*, 30 LAWKA PALA 4, 5 (2008).

¹⁹⁷ B.K. Sen, *The International Criminal Court’s Indictment of the Sudanese President for Genocide in Darfur and its Relevance to Burma*, 31 LAWKA PALA 71, 72 (2008). Before the recent reforms, critics of the formation of a commission of inquiry warned that it would deter Myanmar military leaders from accepting democratic reforms. See, e.g., Colum Lynch, *U.S. Push for Burmese War Crimes Probe Hits Chinese Wall*, FOREIGN POL’Y, Oct. 24, 2010, http://turtlebay.foreignpolicy.com/posts/2010/10/24/us_push_for_burmese_war_crimes_probe_hits_chinese_wall (reporting on the low-profile and multilateral approach adopted by the U.S. in seeking to establish a commission of inquiry with regards to atrocities in Myanmar, and contrasting it with China’s “high-octane, Western-style diplomatic effort” to oppose any such measure on grounds that a commission of inquiry “could undermine the country’s fragile political transition”); see also Mark L. Goldberg, *Momentum for Burma Commission of Inquiry Seeming to Falter*, Oct. 25, 2010, U.N. DISPATCH, <http://www.undispatch.com/momentum-for-burma-commission-of-inquiry-seeming-to-falter> (citing Colum Lynch’s article in *Foreign Policy* and explaining that appointment of a commission of inquiry on “human rights abuses by the Burmese junta” would likely be “off the agenda” during Ban Ki Moon’s October 2010 visit to Southeast Asian countries because of an absence of international support). Now, after reforms have begun, they fear that a commission of inquiry would unfairly punish Myanmar and could cause the reforms to unravel. See, e.g., Wilson, *supra* note 180, at 8 (“Convening a UN Commission of Inquiry at this time would be tantamount to imposing new sanctions on Burma at the very time when it is making serious efforts to introduce change.”); Simon Roughneen, *A Decommissioned Inquiry on Myanmar*, ASIA TIMES ONLINE, Jan. 10, 2012, http://www.atimes.com/atimes/Southeast_Asia/NA10Ae01.html (“With the threat of backsliding still looming large ... some observers say that it is important to encourage Thein Sein’s reform process and not play into the hands of hardliners by pushing for the creation of a COI.”).

An important turning point for criminal accountability efforts came in May 2009 when key stakeholders met in Thailand to discuss the viability of a Commission of Inquiry and an ICC referral. Over three days of seminars and meetings, a wide variety of international human rights organizations, legal and documentation experts, and Burmese advocates debated the timing, usefulness, strategy of, and obstacles to, a Commission of Inquiry and a potential U.N. Security Council referral.¹⁹⁸ In a bizarre turn of events, rumors circulated that the Thai and Myanmar governments had sent agents to infiltrate the meetings.¹⁹⁹ The Myanmar government had reportedly issued an arrest warrant for the General Secretary of the Burma Lawyers' Council ("BLC")²⁰⁰ and was apparently trying to either kidnap²⁰¹ or kill²⁰² him. As the author personally experienced, attendees were advised to eat meals in a sheltered inner area of the dining room of the hotel meeting venue. The BLC's General Secretary was spirited away to an anonymous hotel room,²⁰³ went into hiding, and subsequently left the country for Sweden.²⁰⁴ The rumors of spies in the May 2009 meetings created a clear impression: the Myanmar government was concerned about a potential ICC referral. The BLC's General Secretary confirmed that a war crimes commission "very much concerns the Burmese leadership"²⁰⁵ and the Director of Burma Campaign UK commented that the provision in the 2008 Myanmar Constitution granting government officials immunity from domestic criminal prosecution "shows they're worried" about international prosecution.²⁰⁶

¹⁹⁸ Although names of attendees are omitted from this article for confidentiality purposes, a partial list is publicly available. Burma Lawyers' Council, *Seminar on Criminal Accountability in Burma: 'Advancing Human Rights and Ending Impunity in Burma: Which External Leverages?'*, 33 LAWKA PALA 17 (2009).

¹⁹⁹ Shirin Ebadi & Souhayr Belhassen, *A Seminar Fraught with Risks*, in FIDH/BLC SEMINAR: ADVANCING HUMAN RIGHTS AND ENDING IMPUNITY IN BURMA: WHICH EXTERNAL LEVERAGES? 3 (2009), available at http://www.fidh.org/IMG/pdf/FIDH_BLC_Burma_seminar_final_internet.pdf.

²⁰⁰ *Press Release: Burma: Outlaw of the Burma Lawyers Council and Harassment of its Members*, INT'L FED'N FOR HUMAN RIGHTS, May 5, 2009, <http://www.fidh.org/Press-Release-Burma-Outlaw-of-the-Burma-Lawyers?envoiamis=1>.

²⁰¹ Dan Withers, *Aung Htoo, BLC: 'Than Shwe Fears the ICC'*, DEMOCRATIC VOICE OF BURMA, Oct. 22, 2010, <http://www.dvb.no/interview/aung-htoo-blc-%E2%80%99than-shwe-fears-the-icc%E2%80%99/12370>.

²⁰² Andrew Marshall, *Putting Burma's Junta on Trial*, 33 LAWKA PALA 47, 48 (2009) (relaying reports that Myanmar agents "had been dispatched to kidnap or kill" the General Secretary).

²⁰³ *Id.*

²⁰⁴ Withers, *supra* note 201.

²⁰⁵ Marshall, *supra* note 202, at 49.

²⁰⁶ *Id.* at 48; see also INT'L CRISIS GRP., CHINA'S MYANMAR DILEMMA 30 (Int'l Crisis Grp. Asia Report No. 177) (2009), available at http://www.crisisgroup.org/~media/Files/asia/north-east-asia/177_chinas_myanmar_dilemma.pdf (commenting that a feeling of victimization on the part of Myanmar's then-leader, Senior General Than Shwe, was caused in part by fear of

As awareness of crimes in Myanmar has increased, scores of NGOs, members of governments, and prominent individuals have expressed support for a Commission of Inquiry.²⁰⁷ Ultimately, however, the support that truly matters is that of the U.N. Security Council members;²⁰⁸ significantly, three of the countries that have expressed support—France, the United Kingdom, and the United States—are permanent members of the fifteen-member body.²⁰⁹ China and Russia, the

prosecution for crimes against humanity). Not coincidentally, just days before the Thailand meetings, the Myanmar government declared the BLC an “unlawful association,” claiming that it was “hurtful to the rule of law in the Union of Myanmar, stability of the state and community peace.” *Myanmar Junta Declares Lawyers Council Unlawful*, MYANMA THADIN, May 1, 2009, <http://www.myanmathadin.com/news/human-rights/268-myanmar-junta-declares-lawyers-council-unlawful.html>. The so-called “immunity provision” in Myanmar’s constitution provides that “[n]o proceeding shall be instituted against the said Councils or any member thereof or any member of the Government, in respect of any act done in the execution of their respective duties.” MYANMAR CONST. ch. XIV § 445.

²⁰⁷ For a partial list, see *Criminal Accountability: Support the Call for a Commission of Inquiry on Crimes in Burma! Updates*, UNSC BURMA.ORG (Mar. 10, 2011), <http://www.unscburma.org/Crimes%20in%20Burma/ICC/Updates.php?Submit=Updates>.

The website lists—among others supporting a Commission of Inquiry on Myanmar—the following individuals, organizations, and associations: the International Burmese Monks Organization, sixty British members of Parliament, President of East Timor and Nobel Laureate José Ramos-Horta, Thai Member of Parliament and ASEAN Inter-Parliamentary Myanmar Caucus President Kraisak Choonhavan, former U.N. Special Rapporteurs on the Situation of Human Rights in Myanmar Paulo Sérgio Pinheiro and Yozo Yokota, fifty-five members of the U.S. House of Representatives, former U.S. First Lady Laura Bush, fourteen Nobel Laureates, the U.S. Campaign for Burma, 442 members of parliament from twenty-nine countries, the U.K. Conservative Party’s Human Rights Commission, UNISON (the U.K.’s second-largest trade union), current U.N. Special Rapporteur on the Situation of Human Rights in Myanmar Tomás Ojea Quintana, the Karen National Union, the European Karen Network, the Alternative ASEAN Network on Burma (ALTSEAN–Burma), the International Trade Union Confederation, thirty-seven Karen organizations (representing the Karen ethnic nationality of Myanmar), the Nobel Women’s Initiative, sixty-four women’s organizations from around the world, and thirty-two U.S. senators. See also *US Civil Society Urges More Myanmar Pressure*, BRUNEI TIMES, July 8, 2011, <http://www.bt.com.bn/news-asia/2011/07/08/us-civil-society-urges-more-myanmar-pressure> (reporting that twenty-one U.S. civil society groups, including the AFL-CIO and the Foreign Policy Initiative, joined together to pressure U.S. President Barack Obama to provide support to a U.N. Commission of Inquiry on Myanmar crimes).

²⁰⁸ Views differ on whether cooperation from the Myanmar government would also be essential. Compare Wilson, *supra* note 180, at 10 (arguing that without government cooperation, a commission of inquiry “would have little prospect of being held or of achieving useful outcomes”), with *Burma: Q&A on an International Commission of Inquiry*, *supra* note 5 (explaining the rationale behind calls by Human Rights Watch for a U.N. commission of inquiry on violations of human rights and international humanitarian law in Myanmar, and contending that a lack of government cooperation “would not present insurmountable challenges to conducting a valuable and needed inquiry”).

²⁰⁹ It is unclear whether these countries would continue to support a Commission of Inquiry today. See, e.g., *Press Availability in Rangoon, Burma*, *supra* note 28, noting

other two permanent members, have come out against such a move. China has forcefully lobbied high-level United Nations, Asian, and European officials, arguing that a Commission of Inquiry could undermine Myanmar's transition to democracy, and called such a commission "dangerous and counterproductive" in a confidential meeting.²¹⁰

But observers of China should not be surprised. China repeatedly supported Sudan publicly: before, on the day of, and after its referral to the ICC. China's public statements seemed to have little to do with its ultimate decision to allow Sudan to be referred. More relevant to China's decisions are the economic and political interests that determine its foreign policy, and it is to those interests that we now turn.

VI. CHINA'S ECONOMIC RELATIONSHIP WITH SUDAN

In analyzing China's economic relationships with Sudan and Myanmar, this article aims to make three main points. First, China buys important commodities from Sudan and Myanmar, particularly petroleum and other natural resources, but its reliance on those countries—viewed as a percentage of overall trade—is miniscule compared to Sudan's and Myanmar's dependence on China. The economic power in the relationships is so heavily weighted in China's favor that Sudan and Myanmar are simply unable to credibly threaten China's economic well-being without completely undermining their own economies and thus their ruling parties' political power. Conversely, an angered China in a mood to retaliate could quickly cause economic crises in Sudan or Myanmar with negligible effect on its own economy. Second, China's imports from Sudan, in particular its energy imports, are appreciably larger than China's imports from Myanmar. Thus, it follows that China would be even less threatened, from an economic perspective, by Myanmar's negative reaction to an ICC referral than it ought to have been with Sudan. Third, and perhaps most importantly, China's economic relationship with Sudan appears not to have been adversely affected by the 2005 referral of Sudan to the ICC. Oil imports thereafter continued to increase while overall trade, although at times surging and dropping, remained healthy.²¹¹ There is little reason to believe, therefore, that a Chinese abstention on the creation of a Commission of Inquiry or on a referral of Myanmar to the ICC would harm China's economic interests.

comments on the part of U.S. Secretary of State Hillary Clinton, reflecting a newfound willingness to consider accepting Myanmar domestic accountability mechanisms.

²¹⁰ Dan Withers, *China Sabotaging UN War Crimes Probe*, DEMOCRATIC VOICE OF BURMA, Oct. 26, 2010, <http://www.dvb.no/news/china-sabotaging-un-war-crimes-probe/12420>.

