

Are International Criminal Tribunals a Disincentive to Peace?: Reconciling Judicial Romanticism with Political Realism

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ABSTRACT

A significant challenge to the efficacy of international criminal justice in global governance is the view that prosecution of political leaders still in power creates a disincentive to peace and thus prolongs atrocities. While "judicial romantics" are often oblivious to these complexities, the "political realists" have failed to demonstrate that tribunals are in fact an impediment to peace and stability. The impact of the International Criminal Court on

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three recent situations in Africa suggests that judicial intervention is more likely to help prevent atrocities rather than impede peace, even if arrest warrants cannot be executed.

I. INTRODUCTION

There appears to be intrinsic merit in prosecuting those responsible for mass atrocities. Leaving such crimes unpunished contradicts our intuitive conceptions of fundamental justice. An equally unimpeachable goal, however, is putting an end to such atrocities—as they are happening—through the pursuit of peace. The dilemma is whether, in certain circumstances, the prospect of prosecution creates a disincentive for implicated leaders to end war or surrender power. This debate is embodied in the caricatures of the naïve “judicial romantic” who blindly pursues justice and the cynical “political realist” who seeks peace by appeasing the powerful. Although this debate was largely irrelevant in the context of “victor’s justice” at the Nuremberg trials, it is of increasing global importance given the frequency of situations in which the international community seeks to end atrocities through negotiation rather than military intervention. It may even be said that contemporary tribunals are most often a substitute for more forceful measures against mass atrocities. In light of this reality, a leading criticism of international criminal tribunals is that they impede peace settlements and thus prolong atrocities. The assumption is that leaders facing threats of prosecution are more likely to prolong conflicts that keep them in power whereas immunity increases the incentives to end atrocities. Beyond ad hoc tribunals, the gradual permanence of global justice through the International Criminal Court (ICC) has given the so-called “peace versus justice” debate a systematic relevance in global governance.

This article sets forth a general framework for assessing the contribution of international criminal justice to the prevention of atrocities and then examines the more immediate impact of the ICC on three recent conflicts. These cases demonstrate that within a broader context of the gradual mainstreaming of global justice, tribunals alter the cost-benefit calculus of using atrocities as an instrument of power with often subtle but far-reaching consequences. In Côte d’Ivoire, the mere threat of an ICC investigation contributed to preventing escalation of an inter-ethnic war by putting an end to state-sponsored incitement to hatred. In Uganda, ICC arrest warrants against rebel leaders responsible for mass atrocities helped pressure neighboring Sudan to eliminate a long-standing safe haven for the rebels, bringing to an end a devastating civil war. Even in Darfur, where there has been little willingness by the United Nations to support the ICC, the diplomatic maneuverings and internal political divisions in Sudan indicate that arrest warrants have at the very least made the continuation of atrocities more costly than before.

II. THE PEACE VERSUS JUSTICE DEBATE AND CONTEMPORARY CONFLICTS

With the unconditional surrender and military occupation of Germany, the Nazi leaders were in no position to negotiate immunity from prosecution with the Allied powers. The Nuremberg paradigm of victor's justice precluded any need to balance the demands of peace and justice. The same circumstances applied to the trials of Japanese leaders before the Tokyo Tribunal. If anything, upon the conclusion of a war that had consumed millions of lives, and amidst calls for summary execution of the much-loathed vanquished leaders, criminal justice was viewed as an expression of tremendous magnanimity.

With the establishment of the International Criminal Tribunal for the former Yugoslavia (ICTY) in 1993, a new model of global justice emerged. As the evidence of "ethnic cleansing" surfaced, punishing leaders responsible for such abominations became a moral imperative. Absent a willingness to intervene, however, the international community had to resign itself to negotiating a peace agreement with the very same leaders—still in positions of authority—to put an end to an armed conflict replete with atrocities. Following the 1995 Dayton Peace Accords and the conclusion of the Bosnian war, this unprecedented situation gave rise to a then famous debate in the pages of this journal as to how peace and justice could be reconciled.¹ The ICTY model of justice, which established a pattern that has since repeated itself, draws on this debate in response to scenarios where the imposition of victor's justice is impossible.

A qualified exception to this post-Nuremberg pattern of justice is the International Criminal Tribunal for Rwanda (ICTR), which was established in 1994 after the military defeat of the *génocidaires* by the Tutsi-led Rwandese Patriotic Front (RPF). Unlike Nazi Germany, this was not a situation of unconditional surrender. Hutu extremist insurgents continued to attack the new Rwandan government from the territory of what was then Zaïre, and from 1998 onwards, the spillover of the conflict claimed three to four million victims in the newly established Democratic Republic of Congo (DRC). Nonetheless, the *génocidaire* leadership was largely relegated to seeking asylum in various countries from which they were eventually arrested and surrendered for trial before the ICTR. The pattern of global justice that started with the ICTY resumed with the hybrid UN tribunals in Sierra Leone, Timor Leste, and Cambodia, as well as the ICC, all of which have had to operate

1. See Payam Akhavan, *The Yugoslav Tribunal at a Crossroads: The Dayton Peace Agreement and Beyond*, 18 HUM. RTS. Q. 259 (1996); Anonymous, *Human Rights in Peace Negotiations*, 18 HUM. RTS. Q. 249 (1996).

in circumstances where implicated leaders still retained some measure of power. This post-Nuremberg model of tribunals has become increasingly entrenched. For better or worse, aside from such notorious precedents as Saddam Hussein's trial before the Supreme Iraqi Criminal Tribunal, very few instances of victor's justice exist in the contemporary world. From Bosnia to Rwanda to Darfur, the international community has used tribunals more as a substitute for rather than a complement to forceful measures to protect civilians against mass murder.

