

2014

H-Diplo

H-Diplo Roundtable Review

h-diplo.org/roundtables

Volume XVI, No. 12 (2014)

8 December 2014

Roundtable Editors: Thomas Maddux and Diane Labrosse

Roundtable and Web Production Editor: George Fujii

Introduction by Erik Voeten

David Bosco. *Rough Justice: The International Criminal Court in a World of Power Politics*.
New York: Oxford University Press, 2014. ISBN: 9780199844135 (hardcover, \$29.95).

URL: <http://www.tiny.cc/Roundtable-XVI-12> or
<http://h-diplo.org/roundtables/PDF/Roundtable-XVI-12.pdf>

Contents

Introduction by Erik Voeten, Georgetown University	2
Review by Kevin Jon Heller, SOAS, University of London	5
Review by David Kaye, University of California, Irvine, School of Law	10
Review by Samuel Moyn, Columbia University	14
Author's Response by David Bosco, American University School of International Service ...	17

© 2014 H-Net: Humanities and Social Sciences Online



This work is licensed under a [Creative Commons Attribution-NonCommercial-NoDerivatives 4.0 International License](http://creativecommons.org/licenses/by-nc-nd/4.0/).

Introduction by Erik Voeten, Georgetown University

The International Criminal Court (ICC) was founded on the principle that perpetrators of war crimes, crimes against humanity, and genocide should be prosecuted regardless of their nationality, ethnicity or political affiliation. Yet, the ICC must also operate in an international legal and political system that makes the implementation of these desiderata far from straightforward. Voluntarism remains a key principle in international law. States can escape the ICC's reach (to an extent) by not ratifying the Rome Treaty. Powerful states have both the ability and will to influence the Court's proceedings. Indeed, the Rome Treaty institutionalizes this by assigning certain prerogatives to the United Nations Security Council, most notably the ability to refer and defer cases.

David Bosco's *Rough Justice* masterfully analyzes how this tension between principle and power politics is resolved in practice. Bosco does not offer a simplistic account in which power corrupts all. Instead, he lays out several strategies that major powers could follow as well as potential responses by the Court, most notably the Prosecutor. For example, major powers could have chosen to actively marginalize the Court by consistently and actively undermining it. There is some evidence for such behavior. For example, 73% of the world's armed forces are located in countries that are not ICC members (7). The U.S. efforts to get countries to agree to bilateral immunity agreements (or Article 98 agreements) are another example.

Bosco argues convincingly that the process as a whole is better characterized as one of mutual accommodation. Major powers accept some areas in which the ICC can exercise independence. They seek to control others. The Prosecutor responds with pragmatic and strategic behavior in an attempt to maximize the ICC's authority within the bounds accepted by the major powers, most notably the five permanent members of the UN Security Council. This has resulted in some well-defined areas where the ICC cannot go. Most obvious among these are investigations into misbehavior by the major powers. Yet there have also been surprising areas of cooperation, including Security Council referrals on the Sudan and Libya.

It is my pleasure to introduce the distinguished and diverse set of reviewers of this timely and important book. Samuel Moyn embeds Bosco's book in a longer history of the tensions between power and justice. If international justice is not impartial, then it loses its legitimacy. Yet, powerful states have always had incentives to interfere with individual exercises of justice and they rarely fail to act on these temptations. The ICC, despite all its normative appeal, has been unable to break this pattern.

David Kaye lauds Bosco for the clarity of his exposition and for treating the intersection between idealism and power politics "with great modesty and insight, and without a hint of dogma." Yet, Kaye also finds that in evaluating the ICC we must look beyond power politics. Questions about the way the ICC has had more subtle influences on how national, subnational, and international actors conceive of justice-related issues are not answered in

this book. Looking at such questions may lead to a different and more nuanced perspective about the role of the ICC in international affairs.

Kevin Jon Heller praises Bosco for writing “[..] a history of a complex international organization that is eminently readable yet does not sacrifice analytic rigor.” He especially appreciates the “deceptively simple theoretical structure,” which characterizes the relationship between the Court and powerful states. Yet, Heller also has some pointed criticisms. Most notably, he believes that Bosco underplays the failings of Luis Moreno-Ocampo as the Chief Prosecutor of the ICC. He also takes issue with some historical assessments. At times, Heller argues, Bosco understates the agency of the Court. For example, Moreno-Ocampo was under no obligation to accept the Security Council’s terms on Libya. At other times, Bosco oversells what the Office of the Prosecutor (OTP) might have done. It is really not up to the OTP to lobby in pursuit of referrals against non-member states.

I share the reviewers’ praise for the analytical clarity of the book. From the perspective of my discipline, international relations, I hope it will contribute to more subtle understandings of how power affects the workings of international institutions. But, as the reviews show, there are also important lessons for historians and lawyers. As in his previous volume¹), David Bosco has given us a book that has the distinguished qualities of being clear, interesting, and persuasive.