²¹¹ See tables 1–3, *infra* Parts VI and VII.

It is no exaggeration to say that China is the world's growing economic giant. Measured by gross domestic product, China overtook Japan to become the world's second-largest economy during the second quarter of 2010,²¹² and it is on course to becoming the world's largest economy by 2020.²¹³ From 1989 to 2010, China's average annual GDP growth was a stunning 9.3%.²¹⁴ In comparison, the U.S. growth rate from 1948 to 2011 was a mere 3.25%.²¹⁵ From 2000 to 2009, China's worldwide exports rose from USD \$249 billion to \$1.201 trillion, while its imports rose from USD \$225 billion to \$1.005 trillion.²¹⁶

China's dramatic growth has resulted in an almost insatiable hunger for energy. Between 2000 and 2005, its energy consumption rose over 78%.²¹⁷ China is the world's largest producer and consumer of coal,²¹⁸ and it is the second-largest consumer of oil, behind only the United States.²¹⁹ Understandably, China's astonishing growth has had the result of steadily increasing China's dependence on foreign oil. In 2003, it became the world's second-largest oil importer.²²⁰ According to forecasts by the International Energy Agency, China's ratio of imported to total consumed oil was expected to hit 61% by 2010 and 76.9% by 2020, and its domestic production is expected to be stagnant.²²¹ Directly related to China's need for oil is its growing demand for cars: it has been estimated that China's total number of cars will increase twentyfold between 2002 and 2030, to 390 million.²²²

²¹² *China Overtakes Japan as World's Second-Biggest Economy*, BLOOMBERG NEWS, Aug. 16, 2010, <http://www.bloomberg.com/news/2010-08-16/china-economy-passes-japan-s-in-second-quarter-capping-three-decade-rise.html>.

²¹³ Simon Kennedy, *G-7 Will Be Eclipsed by E-7 by 2020 as China Surges*, *PwC Says*, BLOOMBERG BUSINESSWEEK, Jan. 21, 2010, <http://www.bloomberg.com/apps/news?pid=newsarchive&sid=awJGPSXwf4DE>.

²¹⁴ *China GDP Growth Rate*, TRADING ECON., available at <http://www.tradingeconomics.com/china/gdp-growth>.

²¹⁵ *United States GDP Annual Growth Rate*, TRADING ECON., available at <http://www.tradingeconomics.com/united-states/gdp-growth-annual>.

²¹⁶ *US-China Trade Statistics and China's World Trade Statistics*, U.S.-CHINA BUS. COUNCIL, <http://www.uschina.org/statistics/tradetable.html> (last visited July 25, 2012). All dollar amounts in this article are cited in U.S. dollars.

²¹⁷ HUMAN RIGHTS FIRST, *supra* note 120, at 1.

²¹⁸ *Country Analysis Briefs: China*, ENERGY INFO. ADMIN., <http://www.eia.gov/countries/country-data.cfm?fips=CH> (last updated Oct. 16, 2011).

²¹⁹ *Id.*

²²⁰ Zhang Jianxin, *Oil Security Reshapes China's Foreign Policy 1* (Hong Kong U. of Sci. and Tech. Ctr. on China's Transnational Relations, Working Paper No. 9, 2006), available at <http://www.marshallfoundation.org/documents/ChinaForeignPolicyEnergy.pdf>.

²²¹ *Id.* at 5; see also HUMAN RIGHTS FIRST, *supra* note 120, at ii (stating that, as of 2008, China needed 6.6 million barrels of oil per day).

²²² Joyce Dargay et al., *Vehicle Ownership and Income Growth, Worldwide: 1960–2030*, ENERGY J., Oct. 2007, at 143, 168; see also Pablo Bustelo, *China and Oil in the Asian Pacific Region*, NEW ENGLAND J. PUB. POL'Y, July 2007, at 171, 172, available at <http://www.ucm.es/info/eid/pb/Bustelo07nejpp%20-%20Pub.pdf> ("China could increase its

Recalling that China's leaders believe that domestic political stability—and survival of the ruling party—can only be preserved through continued economic growth, as China's domestic energy resources have declined, it is no surprise that it has increasingly looked abroad for natural resources to sustain its growth. As a result, trade between Africa and China has grown dramatically.²²³ In 2009, China surpassed the United States as Africa's top trading partner,²²⁴ with trade exceeding USD \$100 billion per annum.²²⁵

Sudan is China's third-largest African trading partner.²²⁶ The 1990s saw a strengthening of their economic relationship, primarily due to international isolation of Sudan because of its ties to terrorism, and China's search for unexploited oil opportunities.²²⁷ Oil is the basis of the Sudan-China trade. Although China's oil interests in Africa are still relatively minor compared to the investments of international oil companies, China's involvement in Sudan is an exception.²²⁸ Over 60% of Sudan's oil is sold to China, comprising more than 6% of China's imported oil.²²⁹ Nine out of ten shipped barrels of Sudanese oil are destined for China.²³⁰ In 2010, fuel and mining products made up 88% of Sudan's merchandise exports, with China receiving nearly 65% of all

oil consumption by an average of about 4.5% per year over the next two decades, more than doubling the same figure for the world as a whole and more than quadrupling the consumption increases forecast for developed western countries.”)

²²³ Jian-Ye Wang & Abdoulaye Bio-Tchané, *Africa's Burgeoning Ties with China: Maximizing the Benefits of China's Increasing Economic Engagement with Africa*, FIN. & DEV., Mar. 2008, at 44, available at <http://www.imf.org/external/pubs/ft/fandd/2008/03/pdf/wang.pdf> (describing burgeoning trade between the two regions).

²²⁴ *South Africa: China Now Top Trading Partner*, AFR. PRESS INT'L, Oct. 1, 2009, <http://africanpress.wordpress.com/2009/10/01/south-africa-china-now-top-trading-partner>.

²²⁵ Ed Cropley & Ben Hirschler, *China Overtakes US as Africa's Top Trading Partner*, BUS. DAILY, Jan. 26, 2010, <http://www.businessdailyafrica.com/Corporate%20News/-/539550/850122/-/item/1/-/8r3t1p/-/index.html>.

²²⁶ Denine Walters, *Sino-Sudanese Relations: The Importance of Oil and the 2011 Referendum*, CONSULTANCY AFR. INTELLIGENCE, Apr. 30, 2010, http://www.consultancyafrica.com/index.php?option=com_content&view=article&id=389:sino-sudanese-relations-the-importance-of-oil-and-the-2011-referendum&catid=58:asia-dimension-discussion-papers&Itemid=264.

²²⁷ Daniel Large, *Arms, Oil and Darfur—The Evolution of Relations Between China and Sudan*, 7 SUDAN ISSUE BRIEF 2 (2007), available at <http://www.smallarmssurveysudan.org/pdfs/HSBA-SIB-7-Arms.pdf>; Walters, *supra* note 226; see also Jeffrey Gettleman, *Far Away from Darfur's Agony, Khartoum Is Booming*, N.Y. TIMES, Oct. 23, 2006, http://www.nytimes.com/2006/10/23/world/africa/23iht-web.1024sudan.3262080.html?_r=1 (reporting that foreign direct investment in Sudan increased from USD \$128 million in 2000 to USD \$2.6 billion in 2008).

²²⁸ Erica S. Downs, *The Fact and Fiction of Sino-African Energy Relations*, CHINA SEC. (Summer 2007), at 42, 44; see also Zhang, *supra* note 220, at 9 (reporting that, in 2004, 45% of China's imported oil came from the Middle East, while 28.7% came from Africa).

²²⁹ Walters, *supra* note 226.

²³⁰ HUMAN RIGHTS FIRST, *supra* note 120, at i.

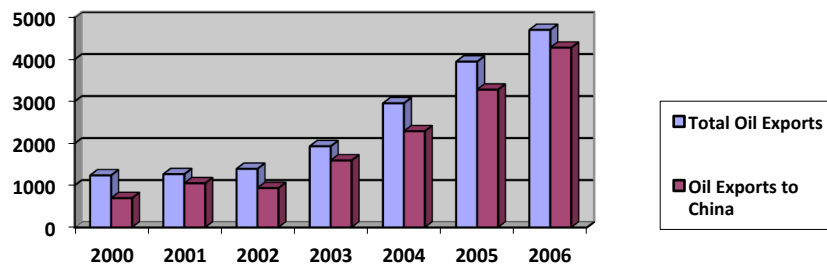
exported merchandise; the second-highest destination was the United Arab Emirates, at 10.5%.²³¹

China also controls almost all of Sudan's potential oil.²³² State-owned China National Petroleum Corporation (CNPC), China's largest producer and supplier of crude oil and natural gas,²³³ is the largest shareholder of the Greater Nile Petroleum Operating Company, Sudan's largest oil company, owning 40% of its stock.²³⁴ Meanwhile, China has been Sudan's principal partner in developing the capacity to transport and extract oil,²³⁵ and Chinese companies have dominated the construction of Sudan's energy infrastructure, including pipelines, marine terminals, and refineries:

In short, Sudan's oil development has, by and large, been a Chinese production. Beijing's companies pump oil from numerous key fields, which then courses through Chinese-made pipelines to Chinese-made storage tanks to await a voyage to buyers, most of them Chinese.²³⁶

The following chart (Table 1) illustrates how Sudan's dramatic increase in oil exports, before and shortly after the ICC referral, was almost exclusively fuelled by China's thirst for petroleum.

Table 1. *Sudanese Oil Exports, in Millions of USD*²³⁷



As China and Sudan's economic ties continue to develop, each country has come to rely increasingly on the other. However, while it is

²³¹ *Trade Profile—Sudan*, WORLD TRADE ORG., <http://stat.wto.org/CountryProfile/WSDBCountryPFView.aspx?Language=E&Country=SD> (last updated April 2012).

²³² HUMAN RIGHTS FIRST, *supra* note 120, at i.

²³³ *China National Petroleum Corporation (CNPC)*, PETRO ENERGY E&P, <http://www.petroenergy-ep.com/cnpc.htm> (last visited July 25, 2012).

²³⁴ Ian Taylor, *China's Oil Diplomacy in Africa*, 82 INT'L AFFAIRS 937, 939 (2006).

²³⁵ HUMAN RIGHTS FIRST, *supra* note 120, at ii.

²³⁶ *Id.*

²³⁷ *Id.* at 4.

clear that Sudan's oil is important to China, China has a number of other major petroleum investments around the world. Analysts predict that the Middle East will supply 70% of China's oil imports in 2025, twice the 2005 figure.²³⁸ China's trade with Sudan is just one small piece in this enormous economic puzzle. Sudan, in contrast, is almost cripplingly dependent on China. China is Sudan's primary political, economic, and military partner.²³⁹ Their ties have led to a relationship in which "China's support dominates the country's economy."²⁴⁰ 80% of the Sudanese government's revenues come from oil, and over 60% of that oil is sold to China.²⁴¹ China is Sudan's largest trading partner, purchasing 71% of its total exports in 2007²⁴² and 65% in 2009.²⁴³

Economic ties and the imbalance in power between the two countries were almost certainly important considerations for China when determining whether to abstain from the Sudanese referral. In Part VII we look at how China would make a similar calculation with respect to Myanmar.

VII. CHINA'S ECONOMIC RELATIONSHIP WITH MYANMAR

Like Sudan, Myanmar is an important Chinese ally. Since 1988, when the Myanmar military government's crackdown on democratic demonstrations isolated it from the West, the country's political, diplomatic, security, and economic ties with China have strengthened.²⁴⁴

China's roots are planted deeply in Myanmar's economy. Heavily invested in infrastructure, Chinese companies have constructed numerous hydropower plants, including a USD \$1 billion project on Myanmar's Salween River,²⁴⁵ and a thermal power station, accounting for around one

²³⁸ Bustelo, *supra* note 222, at 172.