At the same time, these once-sacrosanct tribunals that were considered to be the only glimmer of hope where there was no willingness to intervene have been criticized as wasteful and elitist institutions that exacerbate rather than prevent atrocities.² In the post-euphoria phase of global justice, it has been increasingly argued that local solutions, such as amnesties in El Salvador and Mozambique, have been "highly effective in curbing abuses when implemented in a credible way,"³ and that, combined with truth and reconciliation commissions, these measures have achieved better results than international prosecutions.⁴ Most notably, the South African Truth and Reconciliation Commission has been praised for ensuring a peaceful transition from apartheid to a multiracial democracy.

In this light, the so-called "peace versus justice" debate has assumed a broader systemic dimension as it grapples with the gradual permanence of tribunals in situations where leaders responsible for atrocities still exercise power and where the pursuit of justice often competes with the imperative of a peaceful transition. What then is the context in which to assess the interrelationship of tribunals with peace negotiations and their impact on preventing future atrocities? Beyond speculative assertions, whether of judicial romantics or political realists, how can the experience of institutions like the ICC inform an increasingly complex and vital debate on accountability as an ingredient of global governance?

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2. Some commentators have vigorously criticized international criminal tribunals, arguing *inter alia* that "they have squandered billions of dollars, failed to advance human rights, and ignored the wishes of the victims they claim to represent." See Helena Cobban, *Think Again: International Courts*, FOREIGN POL'Y, Mar./Apr. 2006, at 22, 22.
 3. Jack Snyder & Leslie Vinjamuri, *Trials and Errors: Principle and Pragmatism in Strategies of International Justice*, INT'L SECURITY, Winter 2003/04, at 5, 6.
 4. HELENA COBBAN, AMNESTY AFTER ATROCITY? HEALING NATIONS AFTER GENOCIDE AND WAR CRIMES 194 (2007). For a more general discussion on truth commissions, see Jonathan D. Tepperman, *Truth and Consequences*, FOREIGN AFF., Mar./Apr. 2002, at 128.

III. THE GLOBAL CONTEXT: TRIBUNALS, GENERAL DETERRENCE, AND PEACE

A. Is There a Cost-Benefit Calculus to Radical Evil?

Many imperatives, including national reconciliation, vindication of victim suffering, or symbolic breaks with the past, are invoked to justify tribunals. While these objectives are broadly related to preventing the recurrence of atrocities, the central utilitarian argument in support of tribunals is the nebulous "deterrence" function of prosecutions. How can global imperatives such as deterrence be defined and reconciled with the immediate exigencies of local contexts in the midst of armed conflict or political transitions? The domestic justifications for criminal punishment—themselves ill-defined and speculative—cannot be casually transplanted into the context of mass atrocities. While retribution for "radical evil"⁵ may be morally persuasive, utilitarian objectives such as deterrence are seemingly elusive. Some would argue that the all-consuming primordial hatreds that motivate genocide defy the simplistic rationalist assumption of cost-benefit calculus by perpetrators upon which modern deterrence theories are based.⁶ Even the more flexible notion of "general prevention"—i.e., socio-pedagogical stigmatization of crime through judicial process, leading to the reinforcement of habitual lawfulness—seems to collide with the inverted morality of genocide that elevates mass murder to an expression of glorious heroism. We are dealing with societies where the intended victims have been so thoroughly dehumanized that their extermination is equated to getting rid of infestation by "vermin" or "cockroaches." The perversity and success of genocidal ideologies from Nazi Germany to Rwanda is their ability to appropriate the discourse of lofty and noble causes to justify radical evil, to transform unspeakable cruelty to commendable acts of "cleansing" and "purification." Bearing this reality in mind, if a man is capable of disemboweling pregnant women or ordering the rape of children merely because they belong to the "wrong" race, will he pause to consider that his conduct may lead to prosecution? Within such an aberrant context, how can the credible threat of punishment contribute to the prevention of atrocities?

The proponents of global justice emphasize that such "broader deterrent ambitions are dependent upon the capability and willingness of powerful states to back them up."⁷ Others point out that while it is "impossible to

5. In the words of Hannah Arendt in *THE ORIGINS OF TOTALITARIANISM* (1951).

6. See, e.g., Cobban, *Think Again*, *supra* note 2.

7. Kenneth A. Rodman, *Darfur and the Limits of Legal Deterrence*, 30 *HUM. RTS. Q.* 529, 560 (2008).

prove that war crimes prosecutions deter future atrocities. . . . evidence presented at the recent tribunals strongly suggests that the failure to prosecute perpetrators such as Pol Pot, Idi Amin, Saddam Hussein, Augusto Pinochet, and Papa Doc Duvalier convinced the Serbs and Hutus that they could commit genocide with impunity."⁸ As discussed below, there may be general merit to the argument that with effective enforcement, tribunals can contribute to the long-term transformation of the boundaries of power and legitimacy. Without understanding the particular anatomy of genocidal violence, however, these specious utilitarian justifications fail to adequately explain how the credible threat of punishment can influence behavior in the extreme context of radical evil.