Participants:

David Bosco (JD, Harvard Law School; M.Phil, Cambridge University; BA, Harvard University) is Assistant Professor at the American University School of International Service. He is author of *Rough Justice: The International Criminal Court in a World of Power Politics* (New York: Oxford University Press, 2014) and *Five to Rule Them All: The UN Security Council and the Making of the Modern World* (New York: Oxford University Press, 2009). He is at work on a book project regarding governance of the world’s oceans.

Erik Voeten is the Peter F. Krogh Associate Professor of Geopolitics and Justice in World Affairs at [Georgetown University’s](http://www.georgetown.edu) Edmund A. Walsh School of Foreign Service and Government Department. His research examines the role of international institutions and law in international affairs and has been published in numerous academic journals, including the *American Political Science Review* and *International Organization*. He is an editor of and contributor to the Washington Post’s Monkey Cage. He is also an editor of the new on-line open access peer reviewed journal Research and Politics. He is currently working on a book on theories of how international institutions affect war and peace.

Kevin Jon Heller is Professor of Criminal Law at SOAS, University of London, and a Principal Fellow at Melbourne Law School. He holds a JD (with distinction) from Stanford Law School and a PhD in Law from Leiden University. He is the author of *The Nuremberg*

¹ David Bosco. 2009. *Five to Rule Them All*. Oxford University Press, 2009

Military Tribunals and the Origins of International Criminal Law and the co-editor of *The Hidden Histories of War Crimes Trials*, both published by Oxford University Press. He is currently writing a book entitled *A Genealogy of International Criminal Law*, which will be published by Oxford University Press in 2016.

David Kaye BA (Rhetoric), JD, University of California, Berkeley. The author is a Clinical Professor of Law at the University of California, Irvine, School of Law. He was recently appointed by the United Nations Human Rights Council as Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression. He previously was on the faculty at UCLA School of Law and served for ten years as a lawyer with the U.S. Department of State. Relevant publications include *The Council and the Court: Improving Security Council Support of the International Criminal Court* (May 2013); *Who's Afraid of the International Criminal Court?* Foreign Affairs (May/June 2011); and *Justice Beyond The Hague: Supporting the Prosecution of International Crimes in National Courts*, Council on Foreign Relations Special Report No. 61 (June 2011). He is currently working on an analysis of Security Council members' uses of authority – legal and otherwise – to justify voting behavior on the Council.

Samuel Moyn is Professor of Law and History at Harvard University. His most recent book is *The Last Utopia: Human Rights in History* (2010) and his new book is *Human Rights and the Uses of History* (2014). With Jan Eckel, he has also recently edited *The Breakthrough: Human Rights in the 1970s* (2013).

In *Rough Justice: The International Criminal Court in a World of Power Politics*, David Bosco provides a comprehensive account of the creation and evolution of the first international criminal tribunal with pretensions to exercise jurisdiction over both the victors and the vanquished. As the book's subtitle indicates, though, *Rough Justice* is not content with a dry, positivistic account of the International Criminal Court's (ICC) first fifteen years. Instead, Bosco's aim is to illuminate how the Court has managed – occasionally successfully, more often less so – the inevitable pressures brought to bear on it by powerful states. As he says, “[t]his book tells the story of how powerful states and a potentially revolutionary court learned to get along” (2).

There is much to like in this excellent book. Its structure is straightforward: an introductory chapter laying out the conceptual framework Bosco uses to analyze the relationship between the ICC and powerful states; five chapters that narrate the various chronological phases in the Court's development; and a final chapter that uses the theoretical framework to draw conclusions about how the ICC and powerful states have influenced each other. The book's narrative chapters are eminently readable, providing a wealth of information about the Court that will surprise even scholars who follow it closely. Some particularly striking examples: concern among lawyers in the Office of the Prosecutor (OTP) that the Jurisdiction, Complementarity, and Cooperation Division – which was headed by a former foreign-ministry official – represented “a political organ at the very center of the prosecution's office” (95); Luis Moreno-Ocampo, the ICC's first Prosecutor, returning unopened a sealed envelope containing intelligence on Darfur the U.S. had accidentally turned over to the OTP (114); a Sudanese official “pushing \$15,000 in a case across a table during a meeting with a court representative” about Darfur (127). These juicy details – and there are many more in the book – represent the fruit of the hundreds of hours Bosco spent conducting interviews with the Court's stakeholders.

The real value of Bosco's book, however, comes from its deceptively simple theoretical structure. In terms of state behavior, he identifies three different approaches powerful states could take toward the Court: marginalization; control; and acceptance (12). In terms of Court behavior, he identifies four different strategies the OTP could use to respond to those approaches, differentiated in terms of how deferential they are to state interests: the apolitical; the pragmatic; the strategic; and the captured (20). Bosco then argues that the evolution of the Court can best be understood as a process of “mutual accommodation” that reflects the relative asymmetry of power between the ICC and powerful states (22): powerful states gradually abandoned marginalization in favor of acceptance and control through the Security Council; the OTP pragmatically and strategically avoided institutional capture by insisting upon the Court's independence while avoiding open conflict with powerful states. As Bosco puts it:

For the most part, the prosecution officials have not resisted these efforts at major-power control. They have not challenged the Security Council's restrictions on the court's freedom of action or campaigned for expanded jurisdiction. Meanwhile, the court's cautious and

deferential behavior in selecting situations to investigate has continued. The historical record does not suggest that leading states have “captured” the prosecutor or other court officials. Indeed, there are notable examples of the prosecutor rejecting major-power pressure and advice. But these assertions of independence have occurred within a broadly conciliatory framework (22).