²³⁹ HUMAN RIGHTS FIRST, ICC CHARGES IN DARFUR AND THE GENOCIDE CONVENTION 3 (2008), available at <http://www.humanrightsfirst.org/wp-content/uploads/pdf/080508-cah-genocide-charges-impact-on-arms-sales.pdf>.

²⁴⁰ HUMAN RIGHTS FIRST, *supra* note 120, at 10. *But see* Li Anshan, *China and Africa: Policy and Challenges*, CHINA SEC. (Summer 2007), at 69 (asserting that China is more dependent on Africa than vice versa).

²⁴¹ Walters, *supra* note 226.

²⁴² HUMAN RIGHTS FIRST, ICC CHARGES IN DARFUR AND THE GENOCIDE CONVENTION, *supra* note 239, at 3.

²⁴³ See U.N. COMMODITY TRADE STATISTICS DATABASE, <http://comtrade.un.org/db/> (last visited July 25, 2012) (reporting that in 2009, Sudan's total exports to the world approximated USD \$9.0 billion, while its exports to China approximated USD \$5.9 billion).

²⁴⁴ Toshihiro Kudo, *Myanmar's Economic Relations with China: Can China Support the Myanmar Economy?*, at 4 (Inst. of Dev. Economies, Discussion Paper No. 66, July 2006), available at <http://www.ide.go.jp/English/Publish/Download/Dp/pdf/066.pdf>.

²⁴⁵ Larry Jagan, *China: The Junta's Best Friend*, MYANMAR ETHNIC ROHINGYAS HUMAN RIGHTS ORG. MALAYSIA (MEHROM), Aug. 12, 2011, available at <http://merhrom.wordpress.com/2008/08/12/china-the-junta%E2%80%99s-best-friend>.

third of Myanmar's total energy generation capacity.²⁴⁶ China also provides a significant amount of economic assistance in the form of interest-free loans.²⁴⁷

As with Sudan, a large part of China's economic interest in Myanmar revolves around Myanmar's natural resources. Myanmar has the fastest-growing oil and gas industry in Southeast Asia, with natural gas its largest source of export revenue.²⁴⁸ In exchange for China's help, Myanmar grants it privileges regarding oil and gas rights.²⁴⁹ China's agreement to USD \$300 million in trade deals and financial assistance in 2005 was crucial in securing Myanmar's acquiescence for parallel pipelines transporting natural gas from Myanmar and oil from Africa and the Middle East.²⁵⁰

That gas pipeline is critical for China to meet its growing need for natural gas: from 2000 to 2008, China's natural gas consumption more than tripled, rising at a double-digit rate.²⁵¹ In 2008, China imported 4% of its natural gas; predictions are that by 2030 it will be importing between 54% and 65%.²⁵² And the oil pipeline has both economic and strategic benefits for China.²⁵³ It is reportedly capable of reducing China's reliance on the Malacca Strait, which runs between Malaysia and Indonesia, by one third.²⁵⁴ Nearly 80% of China's imported oil passes through the Strait.²⁵⁵ Fees that Myanmar will collect for delivering oil will likely reach USD \$14 million per year.²⁵⁶ Over thirty years, the pipelines should yield USD

²⁴⁶ Kudo, *supra* note 244, at 13–14.

²⁴⁷ *Id.* at 15; *see also* Jagan, *supra* note 245 (reporting that in January 2003, China supplied USD \$200 million in financial assistance to Myanmar, and in June 2006 provided a further loan of USD \$200 million).

²⁴⁸ Matthew F. Smith & Naing Htoo, *Energy Security: Security for Whom?*, 11 YALE HUM. RTS. & DEV. L.J. 217, 221 (2008).

²⁴⁹ Kudo, *supra* note 244, at 15.

²⁵⁰ *See* Dan Blumenthal, *Concerns with Respect to China's Energy Policy*, in CHINA'S ENERGY STRATEGY: THE IMPACT ON BEIJING'S MARITIME POLICIES 418, 425 (Gabriel Collins et al. eds., 2008); *see also* Bo Kong, *The Geopolitics of the Myanmar–China Oil and Gas Pipelines*, in PIPELINE POLITICS IN ASIA: THE INTERSECTION OF DEMAND, ENERGY MARKETS, AND SUPPLY ROUTES 55, 57 (2010) (explaining that the pipeline, officially agreed to in 2009, is 690 miles long, and designed to transport 440,000 barrels of oil per day from the Middle East and Africa, and that a parallel, 1,123-mile-long pipeline will carry 12 billion cubic meters of natural gas per year from the Bay of Bengal).

²⁵¹ Bo Kong, *supra* note 250, at 61.

²⁵² *Id.* at 60–61.

²⁵³ Blumenthal, *supra* note 250, at 426.

²⁵⁴ INT'L CRISIS GRP., CHINA'S MYANMAR DILEMMA, *supra* note 206, at 20.

²⁵⁵ *Id.* *But see* Michael Lelyveld, *Mideast Oil Drives China Disputes*, RADIO FREE ASIA, July 18, 2011, http://www.rfa.org/english/energy_watch/oil-07182011103202.html (estimating the amount of China's oil shipments passing through the Malacca Straits in 2011 at about 30% of China's total oil demand).

²⁵⁶ Bo Kong, *supra* note 250, at 60.

\$1 billion or more for Myanmar, equal on an annual basis to one-third of its existing foreign exchange reserves.²⁵⁷

Looking at overall trade between the countries, it is evident that China is vital to the success of Myanmar and its government. Some even argue that the Myanmar military regime would not have survived without China's aid.²⁵⁸ Border trade with China has been called the "lifeline" of Myanmar's economy.²⁵⁹ In 1988, total trade between the two nations was USD \$9.51 million, by 2000 it had grown to USD \$621.26 million,²⁶⁰ and by 2010 it had reached USD \$4.44 billion.²⁶¹ As a result of an imbalance in production of manufactured goods, Myanmar's lack of domestic capital, and over-bureaucratization, Myanmar has consistently faced significant trade deficits with China.²⁶² Myanmar's exports to China increased by 1.3 times from 1988 to 2003, but its imports increased by 7.1 times.²⁶³

Despite strengthening economic ties between China and Myanmar, trade between the countries remains a tiny percentage of China's overall trade. Trade from Yunnan Province, bordering Myanmar, constituted 73% of Myanmar's overall border trade, yet the amount of goods flowing through Yunnan's capital was less than 1% of China's overall trade.²⁶⁴ Additionally, despite the well-publicized oil trade between the nations, Myanmar is not considered a major energy supplier to China,²⁶⁵ and on a global scale its proven oil reserves are "quite small."²⁶⁶ In 1994, 56% of China's imported oil came from the Asia-Pacific region, but by 2001 it was only 15%.²⁶⁷ In 2011, about 80% of China's oil came from the Middle East and Africa, and the proportion from those regions was expected to rise.²⁶⁸ Furthermore, the pipeline to bring crude oil from the Middle East through Myanmar, despite its geopolitical importance, will

²⁵⁷ *Id.*

²⁵⁸ See, e.g., INT'L CRISIS GRP., CHINA'S MYANMAR DILEMMA, *supra* note 206, at 1; Zou Keyuan, *China's Possible Role in Myanmar's National Reconciliation*, 17 COPENHAGEN J. ASIAN STUD. 59, 66 (2003).

²⁵⁹ Kudo, *supra* note 244, at 10. But see Poon Kim Shee, *The Political Economy of China-Myanmar Relations: Strategic and Economic Dimensions*, 1 RITSUMEIKAN ANN. REV. OF INT'L STUD. 33, 45 (2002) (arguing that "there is no danger that China is overwhelmingly dominating Myanmar's trade"); Smith & Htoo, *supra* note 248, at 221 (noting that Thailand, rather than China, is by far Myanmar's biggest trading partner).

²⁶⁰ Shee, *supra* note 259, at 43.

²⁶¹ U.N. COMMODITY TRADE STATISTICS DATABASE, *supra* note 243; see also Jagan, *supra* note 245 (reporting that from 1999 to 2005, Myanmar's trade with China doubled, with China becoming Myanmar's largest source of imports, accounting for more than 31% in 2006).

²⁶² Shee, *supra* note 259, at 45-47.

²⁶³ Kudo, *supra* note 244, at 7.

²⁶⁴ *Id.* at 10-11.

²⁶⁵ *Id.* at 18.

²⁶⁶ INT'L CRISIS GRP., CHINA'S MYANMAR DILEMMA, *supra* note 206, at 17 n.184.

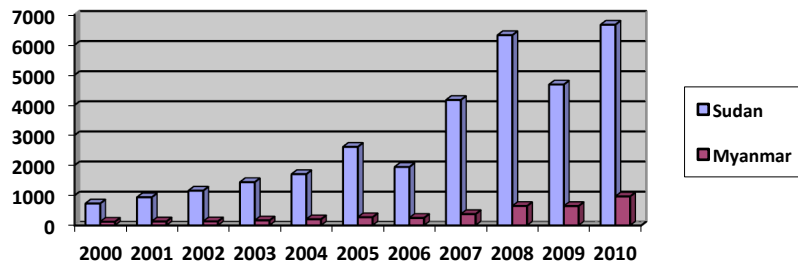
²⁶⁷ *Id.* at 18.

²⁶⁸ Lelyveld, *supra* note 255.

have only a marginal impact on China's overall energy security, delivering only 11% of China's current oil imports.²⁶⁹ That amount is not expected to increase significantly: 78% of China's oil imports in 2015 and 89% in 2030 are expected to still come from maritime transport.²⁷⁰ Thus, while Myanmar is clearly a key trade partner for China, as China's economy grows and it spreads its trade further and further abroad, Myanmar's importance to it will continue to wane.

How does China's trade with Myanmar compare to its trade with Sudan? In 2010, Sudan was ranked the 28th-largest exporter of goods to China, whereas Myanmar was not in the top fifty.²⁷¹ However, Myanmar topped Sudan in importing Chinese goods, where Myanmar was 40th, at 0.2%, and Sudan was not in the top fifty.²⁷² In overall trade with China, Sudan ranked 34th, and Myanmar 46th.²⁷³ But more significant than these rankings are the relative amounts of trade shown by the following two tables.

Table 2. *Imports to the P.R.C. (excluding Hong Kong and Macao) from Sudan and Myanmar, 2000–2010, in Millions of USD*²⁷⁴



²⁶⁹ Bo Kong, *supra* note 250, at 63.

²⁷⁰ *Id.*

²⁷¹ DG TRADE, CHINA: EU BILATERAL TRADE AND TRADE WITH THE WORLD (2012), available at http://trade.ec.europa.eu/doclib/docs/2006/september/tradoc_113366.pdf. These statistics consider the European Union as one body. If European nations had been separated, Sudan and Myanmar would have ranked lower.

²⁷² *Id.*

²⁷³ *Id.*

²⁷⁴ U.N. COMMODITY TRADE STATISTICS DATABASE, *supra* note 243. In this article, import data, rather than export data, have been used as much as possible because they are usually recorded more accurately. See Azita Amjadi et al., *User's Manual, WORLD INTEGRATED TRADE SOLUTION* 38, Jan. 2011, available at http://wits.worldbank.org/data/public/WITS_User_Manual.pdf (noting that imports are recorded more accurately because they generate tariff revenues). In this chart, for example, imports from China's records, rather than exports from Sudan's and Myanmar's records, were used. All data are based on the Harmonized Commodity Description and Coding System.