In considering the peace versus justice debate, a preliminary question is why the burden of proof rests with the proponents of justice. If retribution is a worthy moral objective, is a favorable impact on peace a requisite justification for tribunals, or can this effect remain indeterminate? Is it necessary to try to measure deterrence with mathematical precision to satisfy the skeptics? What is the quantum of proof required for what is evidently not an exact science? As set forth below, what can be ventured by way of soft empiricism in the nascent ICC system suggests that while prosecutorial discretion must adapt to the complexities of each situation, there is little evidence to support the contention that tribunals are a disincentive to peace, whether in negotiations or post-conflict peacebuilding. On the contrary, some indicia show that the mere threat of prosecution may have a stabilizing effect by exacting a cost for continuing atrocities and by undermining the power of genocidal leaders whose manifest treachery often renders unrealistic the prospect of good faith peace negotiations.

Admittedly, it is difficult to presume that ruthless warlords and *génocidaires* are rational actors who will invariably engage in a dispassionate analysis of whether atrocities are a cost-effective instrument of power in view of possible prosecution. However, there is also a temptation to depict such leaders as repositories of mystical diabolical forces whose primordial power-lust is inscrutable. This fashionable rebuke of rationalism has to account for the hard political calculus of mass atrocities, even if clothed in the guise of visceral conflicts of identity. Just as the judicial romantics are not realistic about the limits of ritualistic ordering of overwhelming evil through criminal trials, the political realists often romanticize the profane rules of political conflict as inexorable outbursts of tribal hatred in exotic lands. This

8. Michael P. Scharf, *Jostling over Justice*, FOREIGN POL'Y, May/June 2006, at 6, 7. For a study on contribution of international criminal justice to deterrence, see David Wippman, *Atrocities, Deterrence, and the Limits of International Justice*, 23 FORDHAM INT'L L.J. 473 (1999).

essentialized view of identity disregards the pliability and instrumentalization of ethnicity by political elites as a means of acquiring and consolidating power. Far from being a spontaneous outburst of tribal hatred, genocidal policies require considerable planning and preparation in addition to efficient organization and utilization of resources under strong and unified leadership. Permutations of this political logic of hate-induced identity homogenization leading to atrocities can be discerned in a wide variety of contexts from Nazi Germany and the former Yugoslavia to Rwanda and Darfur. It suggests that somewhere in the anatomy of genocide lies a cost-benefit calculus, however diabolical its parameters may be. It is in this regard that the romanticization of genocidal violence in the name of political realism overlooks the potential impact of tribunals on the behavior of political leaders.

B. The Complexities of Justice

In contrast with the so-called political realists, the judicial romantics are wont to gloss over the complexities of conflicts by creating an idyllic meta-political sphere within which justice is done. The immediate impact of tribunals on a peace settlement or surrender of authoritarian rule in a particular situation cannot be disregarded merely because of an asserted broader, more gradual impact on global deterrence and peace. In certain circumstances, political compromise or alternatives to prosecution may be a necessity that cannot be easily escaped.⁹ Some stakeholders believe that the immediate need to save lives outweighs any speculative deterrent effect of justice. Furthermore, even the proponents of tribunals have to acknowledge at some point that power realities may dictate whether lofty ideals of accountability are realistic or not. Absent victor's justice, where accused leaders are dethroned and neutralized, impunity and even power sharing may appear to be the most viable options for negotiating an end to hostilities or authoritarian rule. So long as a demagogical head of state or warlord is firmly in power, an indictment by a tribunal may merely imply the inconvenience of not being able to travel abroad and—as demonstrated by the travels of Sudan's President Bashir to certain sympathetic countries despite the ICC arrest warrant against him—even that restriction may be partially circumvented. Some would add that given the xenophobic or exclusionary nature of genocidal ideology, isolation from the international community might actually strengthen leaders who prey on fears and hatred rather than promote the freedom and prosperity of their

9. For a discussion on a necessity exception to prosecutions in certain situations, see Darryl Robinson, *Serving the Interests of Justice: Amnesties, Truth Commissions and the International Criminal Court*, 14 EUR. J. INT'L L. 481, 493 (2003).

citizens.¹⁰ Thus, the indictment of a charismatic leader or self-proclaimed nationalist savior may even transform him into a martyr among followers saturated with an “us” against “them” mindset.

The quixotic project of judicial romantics often neglects the complexities that tribunals must navigate in the context of peace negotiations and peacebuilding, even if the decision to opt for a political compromise is made by other actors. International criminal justice operates in a multifaceted situation with multiple stakeholders who must make difficult political choices. Furthermore, even if a prosecutor is adamantly non-political, seemingly routine investigative and prosecutorial decisions may invariably have far-reaching political implications that cannot be easily dismissed. Unlike domestic judicial systems, where prosecution of serious crimes such as murder or rape is usually not subject to discretion, international judicial systems necessarily must exercise such discretion. The combination of such factors as the multiplicity of serious crimes, barriers to investigations and arrests, the cost and length of trials, and the capacity of tribunals only to prosecute a handful of perpetrators, makes it difficult simply to “follow the evidence” in deciding who to indict. The policy of the ICC is to pursue those “who bear the greatest responsibility” for international crimes.¹¹ Does this imply that only leaders above a certain rank should be prosecuted? What about the “willing executioners” of criminal designs hatched by such leaders? Are so-called “small fish” obviously less responsible?