Bosco’s conceptual framework, his chronological narrative, and his overall assessment of the relationship between the Court and powerful states are all convincing. But that does not mean *Rough Justice* is beyond criticism. On the contrary, it is possible – and in some cases necessary – to take issue with Bosco’s analysis and conclusions.

To begin with, Bosco’s analysis of Security Council referrals – in Darfur and Libya – is not always persuasive. He describes them as “significant acts of control,” because they “allowed the major-power dominated Security Council to shape the resource-constrained court’s docket” (180). That may be true – but if the Court was captured by the Security Council, the Court had no one but itself to blame. The OTP is under no obligation to act on a Security Council referral; if Moreno-Ocampo had disapproved of the conditions the Council imposed on the referrals – the lack of funding and the ostensible exemption of citizens of non-member states from the Court’s personal jurisdiction (112) – he could have refused to open investigations until the Security Council rectified the problem. With regard to Darfur, we might be able to give Moreno-Ocampo a pass; as Bosco notes, the referral “seemed in one stroke to move the institution to the center of international conflict resolution efforts” (113), which was critically important in the Court’s formative years. But no such need justifies Moreno-Ocampo’s lightning-fast decision to open an investigation in Libya. By that time, the Court had a full docket, the OTP’s investigative resources were spread dangerously thin, and the Security Council had already made clear in Darfur that it could not be counted on to ensure that the OTP would be able to effectively investigate. Yet Moreno-Ocampo opened the Libya investigation anyway, thereby ensuring the Court’s further marginalization.

If Bosco goes too easy on Moreno-Ocampo in terms of the Libya referral, he is too hard on him – and on his successor, Fatou Bensouda – when he criticizes the OTP for not seeking referrals when “faced with evidence of large-scale crimes in nonmember states, notably Iraq, Syria, and Sri Lanka.” In Bosco’s view, that reluctance limits the OTP’s “ability to deploy the court’s moral authority” (185). Bosco is surely correct to insist, in response to the OTP’s insistence that such lobbying would be impermissibly political, that reluctance to lobby is “not at all inevitable.” But that does not mean that the OTP’s reluctance is unjustified. How should the OTP decide which non-member situations deserve a lobbying campaign? Such decisions would have to be made pursuant to some kind of gravity metric, lest they be based on the fickle attention span of the international media. And they would have to be made on the basis of a world-wide comparison of situations, to avoid (justified) claims of arbitrariness. Neither requirement is impossible to satisfy – but how could the OTP justify committing the resources necessary to conduct the requisite principled and universal survey of international crimes, particularly given that the OTP would never be able to guarantee that the Security Council would act on its recommendations? Would not the Court’s ‘moral authority’ be undermined, not enhanced, by a string of failed lobbying

efforts?

In a similar vein, it is also possible to question Bosco's reading of the Security Council's failure to defer the investigations in Darfur and Kenya, which he believes means that "the court's normative power has effectively deactivated one key major-power instrument of control" (181). But those failures do not seem to reflect normative power at all – instead, they represent an example of how good institutional design can minimize the possibility of an organization being captured by powerful states. Early drafts of Article 16 of the Rome Statute would have permitted any member of the Security Council to defer an investigation simply by putting the situation in question on the Council's agenda. The final text of Article 16, however, requires the Security Council to pass a deferral resolution.¹ As a result, any member of the Permanent Five (P-5) can prevent a deferral simply by casting its veto. That power makes a deferral just as difficult to pass as a referral: unless all of the members of P-5 agree that an investigation should be deferred, the investigation will continue. Indeed, as Bosco discusses, the U.S. likely kept the Darfur investigation going single-handedly by threatening to veto any attempt to defer the OTP's investigation (146).

It is also worth mentioning a few issues with Bosco's historical narrative. Most notably, he seriously downplays Moreno-Ocampo's failings as Prosecutor – both managerial and legal. In terms of the former, Bosco acknowledges that in 2005 the International Labor Organisation (ILO) "criticized the prosecutor for having participated directly in the dismissal" of an employee who had informed the judges that Moreno-Ocampo had pressured a journalist for sex (153). But that is a rather desiccated account: in fact, the ILO (which Bosco does not name) concluded that Moreno-Ocampo had "seriously infringed" the employee's rights and awarded the employee two years' salary and 25,000 euros in "moral damages"² – money that came directly out of the Court's already-tight budget. Moreover, Bosco fails to mention that the ILO ruled against Moreno-Ocampo a *second* time in 2012, holding that he had wrongly refused to pay the lead prosecutor in the *Lubanga* case nearly 40,000 euros of overtime.³ Little wonder the OTP had a very difficult time holding on to key staff during Moreno-Ocampo's tenure.