Table 3. *Exports from the P.R.C. (excluding Hong Kong and Macao) to Sudan and Myanmar, 2000–2010, in Millions of USD*²⁷⁵

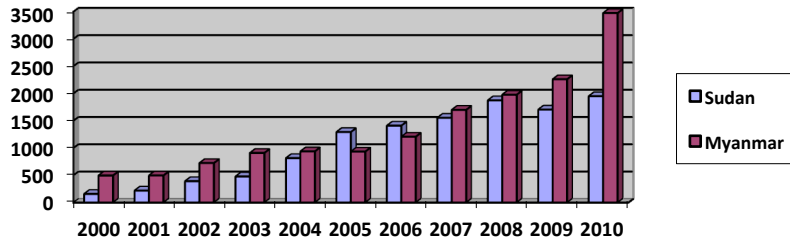


Table 2 demonstrates that Sudan's exports to China dwarf Myanmar's. This is a critical difference that supports the argument that China would show less compunction in referring Myanmar to the ICC than it showed Sudan. In imports, the countries remained close for most of the 2000s, with Myanmar taking a measurable lead in 2010. On an aggregate basis, Myanmar is apparently a more valuable import partner than Sudan, although it is surprising how close the numbers are given Sudan's geographical distance from China.

Moving from a comparison between the two countries to a comparison of them with the rest of the world, it becomes clear that both have little economic leverage. In 2010, China's imports from Myanmar were 0.07% of China's total imports, less than one tenth of one percent.²⁷⁶ Imports from Sudan were 0.48% of China's total.²⁷⁷ China's exports to Myanmar in the same year were 0.22% of China's total exports, while exports to Sudan were 0.12%.²⁷⁸

²⁷⁵ U.N. COMMODITY TRADE STATISTICS DATABASE, *supra* note 243. As noted *supra* in note 274, import statistics are generally more reliable than export data. In the case of imports from China to Myanmar, however, import data were unavailable for the years under study. Thus, export data from the China reporter were used to show trade from China to Myanmar. To maintain consistency in comparison, export data were also used for trade from China to Sudan.

²⁷⁶ *Id.* China's total imports worldwide in 2010 were worth approximately USD \$1.4 trillion, of which imports from Myanmar totaled approximately USD \$966 million.

²⁷⁷ *Id.* Imports to China from Sudan in 2010 were approximately USD \$6.7 billion. This number does not account for different types of imports, and some imports like petroleum and natural gas—the primary products that Myanmar sells to China—are arguably more critical to China than other goods. Moreover, economics is just one factor of many that influence foreign policy decisions. Nevertheless, the comparative insignificance of Myanmar and Sudan within China's overall trade portfolio is startling.

²⁷⁸ *Id.* China's total exports worldwide in 2010 were approximately USD \$1.6 trillion; of that total, exports to Myanmar were approximately USD \$3.5 billion, and to Sudan approximately USD \$2 billion.

In contrast to China's diversified trade, Myanmar and Sudan are almost completely dependent upon China. In 2010, China was Myanmar's largest import and third-largest export partner, ranking second in overall trade only behind Thailand.²⁷⁹ In the same year, China was Sudan's top importer, top exporter, and top overall trade partner.²⁸⁰

These economic statistics do not predetermine China's foreign policy decisions, in the Security Council or otherwise. They nevertheless reveal important relationships that must be taken into account when predicting Chinese diplomatic decisions. In the cases of Sudan and Myanmar, these statistics show that China enjoys enormous disparities in economic leverage and power.

VIII. CHINA'S POLITICAL RELATIONSHIP WITH SUDAN

Political and diplomatic relations are less concrete and more difficult to compare than economic data, especially with regards to nations as secretive as China, Myanmar, and Sudan. Nevertheless, an examination of China's political relationships similarly reveals that the price for China of acting adversely to Sudan and Myanmar is lower than one might anticipate. As international pariahs, Sudan and Myanmar have little ability to provide meaningful diplomatic support to China, compared to China's capacity to use its substantial international leverage to protect them.

For over fifty years, China has considered African countries diplomatically important.²⁸¹ It has had long and positive relations with Sudan, built on an established framework of cooperation, including ties between political leaders and business elites.²⁸² Historically, China's diplomatic approach to Sudan has been characterized by its support for Sudan's sovereignty, partiality for Sudanese or African mediation processes, and opposition to sanctions—particularly petroleum sanctions.²⁸³ China has been a relatively reliable defender of Sudan on the U.N. Security Council.²⁸⁴ In exchange, China receives diplomatic benefits such as support in defeating Taiwan's application for membership in the

²⁷⁹ DG TRADE, MYANMAR: EU BILATERAL TRADE AND TRADE WITH THE WORLD 6 (2012), available at http://trade.ec.europa.eu/doclib/docs/2006/september/tradoc_113423.pdf.

²⁸⁰ DG TRADE, SUDAN: EU BILATERAL TRADE AND TRADE WITH THE WORLD 6 (2012), available at http://trade.ec.europa.eu/doclib/docs/2011/january/tradoc_147395.pdf.

²⁸¹ Taylor, *supra* note 234, at 939.

²⁸² Large, *supra* note 227, at 1, 7.

²⁸³ *Id.* at 7.

²⁸⁴ Richard W. Williamson, *Sudan and the Implications for Responsibility to Protect*, POL'Y ANALYSIS BRIEF (The Stanley Found., Muscatine, I.A.), Oct. 2009, at 6, available at <http://www.stanleyfoundation.org/publications/pab/WilliamsonPAB1009.pdf>.

United Nations²⁸⁵ and rejection of human rights proposals against China.²⁸⁶ Sudan has come to trust China.²⁸⁷

China's political support for Sudan is focused on two areas: military cooperation and protection at the United Nations.²⁸⁸ China is "Sudan's primary provider of small arms, a major supplier of advanced weapons systems, and Khartoum's most powerful military partner."²⁸⁹ It uses the weapons trade to increase political power and gain access to valuable natural resources.²⁹⁰ Since 2004, China has sold on average 90% of Sudan's small arms.²⁹¹ Notwithstanding a U.N. ban on arms provision and sale in the Darfur region, the United Nations found that most small arms used in the Darfur conflict were manufactured in China.²⁹² Reportedly, many of these weapons found their way to the Janjaweed militias.²⁹³ Military aircraft, including fighter jets and transport helicopters, were imported from China throughout the 1990s.²⁹⁴ In sum, China has become Sudan's "military mentor."²⁹⁵

China's military relationship with Sudan has had myriad benefits for China, strengthening political ties and helping China to obtain Sudan's political support when needed. It has also incentivized Sudan to continue to give China preferences in the oil trade, helped China recoup some of its expenditures on petroleum, provided an outlet for outdated weaponry no

²⁸⁵ *China Thanks Africans for Defeating Taiwan's Bid to Join UN*, SUDAN TRIB., Sept. 27, 2007, http://www.sudantribune.com/spip.php?page=imprimable&id_article=23973.

²⁸⁶ Li, *supra* note 240, at 75.

²⁸⁷ *Id.* at 77.

²⁸⁸ J.S. Kohli, *The Dragon on Safari: China's Africa Policy*, INST. FOR PEACE & CONFLICT STUD. (Special Report No. 86, Oct. 2009), at 6, available at http://www.ipcs.org/pdf_file/issue/SR86-China-Kohli-Final.pdf.

²⁸⁹ HUMAN RIGHTS FIRST, *supra* note 120, at 15.

²⁹⁰ See Christopher Alessi & Stephanie Hanson, *Expanding China-Africa Oil Ties*, COUNCIL ON FOREIGN REL., http://www.cfr.org/publication/9557/china_africa_and_oil.html (Feb. 8, 2012); Large, *supra* note 227, at 5; RICHARD F. GRIMMET, CONG. RES. SERVICE, CRS REPORT FOR CONGRESS: CONVENTIONAL ARMS TRANSFERS TO DEVELOPING NATIONS, 1999–2006, (2007), at 12, available at http://assets.opencrs.com/rpts/RL34187_20070926.pdf; see also Walters, *supra* note 226 (tracing the moment China became Sudan's top provider to 1996).

²⁹¹ HUMAN RIGHTS FIRST, *supra* note 120, at ii.

²⁹² Taylor, *supra* note 234, at 950.

²⁹³ William D. Hartung, *Deadly Traffic: China's Arms Trade with the Sudan*, ARMS & SEC. INITIATIVE POL'Y BRIEF (New Am. Found., D.C.), Aug. 2008, at 2, available at <http://www.newamerica.net/files/nafmigration/080606PBChinaArmsTrade.pdf>.

²⁹⁴ Large, *supra* note 227, at 5.

²⁹⁵ HUMAN RIGHTS FIRST, *supra* note 120, at i; see also Hilary Andersson, *China 'Is Fuelling War in Darfur'*, BBC NEWS, July 13, 2008, <http://news.bbc.co.uk/2/hi/7503428.stm> (reporting on Sudanese weapons that had been traced to China); *China Ups Military Aid to Sudan Despite Human Rights Issues*, WORLDTRIBUNE.COM, Apr. 6, 2007, http://www.worldtribune.com/worldtribune/WTARC/2007/ea_china_04_05.html (reporting increased military cooperation between China and Sudan).

longer needed by the Chinese military, and armed the security forces tasked with protecting China's oil fields and facilities in Sudan.²⁹⁶

The crisis in Darfur made the China-Sudan relationship a subject of international scrutiny, consequently compelling China to play a more active role in Sudanese politics than it might otherwise have chosen.²⁹⁷ In Darfur, China was caught between defending a marginalized ally and improving its international image:

Darfur also placed Beijing [in] a dilemma between two diverging aspects of its new diplomatic standards. On the one side is the traditional emphasis on sovereignty and non-interference, principles that proved to be lucrative to carve out economic deals in Sudan and elsewhere in Africa. . . . On the other side we find constructive engagement . . . necessary to maintain good relations with other world powers and to play a role in multilateral organisations.²⁹⁸

The Darfur situation, in fact, illustrates the “breaking down” of China's strict adherence to non-interference.²⁹⁹ While China officially continues to propound its historical respect for sovereignty, increasing—and negative—media attention, combined with a realization by China that its desire for international prestige depends to some degree on its active participation in world affairs, have led it to be more willing than ever to use its position to influence Sudan.³⁰⁰

As an illustration of this shift to the center, China has continued to give only qualified support for Sudan at the United Nations. For instance, in connection with the Security Council resolution condemning the violence in Darfur and declaring the situation a threat to international peace and security, China's veto threat resulted in the removal of language approving economic sanctions.³⁰¹ Nonetheless, in abstaining from the final vote, China allowed the resolution to pass.³⁰² Later in 2004, the issue of sanctions was raised again, but disappeared due to Chinese objections.³⁰³ Yet China still permitted the passage of Resolution 1564,

²⁹⁶ HUMAN RIGHTS FIRST, *supra* note 120, at 15–16.

²⁹⁷ Large, *supra* note 227, at 7.

²⁹⁸ Holslag, *supra* note 66, at 1.

²⁹⁹ Marcus Power & Giles Mohan, *The Geopolitics of China's Engagement with African Development* (Open U. POLIS Dep't of Politics & Int'l Stud. & BISA Afr. & Int'l Stud. Working Grp.-Sponsored Workshop, July 9, 2008), at 18, available at http://www.open.ac.uk/socialsciences/bisa-africa/workshop/mohan_and_%20power.pdf.

³⁰⁰ Large, *supra* note 227, at 1.

³⁰¹ HUMAN RIGHTS FIRST, *supra* note 120, at iii.

³⁰² S.C. Res. 1556, U.N. Doc. S/RES/1556 (July 30, 2004).