In peace negotiations, as well as post-conflict peacebuilding, these difficulties are exacerbated by the impact that these choices will have on military stability and national reconciliation. Some argue that there must be a “sequencing” of investigations, indictments, and the issuance of arrest warrants to ensure that tribunals will not impede peaceful outcomes to conflict. Others maintain that such considerations politicize the institutions tasked with delivering impartial justice.¹² In any event, this is not a question of impunity but rather a question of astute timing. In the DRC for instance, the ICC initially focused its investigations on the Ituri province, rather than North and South Kivu where mass atrocities were also committed. The pres-

10. In this respect, see the discussion on the indictment of President Bashir of Sudan below.

11. Office of the Prosecutor, Int'l Criminal Court (ICC-OTP), *Paper on Some Policy Issues Before the Office of the Prosecutor* (Sept. 2003), available at http://www.amicc.org/docs/OcampoPolicyPaper9_03.pdf.

12. The ICC Prosecutor has strongly condemned the strategy of sequencing ICC decisions with peace negotiations. Luis Moreno-Ocampo, Chief Prosecutor, Int'l Criminal Court, Keynote Address at the Yale Law School Conference: The Pursuit of International Criminal Justice: The Case of Darfur (6 Feb. 2009), available at http://www.icc-cpi.int/NR/rdonlyres/F04CB063-1C1E-463E-B8FB-5ECE076FB1E0/279792/090206_ProsecutorskeynoteaddressinYale.pdf.

ence of peacekeepers from the UN Mission in the DRC (MONUC) in Ituri greatly facilitated the security required for conducting on-site investigations. Furthermore, the insurgents in Ituri did not have substantial links with the DRC government upon which the ICC depends for judicial cooperation.¹³ The situation is different in the Kivus where an ICC investigation would have encountered more significant obstacles.¹⁴ How should a prosecutor assess such constraints or opportunities in deciding how to prioritize or sequence investigations while maintaining impartiality and independence?

Additional considerations arise when a prosecutor selects targets for investigation in an inter-ethnic conflict where atrocities have been overwhelmingly committed by one side against the other. Should all parties be indicted to preserve an image of impartiality? This approach is reflected in the ICTY prosecutor's decision to prosecute Bosnian Muslim and Albanian leaders and military commanders who were either acquitted or received nominal sentences for crimes that were dwarfed by those committed by Bosnian Serbs, such as the 1995 Srebrenica genocide in which some 7,000 Muslims were executed. Does such an approach pose a danger of inadvertently equating impartiality with moral parity in a one-sided situation?

This dilemma is rendered even more complicated for the ICC because of the "complementarity" scheme, which gives the primary responsibility to national courts where they are "willing" and "able" to genuinely prosecute international crimes.¹⁵ There is nothing to impede states parties from making "self-referrals" where they voluntarily relinquish national jurisdiction to the ICC. Although the ICC ultimately determines if it will exercise jurisdiction, some commentators have expressed misgivings about the one-sided nature of such referrals. Consider the case of the Lord's Resistance Army (LRA) in Uganda. For almost two decades, the LRA insurgents had committed mass atrocities against civilians, including recruitment of tens of thousands of child soldiers who terrorized their own communities under duress. The government's counterinsurgency campaign involved abuses such as the forced displacement of populations in camps as a security measure. While the ICC

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13. More recently, the Congolese authorities have also arrested former insurgents who had established closer links to the government. Mathieu Ngudjolo Chui had even been integrated as a colonel into the national armed forces of the DRC when he was arrested and surrendered to the Court by the DRC authorities. See Press Release, Int'l Criminal Court, Third Detainee for the International Criminal Court: Mathieu Ngudjolo Chui (18 Jan. 2008).
 14. The ICC announced in April 2009 that the third DRC investigation would focus on the Kivu provinces. Fifteenth Diplomatic Briefing of the International Criminal Court, Compilation of Statements (7 Apr. 2009), available at http://www.icc-cpi.int/NR/rdonlyres/1E5F488B-2FA9-40F4-9378-A386AF6CBA6E/280246/Compilation_of_Statements_15_DS.pdf.
 15. Rome Statute of the International Criminal Court, adopted 17 July 1998, art. 17, U.N. Doc. A/CONF.183/9 (1998) (entered into force 1 July 2002).

Prosecutor has been criticized for delivering one-sided justice¹⁶ and failing to recognize the true problem of impunity in this situation,¹⁷ is it appropriate to equate the scale and nature of atrocities committed by government forces with those committed by the LRA?