Bosco also understates the extent of Moreno-Ocampo's legal failings. To be sure, some of those failings appear in the book, such as Moreno-Ocampo's penchant for meeting privately, and inappropriately, with powerful states to reassure them he had no intention of investigating their actions – the U.S. concerning Iraq (87), Israel concerning Operation Cast Lead (162). But many of Moreno-Ocampo's most problematic actions are either underscrutinized or ignored completely. The issue of intermediaries in *Lubanga* is an

¹ See Rome Statute, Article 16.

² <http://www.rnw.nl/international-justice/article/moreno-ocampo-slammed-abuse-power-chief-icc-prosecutor-denies-allegations>.

³ <http://opiniojuris.org/2012/02/10/international-labor-organization-rules-against-otp-regarding-overtime/>

example of the former: although Bosco acknowledges that the OTP's refusal to turn over confidential information to the judges and the defence almost derailed the case, he fails to mention the most disturbing aspect of the controversy: Moreno-Ocampo's scandalous insistence that he had no obligation to follow a binding order of the Court. That is why the Trial Chamber considered terminating the prosecution; in its words, Moreno-Ocampo could not "be allowed to continue with this prosecution if he seeks to reserve to himself the right to avoid the Court's orders whenever he decides that they are inconsistent with his interpretation of his other obligations."⁴ It would also have been helpful if Bosco has noted that it was not just confidential information in general that the OTP refused to disclose, but *exculpatory* confidential information – a fact that makes Moreno-Ocampo's intransigence look even worse.

Bosco also should have mentioned Moreno-Ocampo's scandalous 2012 interview with *Vanity Fair*, during which he made numerous prejudicial statements about the prosecution of Saif Gaddafi. Those statements led the Appeals Chamber to issue a stunning rebuke of Moreno-Ocampo, describing his behavior as "clearly inappropriate in light of the presumption of innocence" and asserting that it "not only reflects poorly on the Prosecutor but also, given that the Prosecutor is an elected official of the Court and that his statements are often imputed to the Court as whole, may lead observers to question the integrity of the Court as a whole."⁵ The failure to include that incident in the book – and there are many others worth mentioning – makes it difficult, if not impossible, for the reader to judge the success or failure of Moreno-Ocampo's tenure.

Finally, there are few places in the book where Bosco would have been well-served by dwelling in more detail on legal issues. In some cases, the problem is that Bosco fails to question unconvincing explanations provided by his sources. An example is the OTP's failure to open a formal investigation in Afghanistan, which he explains by saying that "[a]bsent active cooperation by the Afghan authorities and NATO forces, the prosecutor might have difficulty meeting" the Rome Statute's threshold for a *proprio motu* investigation (163) – "a reasonable basis" to believe crimes had been committed. But that is simply not the case: "a reasonable basis" is an extremely low standard,⁶ one that the OTP could have easily met simply by relying on witness statements and public reports of Taliban crimes and torture at Bagram Air Force Base. Indeed, the OTP had little trouble establishing a reasonable basis to believe crimes had been committed in Darfur, despite never being able to enter the country – a limitation that would not hinder a formal investigation in Afghanistan.

⁴ <http://opiniojuris.org/2010/07/09/i-think-its-time-to-remove-moreno-ocampo/>

⁵ Prosecutor v. Saif Gaddafi, Decision on Request for Disqualification of the Prosecutor, ICC-01/11-01/11 OA 3 (12 June 2012), para. 33.

⁶ See, for example, Situation in the Republic of Kenya, Decision Pursuant to Article 15 of the Rome Statute on the Authorization of an Investigation into the Situation in Kenya, ICC-01/09 (31 Mar. 2010), paragraph 34.

In other cases, Bosco simply fails to provide the reader with enough law to understand his more general political analysis. The best example here is his discussion of Judge Kaul's "vigorous dissent" in the *Kenya* cases. According to Bosco, Kaul "argued that the violence in Kenya did not meet the threshold that should be required for crimes against humanity. More broadly, he worried that the court might spread itself too thin if it did not police the line between serious crimes and crimes of concern to the international community as a whole" (160). Bosco's statement is not inaccurate – but it is incomplete. It implies that Kaul concluded that the crimes in Kenya were not grave enough to justify a formal investigation. In fact, Kaul dissented because he did not believe that the prosecution's evidence satisfied Article 7(2)(a) of the Rome Statute, which deems a widespread or systematic attack on a civilian population a crime against humanity only if it is committed "pursuant to or in furtherance of a State or organizational policy to commit such an attack." It is precisely the presence of such a policy, in Kaul's view, that distinguishes crimes against humanity from "ordinary" domestic crimes.⁷

None of these problems, however, detracts from the value of *Rough Justice*. We might wish that Bosco was more skeptical of his subject; it is difficult to avoid coming away from his book with the sense that the ICC has little chance of ever moving beyond its conciliatory approach to powerful states. And we might quibble here and there with some of Bosco's interpretations of important figures and events in the Court's history. But *Rough Justice* is still a major accomplishment – it is not easy to write a history of a complex international organisation that is eminently readable yet does not sacrifice analytic rigor. Bosco has done precisely that with regard to the ICC, and we are all in his debt for his having done so.