³⁰³ HUMAN RIGHTS FIRST, *supra* note 120, at iii.

which included the request for a Commission of Inquiry to investigate the Darfur situation.³⁰⁴ These instances exemplify China's strong stance in protecting its economic interests by refusing to endorse sanctions, while still permitting crucial censure of an ally and eventual ICC referral.³⁰⁵ As an indication of Sudan's subservience to China, Sudanese President al-Bashir praised China and the other countries that abstained, saying they were Sudan's "true friends"—despite China's refusal to use its veto.³⁰⁶

At the U.N. Commission of Human Rights, and at its successor agency, the U.N. Human Rights Council, China has followed a similar pattern. In 2006, China defended Sudan following a report on human rights abuses by the U.N. Special Rapporteur on the situation of human rights in the Sudan.³⁰⁷ That same year, China helped pass a Human Rights Council resolution calling for the cessation of human rights violations in Darfur, but only after successfully voting against and helping to remove language recognizing Sudan's responsibility to protect against human rights abuses and language recognizing the importance of criminal accountability.³⁰⁸ China's policy of combining support with criticism continued when it welcomed a mission to Darfur but then later objected to the mission's report.³⁰⁹ While criticism of China is certainly justified when it votes against language condemning its abusive allies, it is equally important to recognize how rarely China actually uses its veto power.

China's diplomatic position regarding the presence of U.N. peacekeeping troops in Darfur further reflected the delicate balance between supporting its economic and political ally and simultaneously maintaining international credibility and prestige. After the Darfur Peace Agreement was signed in May 2006, the Sudanese government, ostensibly worried about Western imperialism, strongly opposed a peacekeeping force.³¹⁰ After the African Union came out in support of troops, conditioned on their acceptance by Sudan, China also announced its

³⁰⁴ *Id.*

³⁰⁵ *But see id.* (interpreting China's abstentions as signs of disapproval and rejection, rather than as tacit approvals).

³⁰⁶ *Id.*

³⁰⁷ *Id.* at 18–19.

³⁰⁸ *Id.* at 19.

³⁰⁹ *Id.*

³¹⁰ *Id.* at 20; *see also* Holslag, *supra* note 66, at 2–3. China had multiple reasons to support U.N. troops in Sudan, and also multiple reasons to oppose them, or at least to condition their presence on acceptance by the Sudanese government. On one hand, violence put China's economic interests at risk, and risked triggering unilateral Western action that could weaken China's strategic position in the country. Furthermore, refusing the African Union's request for U.N. troops would have jeopardized China's relations with other African countries, and obstruction of a troop deployment could have threatened China's relationship with Sudan's neighbor Chad, which supported deployment of troops. On the other hand, China had an interest in maintaining a good relationship with Sudan, in preventing chaos from erupting as a result of the imposition of unwelcome forces, and in cooperating in devising a political solution to the problem.

willingness to support the force.³¹¹ China's suggestion that the Sudanese government's consent be required was rejected, although the final resolution "invited" consent.³¹² Abstaining from the vote on Resolution 1706, China even accepted that U.N. troops could use force.³¹³

With Sudan continuing to object, and international pressure accumulating, in August and September 2006, Chinese diplomats began expressing "displeasure" and sending a "strong message" that Sudan should accept the peacekeepers.³¹⁴ In February 2007, China's president visited Sudan, where he wrote off millions of dollars worth of debt, and gave a multi-million-dollar interest-free loan to al-Bashir for a new presidential palace.³¹⁵ In March 2007, China applied additional pressure by removing Sudan from its list of preferred trade partners, thereby eliminating special incentives for Chinese businesses investing there.³¹⁶ In April 2007, China's assistant foreign minister continued to both prod and support Sudan, calling for increased Sudanese flexibility, while also opposing sanctions.³¹⁷ Finally, China's ambassador to the United Nations convinced Sudan to accept a hybrid United Nations and African Union force.³¹⁸ China quickly took credit for the breakthrough, claiming that China's diplomatic work was "inseparable" from Sudan's acceptance of the peacekeepers.³¹⁹ The efforts received praise from abroad.³²⁰

³¹¹ HUMAN RIGHTS FIRST, *supra* note 120, at 20.

³¹² Wu, *supra* note 64, at 84; *see also* S.C. Res. 1706, U.N. Doc. S/RES/1706 (Aug. 31, 2006).

³¹³ Holslag, *supra* note 66, at 3. There are different interpretations of China's negotiating stance on a peacekeeping force. Holslag paints a picture of a cooperative China that "[i]n the drafting process . . . accepted that the peacekeeping operation acted under a Chapter VII mandate," and assented to emphasizing the urgency of the situation, expanding the new mission's tasks, and allowing the force to play a role in the 2010 referendum on Darfur's autonomy. This can be compared with the account provided by the Human Rights First report, which recounted that the Chinese ambassador "expressed China's opposition to a Chapter VII mandate for the force" and that the mandate passed only after the United States and United Kingdom overrode China's objections. HUMAN RIGHTS FIRST, *supra* note 120, at 20.

³¹⁴ Holslag, *supra* note 66, at 5.

³¹⁵ Andersson, *supra* note 295.

³¹⁶ Wasil Ali, *China Uses Economic Leverage to Pressure Sudan on Darfur—US*, SUDAN TRIB., Mar. 6, 2007, <http://www.sudantribune.com/spip.php?article20615>; *see also* Large, *supra* note 227, at 7 (noting that even after removal from the list of preferred trade partners, investment still expanded); Holslag, *supra* note 66, at 7 (asserting that removal from the list was more a reflection of changes in commercial priorities than a lever of pressure).

³¹⁷ Large, *supra* note 227, at 7.

³¹⁸ Robert F. Worth, *Sudan Says it Will Accept U.N.-African Peace Force in Darfur*, N.Y. TIMES, Nov. 17, 2006, http://www.nytimes.com/2006/11/17/world/africa/17darfur.html?_r=1.

³¹⁹ Chris Buckley, *China Claims Credit on Darfur, Raises Arms Concern*, REUTERS, July 5, 2007, <http://uk.reuters.com/article/idUKPEK3477120070705>.

³²⁰ *See* Holslag, *supra* note 66, at 8; John D. Negroponte & Jendayi Frazer, *Briefing on Their Recent Travel to Africa*, U.S. DEP'T OF STATE ARCHIVE, Apr. 23, 2007,

Critics of China's relationship with Sudan have suggested that China has been an inflexibly staunch supporter of Sudan at the United Nations. Human Rights First argues: "[a]t almost every turn, international efforts to protest and end the suffering in Darfur have collided with China's willingness to stand up for Khartoum. China has consistently deflected pressure, emboldened its obstructionism and, of course, protected the two nations' myriad deals and connections."³²¹ Yet China's voting record reflects a more nuanced approach. Despite watering down language, threatening vetoes, and blocking sanctions, between 2001 and 2007, on twenty-two Security Council resolutions on Sudan, China *never* used its veto power, abstained eight times, and voted in favor fourteen times.³²² Thus, while China clearly remained a reluctant participant in Security Council action in Sudan, when push came to shove, it did not wholeheartedly support its ally. Furthermore, in a move that "would have been unimaginable in the past," China's special envoy to Darfur met with rebel leaders, directly contravening China's historical policy of never dealing directly with anti-government leaders out of respect for national sovereignty.³²³ Darfur forced China to balance its traditional principles and economic interests with its desire for long term stability and its need to satisfy international expectations.³²⁴ This balancing of interests explains, to some degree, China's abstentions:

China often runs into a dilemma between international justice and overseas interests. . . . Diplomatically, China is neither willing to directly conflict with the western countries who are often under the excuse for safeguarding human rights nor able to hold a clear position against the Sudanese government. Here, the abstaining becomes a reluctant but necessary option.³²⁵

2009.state.gov/s/d/2007/83417.htm (quoting the U.S. Deputy Secretary of State's acknowledgment of Chinese assistance in convincing Sudan to accept U.N. troops); *see also* Large, *supra* note 227, at 9 (relating that, after sanctions were dropped, U.N. Security Council Resolution 1769, which created a 20,000-strong U.N. force, was adopted unanimously). For the text of the resolution, see S.C. Res. 1769, at 3, U.N. Doc. S/RES/1769 (July 31, 2007) (authorizing deployment of 19,555 military personnel).

³²¹ HUMAN RIGHTS FIRST, *supra* note 120, at iii.

³²² *Id.* at 43 nn.178–79; Large, *supra* note 227, at 7; Tim Morgan, Jr., *UN Security Council Resolutions Pertaining to Sudan and Darfur*, DARFUR REHABILITATION PROJECT, <http://www.darfurrehab.org/background/UNSecurityCouncilResolutionsDarfurSudan.pdf> (updated through July 31, 2007).

³²³ Wu, *supra* note 64, at 84.

³²⁴ Holslag, *supra* note 66, at 7.

³²⁵ Zhang, *supra* note 220, at 8. *But see* Colin Thomas-Jensen & Julia Spiegel, *Activism and Darfur: Slowly Driving Policy Change*, 31 *FORDHAM INT'L L.J.* 843, 850 (2008) (discussing China's tradition of non-interference, particularly when it has strong economic interests, such as in the case of Sudan); Philipp Kastner, *The ICC—Savior or Spoiler? Potential Impacts of International Criminal Justice on Ending the Darfur Conflict* 22–23

The Sudanese government was reportedly quite angered about China's 2005 abstention on its ICC referral.³²⁶ Yet both nations appear to have treated it as a mere blip in a long history of close relations. High-level meetings between military officials from the two countries continued between 2005 and 2007,³²⁷ the years when the referral would have affected relations most. Since then, the Chinese Embassy in the United Kingdom has continued to designate Sudan publicly as a close ally.³²⁸ In 2008, al-Bashir said that following the withdrawal of many multinational oil companies, Sudan was able to "turn to the East [Asia], and the East has never let us down."³²⁹ In fact, according to Human Rights First, "[t]he relationship between the two governments has grown stronger while the violence in Darfur continues."³³⁰

The relationship remains strong despite China's refusal to unconditionally support Sudan because although on the surface the two nations appear to treat each other as equals, their political alliance is characterized by the same unequal division of power that is evident in their economic relationship. Though Sudan may be able to assist China in some instances, China is "widely recognized as critical to Khartoum's . . . international relations."³³¹ A statement by the Chinese special envoy on Darfur is revealing: "[Sudan is] just like a child. If you judge him to be a bad child, when he does something good you should give him a little encouragement and say some nice things."³³²

There are clearly some lessons to be learned from China's political relationship with Sudan. First, China objects loudly to what it considers violations of national sovereignty, especially when they may affect economic relations, but will stray from this position when a larger interest, such as its desire to maintain its international image, is at stake. Second, China often abstains as a means to placate an ally and the international community at the same time. Third, when an ally is in a

(Aug. 2007) (unpublished LL.M. thesis, McGill University), available at <http://digitool.library.mcgill.ca:8881/thesisfile18691.pdf> (noting that China's accommodation of its international allies ceases when its oil interests are threatened).

³²⁶ Wasil Ali, *The Threat of the ICC to the Sudanese Regime*, SUDAN TRIB., Jan. 14, 2007, <http://www.sudantribune.com/The-threat-of-the-ICC-to-the,19753>.

³²⁷ HUMAN RIGHTS FIRST, *supra* note 120, at 14.

³²⁸ *Foreign Ministry Spokesperson Qin Gang's Regular Press Conference on March 5, 2009*, *supra* note 138.

³²⁹ *Sudan President Scoffs at Darfur Sanctions*, SUDAN TRIB., June 20, 2007, <http://www.sudantribune.com/spip.php?article22464>.

³³⁰ *China Shields Sudan in the Security Council After ICC Prosecutor's Report*, *supra* note 131.

³³¹ Large, *supra* note 227, at 1.

³³² Daniel Schearf, *China Takes Credit for Sudan Allowing UN Peacekeepers*, VOICE OF AM., July 4, 2007, <http://www.voatibetanenglish.com/content/a-28-2007-07-05-voa4-90293082/1271789.html>.

position of almost utter economic and diplomatic dependence, the potential cost to China of angering that ally is more acceptable.