Such choices have an obvious impact on various issues such as the prioritization of limited resources based on the gravity of crimes, dependence on governments for security and judicial cooperation,¹⁸ long-term capacity building by national courts, a sense of domestic ownership of justice for past abuses, perceptions of impartiality in deeply divided nations, and the role of alternative accountability mechanisms like truth commissions and traditional justice. While judicial romantics have not adequately incorporated these complexities into the international criminal justice equation, the assumption that international criminal justice is oblivious to hard political choices has been supplanted by the Rome Statute. Article 53(1)(c) expressly recognizes that a prosecutor must consider whether "taking into account the gravity of the crime and the interests of victims, there are nonetheless substantial reasons to believe that an investigation would not serve the interests of justice."¹⁹

Leaving aside these considerations, the more fundamental question remains as to whether tribunals that are adequately responsible to political

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16. See, e.g., HUMAN RIGHTS WATCH (HRW), *COURTING HISTORY: THE LANDMARK INTERNATIONAL CRIMINAL COURT'S FIRST FIVE YEARS* 41 (July 2008), available at <http://hrw.org/reports/2008/icc0708/icc0708web.pdf>. Shortly after the referral of the situation to the ICC Prosecutor, Human Rights Watch had already called for investigations into crimes committed by government troops. See News Release, HRW, ICC: Investigate All Sides in Uganda (4 Feb. 2004), available at <http://www.hrw.org/en/news/2004/02/04/icc-investigate-all-sides-uganda>. See also TIM ALLEN, *TRIAL JUSTICE: THE INTERNATIONAL CRIMINAL COURT AND THE LORD'S RESISTANCE ARMY* 98 (2006).
 17. William Schabas, *First Prosecutions at the International Criminal Court*, 27 *HUM. RTS. L.J.* 25, 31 (2006). Some commentators, including Schabas, have also argued that the ICC should not have accepted Uganda's self-referral, arguing that Uganda is able and willing to prosecute the LRA leaders. Others, including the author, have argued that this situation must be analyzed under the premise of positive complementarity. See Payam Akhavan, *The Lord's Resistance Army Case: Uganda's Submission of the First State Referral to the International Criminal Court*, 99 *AM. J. INT'L L.* 403, 413 (2005).
 18. For an analysis of the cooperation regime of the Rome Statute, see Rod Rastan, *The Responsibility to Enforce—Connecting Justice with Unity*, in *THE EMERGING PRACTICE OF THE INTERNATIONAL CRIMINAL COURT* 163 (Carsten Stahn ed., 2009).
 19. I have argued elsewhere that "[t]his aspect of prosecutorial discretion is particularly important when investigations or prosecutions may arguably prolong or aggravate an ongoing conflict or undermine a fragile peace process." Akhavan, *The Lord's Resistance Army Case*, *supra* note 17, at 416. The Office of the Prosecutor, while emphasizing the importance of protecting victims and witnesses, has suggested that article 53(1)(c) is to be interpreted narrowly and that a decision not to proceed on the basis of the interests of justice should only be made as the last resort. ICC-OTP, *Policy Paper on the Interests of Justice* (Sept. 2007), available at <http://www.icc-cpi.int/NR/rdonlyres/772C95C9-F54D-4321-BF09-73422BB23528/143640/ICCOTPInterestsOfJustice.pdf>.

complexities within the proper scope of their judicial functions may still impede peace negotiations and induce leaders to prolong atrocities. At the theoretical level, this may involve a balancing of interests between achieving global deterrence by avoiding precedents of negotiated impunity on the one hand, and on the other, addressing the immediate need to stop further victimization at the hands of ruthless leaders who will do whatever is necessary to preserve their interests. As is often the case, the way in which these tensions play out in reality is considerably more complex than abstract debates may suggest. Despite this complexity, case studies reveal a certain simplicity as to how the credible threat of punishment, or the mere stigmatization of indictment, influences the behavior of such ruthless leaders.

IV. MEASURING PREVENTION: RECENT ICC CASE STUDIES

I have attempted elsewhere to delineate the impact of tribunals on the prevention of atrocities based on the early experience of the ICTY and ICTR.²⁰ That inquiry focused on preventing atrocities in the context of post-conflict peacebuilding, as the operation of those ad hoc tribunals coincided with the conclusion of hostilities. In Bosnia and Herzegovina, the indictment of hate-mongering leaders such as Radovan Karadžić and Ratko Mladić and their political marginalization helped stabilize the fragile multiethnic federation envisaged by the Dayton Peace Accords. In Rwanda, the indictment of the *génocidaires* undermined their capacity to reconstitute and legitimize themselves. With the passage of nearly a decade since that inquiry, and with the emergence of the ICC as a functioning tribunal, now there are considerably more cases to study. Given the ICC's permanent status, its preventive capacity is at least notionally enhanced because, unlike the ICTY and ICTR, there is no lapse of time between the commission of atrocities and the establishment of its jurisdiction. Although this applies more directly to states that have ratified the Rome Statute, it is also relevant for states that face the prospect of a Security Council referral under Chapter VII of the UN Charter.²¹ Furthermore, because the ICC has been vested with jurisdiction over cases that involve impending or ongoing atrocities, it is possible to assess its impact in circumstances other than post-conflict peacebuilding.

In the popular imagination, the prosecution of Thomas Lubanga Dyilo in the DRC situation or that of Jean-Pierre Bemba in the Central African Republic

20. See Payam Akhavan, *Beyond Impunity: Can International Criminal Justice Prevent Future Atrocities?*, 95 AM. J. INT'L L. 7 (2001).