⁷ *Ibid.*, paragraph 150.

With impeccable publishing timing, the themes of *Rough Justice* have been coming to life at the United Nations (UN) throughout the spring of 2014.¹ For three years, as the situation in Syria moved from early 2011's mass civil protest against the regime of President Bashar al-Assad to the regime's violent repression of it, then to civil war, Assad's chemical weapons use, massive attacks on civilian populations, mass displacement, and internecine battles within the opposition, the Barack Obama administration resisted the calls for some form of international accountability.² In early 2013, dozens of states signed onto a Swiss-organized campaign urging the Security Council to refer the situation to the International Criminal Court (ICC).³ The UN High Commissioner for Human Rights repeatedly called for such a referral, as did non-governmental organizations (NGOs) around the world.⁴ Suddenly and without explanation, in early May 2014, the United States decided to join a French effort to have the UN Security Council refer the armed conflict in Syria to the ICC for investigation and possible prosecution of those responsible for war crimes, crimes against humanity, and acts of genocide.⁵ Realistically, Russian and Chinese opposition seemed likely, dampening any optimism that the change in American policy and the initiative of the French would lead to an actual ICC referral.⁶

How is one to make sense of the Security Council's decision-making process regarding Syria and the ICC, and the motivations of the actors participating in it? One should start by reading *Rough Justice*, David Bosco's introduction to the forces that envelop and buffet the ICC. The most comprehensive non-technical introduction to the ICC, one that will provide students, faculties in law and politics, and general readers with a framework to understand the role justice plays in the Security Council and beyond, *Rough Justice* avoids generics and

¹ In disclosure, I commented on an early draft of the manuscript, and I am cited as an interviewee in the book.

² See Remarks by Ambassador Samantha Power, U.S. Permanent Representative to the United Nations, on Syria at the Center for American Progress, Washington, D.C., 6 September 2013, available at <http://usun.state.gov/briefing/statements/213901.htm>.

³ See Letter from the Permanent Representative of Switzerland to the United Nations to the President of the Security Council, 14 January 2013, available at <http://www.news.admin.ch/NSBSubscriber/message/attachments/29293.pdf>.

⁴ See, for example, Statement by Ms. Navi Pillay, United Nations High Commissioner for Human Rights: Side event to the Human Rights Council's 23rd Session, Syria – the Path to Peace, 7 June 2013, available at <http://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=13426&LangID=E>; and Human Rights Watch, Syria: Groups Call for ICC Referral, 15 May 2014, available at <http://www.hrw.org/news/2014/05/15/syria-groups-call-icc-referral>.

⁵ See Colum Lynch, *Exclusive: U.S. to Support ICC War Crimes Prosecution in Syria*, Foreign Policy, 7 May 2014, available at http://thecable.foreignpolicy.com/posts/2014/05/07/exclusive_us_to_support_icc_war_crimes_prosecution_in_syria.

⁶ See Gerard Araud, Permanent Representative of France to the United Nations, Twitter, Tweet of 15 May 2014 ("France has presented a resolution to get it. We'll go to the vote next week but, unfortunately, a Russian veto is likely."), available at <https://twitter.com/GerardAraud/status/466940834063998976>.

clichés in a study of the perennial clash between peace and security, on the one hand, and justice and accountability, on the other.⁷ Bosco is transparent about the perspective he brings to the subject, noting, “The letter and spirit of the court’s governing statute reject the idea that power or political influence should influence the course of justice. But the new court operates in a turbulent world where power matters.” (1)

Power matters not merely in an abstract IR-theory sense. In the context of the ICC, a specific set of Security Council powers would benefit the Court’s activity. There is the power to refer a situation to the Court for investigation and possible prosecution, as the French are seeking for Syria.⁸ There is the power to authorize a state to use force that would otherwise be illegal under the UN Charter, such as cross-border force to apprehend an individual fugitive wanted by the ICC.⁹ There is the power to obligate all states to cooperate with the Court, as the Council did when it directly created war crimes tribunals for the former Yugoslavia and Rwanda in 1993 and 1994 respectively.¹⁰ These are meaningful powers that the Council may wield for the benefit of the Court, and yet it almost never does so; indeed, it has never deployed any of these powers in the two cases that the Council itself referred to the Court. It has provided mainly limited political or rhetorical support for the several other situations pending before the Court today. In fact, the Council has exercised power to *limit* the reach of the Court, using such tools as jurisdictional exemptions and funding limitations in the resolutions referring the Darfur and Libya situations.¹¹