IX. CHINA'S POLITICAL RELATIONSHIP WITH MYANMAR

A. *Political Relations Between China and Myanmar, 1949–2010*

The factor that weighs most heavily in Myanmar's favor when considering whether China would veto a Commission of Inquiry or ICC referral is its geopolitical importance to China. Unlike Sudan, Myanmar lies on China's border, separating China's inland provinces from the sea. The stability of Myanmar, both political and economic, has direct repercussions on China; war, HIV and AIDS, drugs, and other problems along the border directly affect Chinese citizens. Because of its key location, Myanmar's condition influences the stability of the entire region's economic, political, security, and military affairs. This Section (A) addresses the history of the nations' diplomatic relationship, the strength of their military ties, the stability of their border, burgeoning rifts in their alliance, and China's 2007 veto of a Security Council resolution critical of Myanmar.

Due to its enormous size, geographic proximity, exploding population, and economic might, China casts a long shadow over Southeast Asian nations,³³³ which it considers crucial to its interests and security.³³⁴ Stability in the area is a top Chinese priority.³³⁵ China and Myanmar's relationship since the 1990s has been one of wary friendship. Border issues, political instability, and Myanmar's status as an international pariah have all strained their relationship. Nonetheless, China has been Myanmar's most important ally. It is too soon to say what type of relationship China will develop with Myanmar's new government, but in regularly defending Myanmar at the international level, China has shown that its interests in political stability and friendly relations with its neighbors are just as crucial to it as its economic interests.

China and Myanmar's relationship dates back to A.D. 122.³³⁶ Since the founding of the P.R.C. in 1949, relations have been generally stable.³³⁷ Ambivalent peaceful co-existence has evolved into strategic alignment.³³⁸ In 1960, the two countries signed a formal treaty agreeing that their relationship would be based on the five "principles of peaceful

³³³ See Michael Leifer, *China in Southeast Asia: Interdependence and Accommodation*, in CHINA RISING: NATIONALISM AND INTERDEPENDENCE 156, 157 (David S.G. Goodman & Gerald Segal eds., 1997).

³³⁴ Zou, *supra* note 258, at 62.

³³⁵ *Id.*

³³⁶ *Id.* at 59.

³³⁷ *Id.*

³³⁸ Shee, *supra* note 259, at 34.

co-existence” China had articulated as the foundation for relations with other nations: (i) mutual respect for territorial integrity and sovereignty; (ii) mutual non-aggression; (iii) mutual non-interference in each other’s internal affairs; (iv) equality and mutual benefits; and (v) peaceful co-existence.³³⁹ As neighbors, the countries proceeded to sign a number of agreements reiterating and expanding on this pledge of cooperation.³⁴⁰ Friendly visits by high-level officials of both countries have been extensive.³⁴¹ China and Myanmar have always called each other “*paukthaw*” (“brother”), a word Myanmar reserves only for China.³⁴²

A turning point in recent China-Myanmar relations came when Myanmar was isolated by the West following its refusal to honor the results of its 1990 democratic election.³⁴³ The economic situation became dire, and Myanmar had little choice but to turn to China.³⁴⁴ Since then, Myanmar has cultivated close ties with China.³⁴⁵ In 1991, the two nations agreed that neither would allow outsiders to impose Western human rights values on their domestic affairs.³⁴⁶ In 2000, China reaffirmed its respect for Myanmar’s territorial integrity and sovereignty, while Myanmar agreed to recognize that Taiwan was part of China.³⁴⁷ In 2004, during a visit to China by Myanmar’s prime minister, the countries again acknowledged and promised to continue their historical friendship.³⁴⁸ In June 2011, the countries “upgraded” their relationship, signing a number of trade agreements, and reaffirming their mutually beneficial friendship and cooperation.³⁴⁹

Several features of Myanmar’s location make it of special interest to China: (i) Myanmar lies at an economic and strategic crossroads where South Asia, East Asia, and Southeast Asia meet;³⁵⁰ (ii) Myanmar shares its longest border with China;³⁵¹ and (iii) Myanmar controls China’s access to

³³⁹ POBZEB VANG, FIVE PRINCIPLES OF CHINESE FOREIGN POLICIES 386 (2008).

³⁴⁰ *See id.* at 386–95.

³⁴¹ Zou, *supra* note 258, at 63–64.

³⁴² *Id.* at 60; Kudo, *supra* note 244, at 3.

³⁴³ Zou, *supra* note 258, at 65.

³⁴⁴ Moe Aung, Myanmar and the Western Pacific Triangle: The Strategic and Economic Policies of China, ASEAN, and Japan Towards Myanmar Since 1988, at 14 (2000) (unpublished M.A. thesis, Int’l Univ. of Japan) (on file with author).

³⁴⁵ Zou, *supra* note 258, at 65.

³⁴⁶ VANG, *supra* note 339, at 392.

³⁴⁷ *Id.* at 395 (explaining that this agreement was part of a joint statement entitled “The Sino-Burmese Joint Statement of the People’s Republic of China and the Union of Myanmar on the Framework of Future Bilateral Relations and Cooperation”).

³⁴⁸ *Id.* at 397.

³⁴⁹ Shwe Yinn Mar Oo, *China, Myanmar Upgrade Relations*, MYANMAR TIMES, June 6–12, 2011, <http://www.mmmtimes.com/2011/news/578/news57811.html> (Thit Lwin trans.).

³⁵⁰ Bruce Vaughn & Wayne M. Morrison, *China-Southeast Asia Relations: Trends, Issues, and Implications for the United States*, CONG. RES. SERVICE, Apr. 4, 2006, at 15, available at <http://www.fas.org/sgp/crs/row/RL32688.pdf>.

³⁵¹ Kudo, *supra* note 244, at 3.

the Indian Ocean.³⁵² China's policies towards Myanmar reflect its multi-faceted interest in the country. China seeks to: (i) preserve regional stability; (ii) continue its economic growth and modernization; (iii) maintain peaceful relations with its neighbors; (iv) keep open a trade route to Southeast Asia, Bangladesh, and India; and (v) develop its southwestern inland provinces.³⁵³ To protect its power and access to trade, China has been building a string of ports from the South China Sea towards the Persian Gulf; several of these are located in Myanmar.³⁵⁴ China's construction of coastal ports and bases along the Indian Ocean has been called the "grand prize" of China's relationship with Myanmar, due to the utility of an increased ability to monitor movements on the Indian Ocean.³⁵⁵

As with China and Sudan, military ties between China and Myanmar have been a key feature of their relationship.³⁵⁶ After 1988, Myanmar abandoned its policy—grounded in a position of Cold War neutrality—of refusing large weapons deals.³⁵⁷ Instead, it launched an ambitious overhaul of its armed forces.³⁵⁸ Since Western countries were unwilling to sell it arms, Myanmar became largely reliant upon China.³⁵⁹ China remains Myanmar's largest supplier of military weaponry.³⁶⁰ In 1989, a Myanmar military delegation agreed to a package of military expenditures totaling approximately USD \$1.4 billion, which included helicopters, attack planes, cruise missiles, and tanks.³⁶¹ As of 2005, China had provided USD \$1.6 billion in military assistance.³⁶² Aside from purely commercial motives, China benefits from the complications that an armed Myanmar causes its rival India.³⁶³ It also appears that China's access to Myanmar's Indian Ocean naval bases came in exchange for arms assistance.³⁶⁴

Despite close ties, the relationship between China and Myanmar has been characterized as "a marriage of convenience rather than a love match."³⁶⁵ There are strains originating from both sides. China's rise has

³⁵² Shee, *supra* note 259, at 36; Vaughn & Morrison, *supra* note 350, at 15.

³⁵³ Shee, *supra* note 259, at 35–36.

³⁵⁴ INT'L CRISIS GRP., CHINA'S MYANMAR DILEMMA, *supra* note 206, at 20.

³⁵⁵ Blumenthal, *supra* note 250, at 425.

³⁵⁶ Zou, *supra* note 258, at 64.

³⁵⁷ Frank S. Jannuzi, *The New Burma Road (Paved by Polytechnologies?)*, in BURMA: PROSPECTS FOR A DEMOCRATIC FUTURE 197, 199 (Robert I. Rotberg ed., 1998).

³⁵⁸ DANIEL L. BYMAN & ROGER CLIFF, CHINA'S ARMS SALES: MOTIVATIONS AND IMPLICATIONS 20 (1999).

³⁵⁹ *Id.*

³⁶⁰ INT'L CRISIS GRP., CHINA'S MYANMAR DILEMMA, *supra* note 206, at 21.

³⁶¹ Shee, *supra* note 259, at 36–37.

³⁶² Vaughn & Morrison, *supra* note 350, at 16.

³⁶³ BYMAN & CLIFF, *supra* note 358, at 19.

³⁶⁴ *Id.*

³⁶⁵ INT'L CRISIS GRP., CHINA'S MYANMAR DILEMMA, *supra* note 206, at i.

created an unbalanced alliance. Before China became a global power, Myanmar played an important role in its foreign policy. But now their imbalance in prestige and economic strength makes China critical to Myanmar's foreign policy, while "Myanmar is currently a low priority for China."³⁶⁶ China's friendship with Myanmar has also become an irritant in China's relationship with the West.³⁶⁷ Tensions also arise because Myanmar's arguable instability and inept government threaten Chinese investments.³⁶⁸

China is increasingly worried about instability on the 2,192-kilometer China-Myanmar border.³⁶⁹ Over 95% of heroin used in China comes from the Golden Triangle region, much of it funneled through Myanmar.³⁷⁰ The border town of Ruili is known as "ground zero" for China's AIDS epidemic; AIDS is reportedly China's leading cause of death related to infectious disease.³⁷¹ Gambling on the Myanmar side of the border is associated with a wide range of illicit activities including kidnapping, torture, and murder.³⁷² Most Chinese have little interest in Myanmar's difficulties, simply regarding it as a failed state rich in natural resources.³⁷³

Myanmar, despite its dependence, is also cautious about its relationship with its neighbor.³⁷⁴ It has become increasingly wary of China's foreign policy intentions. Some in the country fear that China will use it as a bargaining chip with the United States.³⁷⁵ There are indications that China has less sway over the Myanmar government than is widely believed: "[t]he view that China could force political change in Myanmar if only it were willing to use its influence is overstated. Beijing can extract certain minor concessions, but they have never led to fundamental changes."³⁷⁶ The mistrust goes both ways. Myanmar's

³⁶⁶ *Id.* at 2.

³⁶⁷ *Id.*; *see also id.* at 3 ("Beijing has been increasingly frustrated with the erratic and isolationist behaviour of the military leadership, which has spent vast amounts constructing a new capital in Naypyidaw, engaged in discussions to purchase a nuclear reactor from Russia and developed dubious relations with North Korea.").

³⁶⁸ *Id.* at 2-3.

³⁶⁹ *Id.*

³⁷⁰ *Id.* at 14.

³⁷¹ INT'L CRISIS GRP., CHINA'S MYANMAR DILEMMA, *supra* note 206, at 14.

³⁷² *Id.* at 15.

³⁷³ *Id.* at 4; *see also id.* at 22 ("Not only is Beijing increasingly doubtful about the military government's ability to maintain stability on the border, but the generals' mismanagement of their country is compromising Chinese economic interests.").

³⁷⁴ Kudo, *supra* note 244, at 4.