21. According to Article 13(b) of the Rome Statute, the Security Council can refer a situation to the ICC Prosecutor, which triggers ICC jurisdiction also for states that have not ratified the Rome Statute or made an ad hoc declaration under Article 12(3).

(CAR) situation may be the success stories of the ICC. Although a defendant on trial offers a reassuring image, the situations in which no arrests have been made may better demonstrate the ICC's preventive effect. The examples discussed below provide guidance as to the impact tribunals can have on ending atrocities even if they are unable to execute arrest warrants and where leaders still in power may prolong or escalate atrocities to extort an amnesty from ICC indictments. I have deliberately selected three ICC situations where no perpetrators have been apprehended or where no indictments have been issued: Côte d'Ivoire, a voluntary acceptance of ICC jurisdiction by a non-state party according to Article 12(3) of the Rome Statute; northern Uganda, a voluntary referral by a state party to the ICC; and the Darfur region of Sudan, a compulsory Chapter VII Security Council referral.

Before undertaking the case studies, I must first address some prevalent misconceptions that shape the peace versus justice debate. First, one cannot assume that a "power reality" is an immutable state of affairs. While there are obvious limitations on what can be achieved in any given situation, the political realist argument is often invoked to justify inaction by the international community. Appeasement of perpetrators or simple indifference to the victims of atrocities is itself a "reality" constructed by those who have the means to intervene but lack an incentive to do so. In Bosnia, the ICTY was effective because robust UN peacekeeping and economic aid conditionality were used to ensure that fugitives were apprehended or at least eliminated from the political stage. By contrast, as we will see below, in Darfur, Sudanese cooperation in the "war on terror," energy security, and other geopolitical considerations have ensured that the Security Council does not impose a meaningful cost on Khartoum for its intransigence against the ICC. Thus, it is more appropriate to describe these choices as "priorities" rather than "realities."

Second, one cannot assume that if prosecutions are a potential disincentive to peace, then impunity will necessarily be an incentive. Not only is such an approach far from realistic, it is also often oblivious to the psychology of political violence and the presumed need to negotiate from a position of strength in order to end atrocities. The example of Foday Sankoh, the murderous leader of the Revolutionary United Front (RUF) in Sierra Leone, vividly demonstrates this point. In the negotiations to end Sierra Leone's civil war, Sankoh requested an amnesty for the massive atrocities committed by his soldiers in order to maintain his grip on power in rebel-held territories, including control of diamond mines. Apparently, Sankoh interpreted the amnesty granted to him and his combatants in the 1999 Lomé Peace Accord, which was brokered by the international community,²² and a vice presidential

22. *Peace Agreement Between the Government of Sierra Leone and the Revolutionary United Front of Sierra Leone (Lomé Peace Agreement)*, U.N. SCOR, U.N. Doc. S/1999/777 (1999).

appointment, as signs of weakness. He responded to these positive incentives for a peace settlement by attempting to overthrow the government rather than accepting a power-sharing agreement. Sankoh presumably asked himself why he should stop the atrocities if such conduct had been rewarded with a vice-presidential appointment and control of diamond mines.²³

A third misconception is that the preventive impact of tribunals must be measured in a mechanistic "cause and effect" manner. Given the complexity of factors that constitute a political reality, the best approach would be to show that tribunals have an appreciable role in concert with other measures. It is obvious, for instance, that the ICTY had greater preventive impact in Bosnia than the ICC has had in Darfur because of the link between the surrender of accused persons and punitive sanctions by the international community. Thus, while it is difficult to locate an exact cause amidst multiple factors, it may still be possible to broadly assess how tribunals can alter the cost-benefit calculus of criminal conduct. While this analysis ultimately depends on political variables external to the normal functioning of judicial institutions, the selection of seemingly weak situations where the ICC exerts little coercive power may be the best indicia of whether tribunals can have a preventive impact. In the post-Nuremberg context, these cases may be most relevant to dealing with the contention that absent victor's justice, tribunals must remain hostage to power realities.

A. Prevention of Escalation: The Case of Côte d'Ivoire

The most obvious (though overlooked) contribution of tribunals to peace is preventing atrocities before they escalate into genocidal or similar violence. The potential constraint imposed by tribunals is significantly diminished once limited conflict explodes into mass murder. Furthermore, justice in the post-conflict peacebuilding phase assumes that massive victimization has already occurred. Prevention of genocide rather than deterrence after the fact is obviously the best policy. Because successful prevention is measured by what does not happen, it is particularly difficult to assess. This recognition is especially pertinent for tribunals that are often judged solely in terms of defendants on trial (or at least fugitives on the run), rather than the looming threat of indictments. Nonetheless, the example of the ICC's impact on the civil war in Côte d'Ivoire is a compelling demonstration of how international tribunals can help prevent human rights abuses from escalating into mass murder merely by threats of prosecutions.

23. Sankoh was eventually arrested and, in 2003, indicted by the Prosecutor of the Special Court for Sierra Leone. Prosecutor v. Sankoh, Case No. SCSL 03-02-I, Indictment (7 Mar. 2003).