With the exercise of power central to *Rough Justice*, Bosco presents a theory-sensitive but politically-grounded argument that governments – given the choice of marginalizing (weakening), accommodating (accepting), or controlling the Court – more often than not seek mechanisms of control (11 – 22). As he puts it, since “some of the world’s most powerful states lost ownership of international justice” (23), they often want to rein it in and regain control. Bosco highlights examples of state “control behavior” (21) of the ICC throughout the book, wisely focusing on the permanent five members of the UN Security Council (the so-called P5) and a handful of other key states and non-governmental organizations. The first term of President George W. Bush’s administration, for instance, presents a textbook case of marginalization, characterized by anti-ICC legislation and multiple U.S. efforts to shield U.S. nationals from the Court’s jurisdiction (71 – 75). The broad European embrace of the ICC – ratifying the Rome Statute, regularly pressing for

⁷ For a technical exploration of the Rome Statute, see William Schabas, *The International Criminal Court: A Commentary on the Rome Statute* (Oxford: 2010). For an American inside perspective of the story of the adoption of the Rome Statute, see David J. Scheffer, *All the Missing Souls: A Personal History of the War Crimes Tribunals* (Princeton University Press: 2012).

⁸ Article 13, Rome Statute for the International Criminal Court.

⁹ Article 42, United Nations Charter.

¹⁰ See UN Security Council Resolution 827 (1993) (deciding that “all States shall cooperate fully” with the Tribunal); UN Security Council Resolution 955 (1994) (same)

¹¹ See UN Security Council Resolution 1593 (2005) (Sudan referral); UN Security Council Resolution 1970 (2011) (Libya referral).

political support – reflects acceptance (132). Chinese and Russian attitudes toward the Court are less open and pronounced, and they are less discussed in *Rough Justice*. It is evident that China and Russia are accommodationist when it is in their interest to do so (as in Libya) but are generally transactional in their attitudes toward the ICC; their behavior varies according to the policy interest at play.¹²

Bosco goes beyond the states, however, in order to show that ICC officials themselves, aiming not to be pawns in a great power game, try to shape that power dynamic to their own ends. He notes that the first Prosecutor, Luis Moreno Ocampo, went to European capitals to lobby for his job with an “itinerary [that] reflected an understanding that while more than seventy states had joined the court [at that time, 2003], the European powers were the principal movers behind the new institution.” (84) On balance, however, the Court has seemed to come out on the losing side when it has sought to play the power game.¹³ Bosco is sensitive to the difficulties faced by Moreno-Ocampo, but despite the prosecutor’s vision of engaging and speaking the language of states when necessary (94 – 95), he regularly alienated them and triggered numerous crises. His chief prosecutorial legacies – an understandable but burdensome focus on African situations and a deeply fraught and problematic relationship with the African Union – call into question his strategic acumen and reinforce Bosco’s presentation of “evidence that the ICC has been significantly constrained by major-power interests” (187).

Rough Justice focuses on international power politics, but it also lays a foundation for further research. Consider, for instance, the role of ‘soft power.’ Bosco acknowledges the potential salience of “the power of the ideals and norms that underlie the institution” (187). He notes that “even major powers are limited in their ability to challenge frontally justice processes” (188), framing the issue as a question of how norms may limit the freedom of action of major powers. One might also pose the question a bit differently: do those ideals and norms, as embodied by the ICC, influence the behavior of states and non-state actors even when the ICC itself is constrained by major powers? Karen Alter, taking on international courts more generally, asks the same kind of question: “How does creating an international court with such limited powers change international politics?”¹⁴

It is no doubt true that the major powers have found “space for less obvious mechanisms of control” (188) of the ICC. But has the ICC, or its mere existence, created space for “less obvious mechanisms” of influence over state and non-state behavior? Putting aside questions of deterrence of war crimes, crimes against humanity, and acts of genocide, difficult empirical ground for international justice, does the ICC have a symbolic power that shapes the way states, especially on the Security Council, integrate justice into strategies of

¹² The Russian and Chinese statements at an open ICC debate at the Security Council in October 2012 provide evidence of such transactional attitudes. See 6849th Meeting of the Security Council, UN Doc. S/PV.6849, 17 October 2012.

¹³ See also Alana Tiemessen (2014), *The International Criminal Court and the politics of prosecutions*, *The International Journal of Human Rights*, available at <http://dx.doi.org/10.1080/13642987.2014.901310>.

¹⁴ Karen Alter, *The New Terrain of International Law* (Princeton University Press, 2014), 32.

peacemaking, peacekeeping, and international security? Have the public roles of the Prosecutors, Moreno Ocampo and his successor, Fatou Bensouda, influenced state behavior in any sense? How has the existence of the ICC influenced the development of attitudes around the Responsibility to Protect, the well-known set of principles that may culminate in what is also known as humanitarian intervention? The Security Council has referred positively to the ICC over a dozen times in resolutions beginning in 2011; it even authorized an Intervention Brigade for the Democratic Republic of the Congo to use force to capture fugitives from ICC justice there.¹⁵ Would justice and accountability have been given such pride of place in the absence of a permanent international criminal court? Have states taken steps to ensure that they have the tools to ensure accountability for Rome Statute crimes in their domestic systems? Why have they done so or failed to do so? Have such tools had an impact on domestic norms when it comes to behavior in armed conflict? These sorts of questions, though outside the scope of Bosco's study, deserve close examination as much as the power politics do.