³⁷⁵ *Id.*

³⁷⁶ INT'L CRISIS GRP., CHINA'S MYANMAR DILEMMA, *supra* note 206, at 26; *see also* Grant Peck, *New Myanmar's Changes Are No Revolution*, HUFFINGTON POST, Nov. 8, 2011, <http://www.huffingtonpost.com/huff-wires/20111108/as-myanmar-surprising-changes/> (quoting David Steinberg, Director of Asian Studies at Georgetown University: "Burma is not a client state of China, never has been; the Burmese are far too nationalistic and they

military rulers still distrust China for its previous support of the insurgent Communist Party of Burma, and for its more recent dealings with ethnic groups on the border.³⁷⁷ Myanmar government leaders also fear Chinese domination of their country. Even Chinese officials have observed that Myanmar, especially its northern regions, has become a Chinese economic colony.³⁷⁸ To reduce China's influence, Myanmar has worked on improving ties with other neighbors, particularly India.³⁷⁹

A test of the Myanmar-China relationship came in September 2007, when demonstrations led by Myanmar monks against an unannounced price hike in fuel led to a violent crackdown by the military. China urged restraint both privately and publicly.³⁸⁰ It supported a Security Council statement and—after softening it—a U.N. Human Rights Council resolution deploring the violence.³⁸¹ Urging dialogue and democratic progress, China was relieved that the instability brought about by the demonstrations ended quickly.³⁸²

In January 2008, China joined in further criticism when it supported a Security Council statement disapproving of the Myanmar government's progress on the release of political prisoners and on genuine dialogue with the opposition following the 2007 crackdown.³⁸³ In response, less than a month later, the junta announced a timeline for ratification of a new constitution and multiparty democratic elections.³⁸⁴

In 2008, the relationship was tested again after Cyclone Nargis hit Myanmar. Facing intense international pressure, China convinced the regime to accept, and publicly supported, the United Nation's efforts to supply international humanitarian aid.³⁸⁵ During a December 2008 meeting between Myanmar's leader at the time, Than Shwe, and Chinese Foreign Minister Yang Jiechi, China urged the regime to do more for its people, and said that China would not be able to continue supporting

fear China and they have from the very beginning, but at the same time they know they need to work with China.”).

³⁷⁷ INT'L CRISIS GRP., CHINA'S MYANMAR DILEMMA, *supra* note 206, at 26.

³⁷⁸ *Id.* at 28; *see also* Kudo, *supra* note 244, at 6 (“[I]t has become a client state.”).

³⁷⁹ INT'L CRISIS GRP., CHINA'S MYANMAR DILEMMA, *supra* note 206, at 28–29 (weighing Myanmar's bilateral relations with various countries, and noting that Russia, with a veto vote on the Security Council, has recently become a key trading partner and weapons supplier for Myanmar).

³⁸⁰ *Id.* at 6.

³⁸¹ *Id.*

³⁸² *Id.*; *cf. id.* at 6–7 (relating that when China ran into problems procuring a Burmese visa for U.N. Special Advisor to the Secretary-General Ibrahim Gambari, it was possibly as retaliation for China's joining with the West in condemning the regime).

³⁸³ Patrick Worsnip, *U.N. Council Upbraids Myanmar for Slow Reforms*, REUTERS, Jan. 17, 2008, <http://www.reuters.com/article/2008/01/17/us-myanmar-un-idUSN1725020720080117>.

³⁸⁴ INT'L CRISIS GRP., CHINA'S MYANMAR DILEMMA, *supra* note 206, at 8.

³⁸⁵ *Id.*

Myanmar indefinitely.³⁸⁶ Yang also criticized Myanmar's spending on non-priority initiatives and the lengthy jail sentences of political activists.³⁸⁷

In May 2009, China's support for Myanmar was again at issue when the regime extended Aung San Suu Kyi's house arrest by eighteen months for allegedly allowing an American, John Yettaw, to stay in her house after he swam across a lake to visit her. China reportedly initially supported a strong Security Council statement condemning the trial, but backtracked after Russia opposed it.³⁸⁸ After sentencing, China expressed opposition to a statement deploring the verdict, but agreed to a watered-down version expressing "serious concern."³⁸⁹ Privately, Chinese officials expressed support for Aung San Suu Kyi's release, and for dialogue with the opposition, so long as stability and respect for the Myanmar government's political process were ensured.³⁹⁰

These developments in the China-Myanmar relationship echo China's reactions to Sudan's problems. The International Crisis Group characterizes China's approach toward Myanmar's political problems as "value-free," indicating a willingness to work with whatever government is in power.³⁹¹ In fact, China was the first to welcome the main opposition party when it won the 1990 elections.³⁹² Playing all sides, China maintains contact with opposition groups in exile, and, via the provincial government of Yunnan, with ethnic groups along the China-Myanmar border.³⁹³ These relations have strained the goodwill between the two governments.³⁹⁴ There is even evidence that weapons used by armed opposition groups may unofficially come from the People's Liberation Army and perhaps from Chinese state-owned companies.³⁹⁵ Fighting between these groups and the Myanmar military has led to waves of refugees crossing the border into China, further exacerbating tensions between the two countries.³⁹⁶

China's political ties with Myanmar are undoubtedly strong. Nevertheless, China's continued support of Myanmar has had costs,

³⁸⁶ *Id.*

³⁸⁷ *Id.* at 8–9.

³⁸⁸ *Id.* at 9.

³⁸⁹ *Id.*

³⁹⁰ INT'L CRISIS GRP., CHINA'S MYANMAR DILEMMA, *supra* note 206, at 9.

³⁹¹ *Id.* at 10.

³⁹² *Id.*

³⁹³ *Id.*

³⁹⁴ *Id.* at 11.

³⁹⁵ *Id.*

³⁹⁶ INT'L CRISIS GRP., CHINA'S MYANMAR DILEMMA, *supra* note 206, at 12–13; *see also id.* at 26 (reporting that in late 2009, despite strongly warning Myanmar against it, China was unable to stop, and indeed was not even warned of, Myanmar's crackdown of the Kokang militia, in an area dominated by ethnic Chinese communities, which resulted in 35,000 refugees entering China).

particularly in degrading China's global image and diplomatic leverage.³⁹⁷ Some speculate that China may conclude that international embarrassment and criticism are not worth it: “[w]ithin China there are growing doubts over whether it is worthwhile [to jeopardize] important bilateral relations with Western countries—especially the U.S.—because of Myanmar.”³⁹⁸ Regarding a potential Security Council vote on a Commission of Inquiry or ICC referral, it is critical to recall that China and Sudan also enjoyed strong relations at the time of the Darfur crisis. Because of its geographic proximity to China, however, Myanmar clearly has special strategic importance to China that Sudan does not.

In January 2007 came what was probably the most significant indication that China would treat Myanmar differently from Sudan. The United States sponsored a resolution that would have called upon Myanmar's government to stop military attacks against civilians in ethnic regions, release political prisoners, make tangible progress towards democracy, end forced labor, and stop the use of rape by its military.³⁹⁹ China and Russia jointly vetoed the resolution.⁴⁰⁰ This was China's first Security Council veto since 1973 not related to Taiwan. China and Russia stated that human rights problems were not within the mandate of the Security Council unless they threatened regional or international peace and security, which the situation in Myanmar did not.⁴⁰¹ The vote showed that despite China's increasingly cooperative attitude towards Security Council actions and international peacekeeping, it remains willing to exercise its veto power to protect its allies and its notion of sovereignty.⁴⁰² Yet the veto also had a cost. China's image suffered, and it was heavily

³⁹⁷ *Id.* at 35.

³⁹⁸ *Id.* at 34. *But see* Robert Sutter & Chin-Hao Huang, *China-Southeast Asia Relations: Myanmar and South China Sea Issues*, COMPARATIVE CONNECTIONS, July 2010, at 69 (noting that China's publicly-stated policy continues to be one of non-interference in Myanmar issues, and of protection against Security Council sanctions).

³⁹⁹ Colum Lynch, *Russia, China Veto Resolution on Burma*, WASH. POST, Jan. 13, 2007, at A12.

⁴⁰⁰ U.N. SCOR, 62d Sess., 5619th mtg. at 6, U.N. Doc. S/PV.5619 (Jan. 12, 2007).

⁴⁰¹ *Id.* at 3, 6. It is interesting to note that China appears to have benefitted economically from its negative vote. Despite having a lower bid than India for gas reserves off Myanmar's west coast, China was awarded the contract three days after the vote. *See* INT'L CRISIS GRP., CHINA'S MYANMAR DILEMMA, *supra* note 206, at 28; *see also* Smith & Htoo, *supra* note 248, at 241–42 (noting general agreement that China was awarded the gas in exchange for protection at the United Nations); Jagan, *supra* note 245 (arguing that Myanmar forwent USD \$8.4 billion from what it could have negotiated in order to keep China's political support).

⁴⁰² *See* Yin He, *China's Changing Policy on UN Peacekeeping Operations*, INST. FOR SECURITY & DEV. POL'Y, July 2007, at 42, available at <http://www.silkroadstudies.org/new/docs/Silkroadpapers/2007/YinHe0409073.pdf>; *see also* Katie Lynch, *supra* note 47, at 26 (observing that by vetoing the resolution on Myanmar, China “sends a clear signal that if the Council cannot change Myanmar, it certainly cannot hope to change China”).

criticized in the international media.⁴⁰³ China hedged its position slightly by having its ambassador to the United Nations and its State Councilor both express impatience with Myanmar's reforms.⁴⁰⁴ Furthermore, a resolution on human rights, political freedoms, and public safety is quite different from one relating to criminal charges, for which China has never used a veto.⁴⁰⁵

B. *Political Developments in Myanmar in 2011 and 2012*

In November 2010, for the first time in twenty years, Myanmar held parliamentary elections.⁴⁰⁶ Myanmar had not had a civilian government since 1962.⁴⁰⁷ The elections were strongly criticized as being unfair, by parties ranging from leading politicians inside Myanmar, to the U.N. Secretary-General, to U.S. President Barack Obama.⁴⁰⁸ Few were optimistic about change, particularly because a quarter of parliamentary seats were reserved for military appointees.⁴⁰⁹ In March 2011, hardliner and longtime military junta leader Senior General Than Shwe stepped down from power, making way for the new President, ex-general and former Prime Minister Thein Sein. Again, few had hopes for meaningful

⁴⁰³ INT'L CRISIS GRP., CHINA'S MYANMAR DILEMMA, *supra* note 206, at 5.

⁴⁰⁴ *Id.*

⁴⁰⁵ Janet Benshoof, *Advances in International Law and the Security Council's Legal Obligation to End Impunity for Grave Crimes in Burma*, Apr. 27, 2009, at 6, available at http://globaljusticecenter.net/publications/Advocacytools/FIDH_speech_April27_2009.pdf; see also Wuthnow, *supra* note 44, at 277 (suggesting that China vetoed the resolution on Myanmar because (1) Myanmar was willing to participate in international mediation; (2) the U.S.'s objective in sponsoring the resolution was to make a symbolic statement and it was not open to finding a workable compromise (although U.S. flexibility would not have made a difference in this case); (3) the U.S. did not exert high-level diplomatic pressure on China to cooperate; (4) Russia was allied with China; and (5) regional stakeholders did not show interest in Security Council involvement).

⁴⁰⁶ *Turnout Appears Light in Myanmar's Election*, N.Y. TIMES, Nov. 7, 2010, <http://www.nytimes.com/2010/11/08/world/asia/08myanmar.html>.

⁴⁰⁷ *Id.*

⁴⁰⁸ See, e.g., *Burma Refugees Return Home After 'Sham' Election*, HUFFINGTON POST, Nov. 9, 2010, http://www.huffingtonpost.com/2010/11/09/burma-refugees-return-home_n_780931.html (reporting that a senior party official in the second-largest Myanmar political party called the elections "absolutely unfair"); *Thousands Flee Burma Border Clash, as Votes Are Counted*, BBC NEWS, Nov. 10, 2010, <http://www.bbc.co.uk/news/world-asia-pacific-11708237> (reporting that U.N. Secretary-General Ban Ki-moon called the voting conditions "insufficiently inclusive, participatory and transparent"); *US President Calls Burma Elections 'Sham'*, VOICE OF AM., Nov. 8, 2010, <http://www.voanews.com/english/news/asia/US-President-Calls-Burma-Elections-Sham-106968158.html> (reporting that U.S. President Barack Obama called the elections a "sham").