The shift in emphasis to prevention prior to mass atrocities is fundamental to how the efficacy of tribunals is conceived. Many observers pointed to the 1995 Srebrenica genocide as an example of the ICTY's failure to deter perpetrators like Karadžić and Mladić who had already been indicted. This argument disregards the fact that at that point in the conflict, the "ethnic cleansing" campaign had already reached its pinnacle. The most realistic opportunity for influencing the cost-benefit calculus of resorting to mass atrocities as an instrument of power is before the full force of hate-mongering and systematic violence has been unleashed. In the civil war in Côte d'Ivoire, the pre-genocidal dynamics of the conflict afforded an opportunity for substantial preventive impact. In this instance, mere threats of ICC prosecutions may have resulted in the termination of hate broadcasts on the state-sponsored radio at a crucial point of escalating tensions. Although it may be difficult to appreciate just how significant terminating hate speech on a radio station can be to preventing mass murder, one should consider that incitement to hatred by RTLM radio in Rwanda was crucial to the success of the 1994 genocide. Given that 70 percent of the population was illiterate and lived in remote locations, many used the radio as their sole source of information. Without its steady stream of incendiary anti-Tutsi demonization and incitement to genocide, it would have been far more difficult to mobilize the masses required to exterminate close to one million Tutsis. One must consider this precedent, including the important role of radio broadcasts on the population and the dynamics of the civil war, when evaluating the ICC's impact in Côte d'Ivoire.

Since the end of President Félix Houphouët-Boigny's decades-long rule in 1993, which coincided with an increasingly precarious economic situation, this former French colony has been in a difficult transitional period. Those aspiring to succeed Houphouët-Boigny in the 1995 elections gathered support according to ethno-regional origins, an important issue being the approximately 25 percent of the population who were foreign workers, predominantly from Burkina Faso, or citizens who were their descendants. Political leaders and the media exploited the term *ivoirité*, which originally referred to the common cultural identity of all Ivorians, in a nationalistic, often xenophobic way, suggesting that only those from the southern region and the capital Abidjan were true citizens, to the exclusion of immigrants and citizens born in the north.²⁴ Moreover, a new constitutional provision stipulated that a presidential candidate must be Ivorian-born of parents who

24. For more information on the concept of *ivoirité*, see JUDITH RUEFF, CÔTE D'IVOIRE: LE FEU AU PRÉ CARRÉ 22 (2004); THOMAS HOFNUNG, LA CRISE EN CÔTE D'IVOIRE: DIX CLÉS POUR COMPRENDRE 32 (2005). See also INT'L CRISIS GROUP, CÔTE D'IVOIRE: NO PEACE IN SIGHT 3 (July 2004).

were both born in Côte d'Ivoire, thus excluding the influential "northerner" Alassane Ouattara from the elections.²⁵

Tensions ultimately erupted into ethnic violence against Burkinabé and other Muslim groups in the north, leading to armed conflict.²⁶ Coinciding with the 2002–2003 escalation of hostilities between the government of President Laurent Gbagbo and rebel forces (called the "New Forces") in northern Côte d'Ivoire, there was a dramatic increase in radio broadcasts inciting hatred and violence against those deemed to be non-Ivorians. The Global Policy Forum remarked: "The broadcasts reminded many observers of Rwandan radio during the genocide of 1994, in which 800,000 people were massacred in 100 days."²⁷ As in Rwanda, these broadcasts significantly influenced the perceptions of the conflict among the public in Côte d'Ivoire, resulting in widespread violence and looting by pro-government militias and armed groups linked to the rebels with complete impunity.²⁸

In a January 2003 peace accord, the "government of reconciliation" recognized the crucial role played by the media, condemned the incitement to hatred and xenophobia, and committed itself to guaranteeing the neutrality and independence of the public service.²⁹ The media, however, continued to fuel politico-ethnic violence. Most notably, a November 2004 government offensive against the New Forces was backed by a media campaign against

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25. Moreover, Ouattara, a high official of the International Monetary Fund in Washington, D.C., did not fulfill the requirement of having lived in Côte d'Ivoire for five years preceding the elections. See HORNUNG, *supra* note at 33. This provision produced its desired effect and the Supreme Court excluded Ouattara from the 2000 elections because of his "dubious nationality." See *id.* at 34, 42. More than 200 people were killed due to politico-ethnic violence in the run-up to the 2000 elections. See News Release, HRW, Côte d'Ivoire: Abuses Threaten Run-Up to Elections (25 May 2006), available at <http://www.hrw.org/en/news/2006/05/23/c-te-d-ivoire-abuses-threaten-run-elections>.
 26. In 2001, Human Rights Watch had already reported that "[l]eading government officials in Côte d'Ivoire have incited a violent xenophobia that is threatening to destabilize the country." HRW, *THE NEW RACISM* (Aug. 2001), available at <http://www.hrw.org/en/reports/2001/08/28/new-racism>.
 27. Brent Gregston, *Rwanda Syndrome on the Ivory Coast*, [WORLDPRESS.ORG](http://www.globalpolicy.org/security/issues/ivoiry/2004/1130rwandasynndrome.htm), 30 Nov. 2004, available at <http://www.globalpolicy.org/security/issues/ivoiry/2004/1130rwandasynndrome.htm>.
 28. News Release, HRW, Côte d'Ivoire: Militias Commit Abuses with Impunity (27 Nov. 2003), available at <http://www.hrw.org/en/news/2003/11/27/c-te-d-ivoire-militias-commit-abuses-impunity>. For more information on the crimes committed by pro-government militias, the recruitment of Liberian children by the government, and the abuses committed by the New Forces, including torture and summary execution, see News Release, HRW, Côte d'Ivoire: Government Recruits Child Soldiers in Liberia (28 Oct. 2005), available at <http://www.hrw.org/en/news/2005/10/28/c-te-divoire-government-recruits-child-soldiers-liberia>.
 29. The text of the Linas-Marcoussis Accords and its annex are available in the French version of the International Crisis Group report *Côte d'Ivoire: No Peace in Sight*. INT'L. CRISIS GROUP, *CÔTE D'IVOIRE: PAS DE PAIX EN VUE* 36 (July 2004).