Idealism and the realities of power and politics intersect with the example of the ICC, and David Bosco treats that intersection with great modesty and insight, and without a hint of dogma. *Rough Justice* provides the tools with which to begin the broader inquiry, not just into how states constrain the Court and other international organizations, but whether the Court – its reality or its symbolism – constrains or influences states.

¹⁵ See Bruce Oswald, *The Security Council and the Intervention Brigade: Some Legal Issues*, *ASIL Insights*, 6 June 2013, available at <http://www.asil.org/insights/volume/17/issue/15/security-council-and-intervention-brigade-some-legal-issues>.

Review by Samuel Moyn, Columbia University¹

When Supreme Court Justice Robert Jackson went to Nuremberg to try Nazi war criminals in 1945-6, he insisted that the Allies couldn't remain immune to the justice they meted out. "To pass these defendants a poisoned chalice is to put it to our own lips as well," he said in his famous opening statement for the prosecution. International justice would have to be evenhanded, and Americans might have to submit to it in the future.

Today the task of prosecuting the world's war criminals and *génocidaires* has fallen to the International Criminal Court (ICC). The ICC, based in The Hague, began its work about 10 years ago. Yet as *Rough Justice*, David Bosco's excellent book on the Court, shows, Jackson's premonition of truly global criminal justice remains elusive: It is the great powers that set the ICC's agenda, limiting its jurisdiction to weak states while avoiding scrutiny of their own acts.

The ICC was founded in the halcyon days between the end of the Cold War and the eruption of the war on terror, when it looked as if morality and justice might have an unprecedented opening in world affairs. Bosco traces the origins of the Court to a 1998 international conference in Rome, where Non-Governmental Organization (NGO) activists pushed for a prosecutor with independent powers to target states; many governments were less than enthusiastic.

The ICC emerged as a surprising breakthrough from this diplomatic wrangling. A number of powers, including the U.S.'s West European allies, broke with Washington's skittishness and joined the enterprise. The U.S. objected that, when it came to atrocities, decisions about whom to prosecute had to remain in the hands of the traditional guardians of war and peace on the United Nations Security Council. But Germany and smaller states like Chile, Malawi and Norway maneuvered for the Court to have more power than America desired.

President Bill Clinton signed the Rome Treaty that set up the Court in the twilight of his presidency, making its ratification by the Senate possible. But that chamber was controlled by Republicans, who opposed the treaty. Later President George W. Bush tried to undermine the fledgling tribunal by 'unsigned' the treaty in 2002. Since coming to office, the Obama administration has once again signaled Washington's abstract allegiance to the Court's mission. Even so, President Barack Obama did not urge the Treaty's ratification when Democrats held the Senate in 2009, and nobody thinks he will take up the ICC's cause during the rest of his time in office.

Even under Obama, the U.S. acts like a great power, repudiating international legal

¹ A version of this review appeared earlier as "Who Guards the Guardians?," *Wall Street Journal*, January 22, 2014.

accountability as unnecessary for a constitutional democracy, which achieves the Court's goals without its supervision. Indeed, while the U.S. has become much friendlier to the institution in recent years, this isn't so much because a Democrat is now in the White House as because the ICC has proved both advantageous and unthreatening to Washington: Where the Bush administration abstained when the Security Council voted to refer the atrocities in Sudan's Darfur region to the ICC, the U.S. has been willing to vote in subsequent cases, notably during the Libyan campaign, using the Court to bring attention to its enemies' crimes.

It helped that the U.S. has learned that it can mostly immunize its own statesmen, commanders, and troops against falling prey to ICC prosecution. As Bosco narrates, immediately after the U.S. lost one battle over the Court's existence, it won another by protecting its own from scrutiny, thanks to a series of treaties with many nations where the United States sends its forces. Harold Koh, who served as the nation's lead international lawyer until recently, noted that America continues to see no conflict between "the bedrock norms and values of international criminal justice," which we support, and "our skepticism of certain institutions," to which we will avoid subjecting ourselves.²

Thus far, the Court has achieved one conviction, of the Congolese warlord Thomas Lubanga Dyilo, who is serving a 14-year prison term for recruiting child soldiers, among other crimes. The ICC has also investigated a number of other abusers -- all of them in Africa.

The actions of the Court have come from two main sources, and it is thanks to their combination that the ICC has focused on Africa alone so far. The first source is the small set of nations that none of the world's powers will protect. Libya's Moammar Gadhafi might well have faced legal music had he not been executed by his people. It remains to be seen whether and where his son Saif al-Gadhafi will have his day in Court. But there is no appetite yet to bring the ICC into the Syrian morass, even though the Assad regime has murdered many more civilians than the Gadhafis ever did.