⁴⁰⁹ See MYANMAR CONST. ch. IV, §§ 109(b), 141(b).

reform.⁴¹⁰ Since then, however, political developments under the new president—including the loosening of censorship, the release of some political prisoners, a new law legalizing independent trade unions, the suspension of work on a USD \$3.6 billion dam being built by China, the rewriting of tax and property ownership laws, an increase in civil servant pay to prevent corruption, the convening of a national human rights commission, and an agreement to end forced labor⁴¹¹—have “stunned observers inside and outside the country.”⁴¹²

Outside leaders have urged caution in accepting these changes too optimistically.⁴¹³ It is still too soon to know the long-term effect of the recent thaw. If sustained, however, a pattern of reforms, and a new spirit

⁴¹⁰ Kazmin, *supra* note 1 (“Few people, in Burma or the outside world, had high expectations when in March the army handed power to a quasi-civilian government after nearly five decades of repressive rule.”).

⁴¹¹ *See id.*; *see also* *Burma Undergoing ‘Three-Step’ Media Reform: Information Minister*, MIZZIMA, Mar. 19, 2012, <http://www.mizzima.com/news/inside-burma/6780-burma-undergoing-three-step-media-reform-information-minister.html> (describing the Ministry of Information’s three-step media reform process: (1) relaxing restrictions on the press; (2) reforming media laws; and (3) supporting the private media sector); *Burma Frees High Profile Dissidents in Amnesty*, BBC NEWS, Jan. 13, 2012, <http://www.bbc.co.uk/news/world-asia-16540871> (relating the “latest of a series of prisoner amnesties” in January 2012); *Burma Law to Allow Labour Unions and Strikes*, BBC NEWS, Oct. 14, 2011, <http://www.bbc.co.uk/news/world-asia-pacific-15303968> (reporting on a new law permitting labor strikes and the formation of labor unions); *Myanmar’s Surprising Government: Dammed if They Don’t*, ECONOMIST, Oct. 4, 2011, <http://www.economist.com/blogs/banyan/2011/10/myanmars-surprising-government?page=2> (discussing the suspension of work on the dam); Steven L. Myers & Thomas Fuller, *Detecting a Thaw in Myanmar, U.S. Aims to Encourage Change*, N.Y. TIMES, Oct. 7, 2011, at A1 (reporting the revision of tax and property ownership laws); Myo Thant, *Burmese Gov’t Personnel Given Pay Raises*, MIZZIMA, Mar. 14, 2012, <http://www.mizzima.com/news/inside-burma/6765-burmese-govt-personnel-given-pay-raises.html> (reporting pay raises for government personnel); *Burma Sets Up Human Rights Commission*, BBC NEWS, Sept. 6, 2011, <http://www.bbc.co.uk/news/world-asia-pacific-14807362> (reporting the establishment of a national human rights commission); *Myanmar to End Forced Labour*, THE BANGKOK POST, Mar. 17, 2012, <http://www.bangkokpost.com/breakingnews/284817/myanmar-agrees-to-end-forced-labour-by-2015> (relating Myanmar’s agreement with the International Labour Organization to end forced labor by 2015).

⁴¹² Jackie Calmes & Thomas Fuller, *Myanmar Democracy Activist to Rejoin Political System*, N.Y. TIMES, Nov. 19, 2011, *available at* <http://www.bostonglobe.com/news/world/2011/11/19/aung-san-suu-kyi-reenter-politics-myanmar/HV68Pt9LsUqP38ZIS3OQQP/story.html>; *see also* Peck, *supra* note 376 (calling the government’s easing of censorship, increased dialogue with Aung San Suu Kyi, suspension of work on Chinese construction of a dam, and legalization of labor unions “surprising”); *Myanmar’s Surprising Government: Dammed if They Don’t*, *supra* note 411 (referring to Myanmar’s “stunning” decision to suspend Chinese construction work on a dam).

⁴¹³ *See, e.g., Myanmar’s Surprising Government: Dammed if They Don’t*, *supra* note 411 (reporting that Aung San Suu Kyi has urged caution in assessing the government’s intentions); Myers & Fuller, *supra* note 411 (noting the U.S. government’s cautious attitude towards Myanmar).

of international cooperation, could fundamentally change Myanmar's relationship with the West and with China. The immediate effect of these developments is that any hope for a Commission of Inquiry or ICC referral is unrealistic, because, even leaving China aside, Western powers do not have the political will to seriously raise issues of justice and criminal accountability while they are hoping for democratic change.⁴¹⁴ But it is important to observe that if there is a lack of will to investigate and prosecute crimes, it may be rooted in Western hopes for democracy and liberalization, rather than based on either the absence of serious crimes, or China's refusal to cooperate.

X. CONCLUSION

Recent signs of democratic change in Myanmar have obscured efforts to seek justice for victims of heinous crimes. Calls for accountability—including a U.N. Commission of Inquiry—seem at this point less realistic than they were even a year or two ago. It is premature, however, to declare Myanmar a reformed nation. Armed conflict, and reports of widespread sexual violence, have continued even since the new government took power. Many believe that Senior General Than Shwe continues to pull the strings of power.⁴¹⁵

⁴¹⁴ One of the strongest legal arguments against referring Myanmar to the ICC in the midst of its recent reforms is that the situation arguably may not satisfy the Rome Statute's Article 13(b) requirement that the situation pose a threat to international peace and security. Interestingly, the Security Council has decided that even situations that appear purely internal can constitute threats to international peace and security. See S.K. VERMA, AN INTRODUCTION TO PUBLIC INTERNATIONAL LAW 450 (2004); Chiyuki Aoi, *Peace Support Operations: Contemporary Challenges and the Role of Japan*, 3 POL'Y PERSPECTIVES, Mar. 2007, available at <http://www.rips.or.jp/research/policy-perspectives-3.html>; *Frequently Asked Questions About Burma and the International Criminal Court*, GLOBAL JUSTICE CTR., at 3–4, http://globaljusticecenter.net/publications/Advocacytools/FAQ_ICC_Referral%20_Eng.pdf (last visited July 25, 2012). A Commission of Inquiry in Myanmar could still be appropriate because it could provide evidence to help the Security Council determine whether such a threat to international peace and security exists.

⁴¹⁵ See, e.g., Cris Sholto Heaton, *Why Burma Has Huge Potential*, MONEYWEEK, Oct. 21, 2011, <http://www.moneyweek.com/news-and-charts/economics/asia/moneyweek-asia-is-burmas-economy-changing-14300> (“Power remains with the key figures in the military junta, headed by Than Shwe, who has been at the top of the group since 1992.”); Robert Horn, *Is Burma's Strongman Really Retiring?*, TIME, Apr. 11, 2011, <http://www.time.com/time/world/article/0,8599,2064470,00.html> (“Few Burma watchers, and few people in Burma . . . believe 78-year-old Than Shwe has truly called it quits.”); Aung Lynn Htut, *The History Behind the Talks*, THE IRRAWADDY, Sep. 6, 2011, http://www2.irrawaddy.org/article.php?art_id=22014 (asserting that Than Shwe is still in control). But see Zaw Nay Aung, *Than Shwe's Post-Election Choreography*, OPEDNEWS.COM, Sept. 29, 2011, <http://www.opednews.com/articles/Than-Shwe-s-Post-Election-by-Zaw-Nay-Aung-110927-388.html> (“Very few think that Than Shwe is still pulling the strings behind the scene and continues ruling the country.”).

Naturally, China has reacted positively to the apparent changes. China would clearly not support a Commission of Inquiry to investigate crimes in Myanmar. However, based on its foreign policy objectives, its historical voting behavior on the Security Council, its experience with the referral of Sudan to the ICC, and its economic and political relationships with Sudan and Myanmar, it is not clear that China would veto such a commission.

Over the past twenty years, China has gradually shifted from strict defense of national sovereignty to reluctant acceptance of international interventions. The value it places on international prestige, economic growth, and political stability is at times detrimental to its allies. China's voting record on the Security Council reflects its disinclination to use its veto power; instead, China abstains to appease rivals, foes, and allies. Surprisingly, China abstained from resolutions requesting a Commission of Inquiry to investigate Darfur, and referring the Darfur situation to the ICC. These abstentions had negligible adverse impact on China's relationship with Sudan. Furthermore, the economic disparities between China and its smaller allies indicate that it has the ability to vote as it wishes without inordinate concern about the consequences.

The ICC is not the only option for Myanmar. In recent years, nations recovering from internal wars and government-perpetrated atrocities have created their own judicial mechanisms, sometimes with U.N. collaboration, to provide a forum for victims and accountability for perpetrators. The International Criminal Tribunal for the former Yugoslavia, the Truth and Reconciliation Commission of South Africa, and the Extraordinary Chambers in the Courts of Cambodia, are just three examples of how justice, accountability, and reconciliation can be tailored to reflect a country's unique culture, history, and objectives. It is difficult to predict what Myanmar will do, if anything, to account for past injustices. Given the military's dominance of the current government,⁴¹⁶ any internal Myanmar action in the immediate future to prosecute current or past military leaders is extremely unlikely. But justice takes time. The International Criminal Tribunal for the former Yugoslavia was established in 1993 to account for crimes committed from 1991 to 2001;⁴¹⁷ South Africa's Truth and Reconciliation Commission was established in 1995 to investigate crimes that occurred between March 1, 1960 and May 10, 1994;⁴¹⁸ and the Extraordinary Chambers in the Courts of Cambodia were

⁴¹⁶ Human Rights Watch, *Burma: US Backtracks on 'Responsible Investment' Pledge*, July 11, 2012, <http://www.hrw.org/news/2012/07/11/burma-us-backtracks-responsible-investment-pledge> ("The Burmese government remains dominated by the military, which under Burma's 2008 constitution enjoys legal supremacy over civilian authorities.").

⁴¹⁷ *About the ICTY*, INT'L CRIM. TRIBUNAL FOR FORMER YUGOSLAVIA, <http://www.icty.org/sid/3> (last visited Aug. 1, 2012).

⁴¹⁸ *TRC: The Facts*, BBC NEWS, Oct. 30, 1998, http://news.bbc.co.uk/2/hi/special_report/1998/10/98/truth_and_reconciliation/142369.stm.

established in 2003 to bring former government leaders to trial for crimes committed between 1975 and 1979.⁴¹⁹

Advocates for Burmese victims hoped to accelerate the judicial process by directly requesting the U.N. Security Council to refer the situation in Myanmar to the ICC. Ironically, however, the ultimate fate of calls for a Commission of Inquiry or Article 13(b) referral is probably in the hands of Myanmar's leaders.⁴²⁰ If fundamental reforms are sustained, such calls may wither away. But if reforms do not last, if government oppression is renewed, or if there is a military coup d'état, no one should be surprised if the United Nations decides to act, and no one should be surprised if China declines to stand in its way.

⁴¹⁹ *Judge Resigns Citing Interference*, RADIO FREE ASIA, Mar. 19, 2012, <http://www.rfa.org/english/news/cambodia/resignation-03192012165430.html>.

⁴²⁰ The recent reforms in Myanmar, and turnover in its leadership, have likely reduced the influence of those military leaders who would be most likely to be charged with war crimes, making their protection by allies both inside and outside of the country less likely. Cf. Max du Plessis & Christopher Gevers, *UNSC Referral of Libya Gives ICC the Opportunity to Prove Its Worth*, INST. FOR SEC. STUD., Mar. 4, 2011, http://www.issafrica.org/iss_today.php?ID=1243 (arguing that African nations supported the referral of Libya to the ICC because Libya's leader, Colonel Muammar Gaddafi, had become "yesterday's man").