The second source has been the set of African states that have asked the Court to investigate their own crimes. But these reflect unique situations in which parties to domestic disputes have opted to internationalize them. One such case involves the villain Joseph Kony of the Lord's Resistance Army, whom Obama has committed himself to capturing for his horrific reign of terror in northern Uganda. Washington has dispatched 100 special-forces advisers to Central Africa for the hunt and offered rewards for information. But Kony is under ICC indictment because the Ugandan government wanted the international community's help in taking out a warlord it failed to eliminate on its own. Of course, there is a third source for the Court's work: the ICC Prosecutor's once-feared power to initiate cases on his or her own discretion. Yet when the Court indicted Kenya's President Uhuru Kenyatta, accusing him of instigating postelection ethnic violence in 2007-08, Nairobi refused to hand him over. Weaker states like Kenya complain, not

² Harold Hongju Koh, "International Criminal Justice 5.0," *Yale International Law Journal* 38, no. 2 (2013): 533.

unreasonably, that ICC accusations can severely disrupt their national politics -- even as more powerful states have learned that they need not worry about interference.

Bosco concludes that while the U.S. and other great powers have not managed to completely control the ICC, the Court's rise has come about in terms satisfactory to their interests. "The court has, for the most part, become an instrument in the toolkit of major powers, responding to instability and violence in weaker states," he writes (177). International criminal justice may be a high pursuit, but its morality and great-power desires so far seem to coexist only when they do not conflict. Let us hope, then, that the chalice is not poisoned — or that no one ever forces it to our lips.

David Kaye raises an important question: whether the International Criminal Court's (ICC) existence has subtly shifted the environment in which states, including the major powers, operate. If he is correct, then my analytical structure of likely major-power behavior--marginalization, control, and acceptance--may miss an important dynamic. There are several ways in which the ICC could alter the broader landscape. Some have asserted that the ICC's existence may produce a background deterrent effect that shifts state strategies and discourages, in particular, the reckless use of military force.¹ Kaye does not advance this proposition—which is very difficult to test empirically—but does suggest that the ICC's existence may have made justice more central to diplomatic deliberations than it would otherwise have been. The fact of a permanent court that can, with the aid of the Security Council, exercise jurisdiction around the globe could make it more difficult for pragmatic policymakers to shove justice issues aside as they pursue more immediate interests.

The record of the past decade does not convince me that this has happened. Kaye is correct that the Security Council refers frequently (one might say formalistically) to justice, but the reality is that the Council and its key members are adept at sidelining international justice when they see fit. Two of the bloodiest conflicts since the court opened its doors have occurred in Iraq and Afghanistan. International justice has played very little role in either, largely because involving the ICC or other international justice mechanisms did not serve the interests of key players, notably the United States. In Syria, Russia has blocked a Council referral, and no other international justice mechanism has emerged as an alternative. To the extent that policymakers do feel pressure to address international justice even when it does not serve their political interests, I would contend that this is more a product of effective advocacy by the human rights community than of the ICC's existence. The same civil society pressures that produced the ICC continue to demand justice; whether their calls are amplified by the court's existence seems less certain. As discussed in the book, the court's own voice has been quite muted in situations where it does not have clear jurisdiction.

At the end of his review, Samuel Moyn raises the question of whether the ICC's pragmatic performance—and, in particular, its unwillingness to directly challenge major powers--has “poisoned the chalice” of international justice. To my mind, this is a vital question for the court and its supporters, who have argued that international justice must be seen as a work in progress and that a more established court will eventually be able to take more political risks. They rarely discuss an alternative possibility: that the ICC's evident compromises have damaged the court and the broader project of international justice. I have often wondered whether the court was not created too soon. The historical moment in which it emerged was unique, and that uniqueness may have convinced some advocates that the international community was more cohesive than it actually is.

¹ See, e.g., Human Rights Watch, *Course Correction: Recommendations to the ICC Prosecutor for a More Effective Approach to 'Situations Under Analysis'* (New York, 2011).

Finally, Kevin Jon Heller offers several detailed and salient criticisms of the book. Most broadly, he argues that my account is overly sympathetic to the court's first Prosecutor, Luis Moreno Ocampo. He contends that the Prosecutor might have refused to open full investigations in Sudan and Libya to avoid the aspect of Security Council control indicated by the way in which the referrals were made. Heller is correct that the possibility of refusing to open full investigations deserved further analysis and discussion. Nothing in the Rome Statute obliges the prosecutor to open an investigation, even when the Council refers it, and the prosecutor might have used that leverage to help remedy the referrals' defects.

As for criticism of Ocampo's broader performance, Heller neglects to mention that I discuss the widespread discontent with the first Prosecutor's management skills; indeed one section of Chapter 6 is entitled "the Prosecutor and His Critics" (151). That section discusses and quotes from lengthy critiques of the Prosecutor's performance and managerial style. It is true that I did not exhaustively catalogue the complaints against Ocampo, including the lawsuit by a former employee that culminated in 2012 and a blow-by blow account of his battles with the ICC judges on various questions. These omissions had less to do with any desire to avoid criticism of Ocampo, however, than an attempt to keep the focus of the book on the interactions between the court and major powers. As indicated, I found no evidence that Ocampo's travails emerged as a significant factor in the court's relationship with these states (153). For many observers of the court, the performance and personality of the court's first prosecutor is the central story; I had a somewhat different focus.