northerners, immigrants, and French citizens.³⁰ At the same time, opposition newspapers were shut down and the FM transmitters of international radio stations, including those of Radio France Internationale (RFI) and the BBC, were sabotaged by pro-government militias.³¹

On 6 November 2004, an aerial attack by the Ivorian army on French troops, which had intervened in Côte d'Ivoire after the failed 2002 coup against President Gbagbo and had helped secure the subsequent de facto separation of the country,³² killed nine French soldiers. Although France had largely tried to remain neutral in the conflict, it responded by destroying Côte d'Ivoire's air force. Immediately, hate messages were launched by the government-controlled Radio Télévision Ivoirienne (RTI) and Radio Côte d'Ivoire (RCI), which called on the "patriots" to save the country from the "French imperialists" and to "take over the streets of Abidjan."³³ This incitement mobilized a mob that attacked French civilians and pillaged and destroyed the buildings of French institutions and businesses in Abidjan.³⁴

On 15 November 2004, the UN Security Council adopted Resolution 1572, demanding that the government "stop all radio and television broadcasting inciting hatred, intolerance and violence." At the same time, the UN Special Advisor on the Prevention of Genocide, Juan Méndez, issued a statement recalling that the government has "an obligation to end impunity and to curb public expressions of racial or religious hatred especially those aimed at inciting violence." He emphasized that "in the absence of effective action by courts of national jurisdiction, incitement to violence directed against civilians or ethnic, religious or racial communities can be subject to international action, including under the Rome Statute of the International

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30. HRW, COUNTRY ON A PRECIPICE: THE PRECARIOUS STATE OF HUMAN RIGHTS AND CIVILIAN PROTECTION IN CÔTE D'IVOIRE (May 2005), available at <http://www.hrw.org/en/reports/2005/05/03/country-precipice-0>.
 31. Press Release, Reporters Without Borders, Abidjan State Media Mix Propaganda, Disinformation and Incitement to Riot (10 Nov. 2004), available at http://www.rsf.org/article.php?id_article=11824. RFI, in particular, had been accused since 2002 by the pro-government media of supporting the rebels. See HOFNUNG, *supra* note 24, at 81.
 32. The intervention of some 4,000 French soldiers, called "Operation Licorne," was given a mandate *ex-post* by the Security Council in Resolution 1464 (2003), which authorized the deployment of an additional 6,000 UN peacekeepers. For more information on the role of the Licorne troops, see INT'L CRISIS GROUP, CÔTE D'IVOIRE: NO PEACE IN SIGHT, *supra* note 24, at 20; RUEFF, *supra* note 24, at 101.
 33. See Press Release, Reporters Without Borders, *supra* note 31.
 34. Human Rights Watch reported that "spurred on by broadcasts over state radio, pro-government militias in Ivory Coast gathered their machetes and set off to attack French civilians in the commercial capital, Abidjan." News Release, HRW, Now, Protect Ivorian Civilians (16 Nov. 2004), available at <http://www.hrw.org/en/news/2004/11/16/now-protect-ivoirian-civilians>.

Criminal Court.³⁵ Although Côte d'Ivoire had not ratified the Rome Statute, the government had made an ad hoc declaration under Article 12(3) in April 2003 recognizing the Court's jurisdiction.³⁶

Following this threat of potential ICC prosecution against President Gbagbo, the situation changed. The Committee to Protect Journalists observes that, initially, these xenophobic broadcasts incited tens of thousands to take to the streets in a campaign of violence and looting. In other words, the use of hate propaganda successfully incited mob violence, thus serving as a highly effective instrument of political power. Pointing to how threats of prosecution effectively altered the cost-benefit calculus, the Committee observes that "[t]he 'hate' broadcasts stopped only after Juan Méndez, the UN adviser on preventing genocide, warned that the situation could be referred to the International Criminal Court."³⁷ Although it is difficult to ascertain the exact impact of the credible threat of ICC intervention, it is wholly reasonable to conclude that it set into motion a chain of events that significantly contributed to preventing the escalation of ethnic violence in Côte d'Ivoire. Earlier threats made in January 2003 by the French President to hold Gbagbo accountable before the ICC for the crimes committed during the 2002 crisis³⁸ must be considered less persuasive at that time due to the nascent stage of the ICC. In November 2004, however, already two situations, namely Uganda and the DRC, had been referred to the Court. The fact that there was no investigation or arrest warrant in Côte d'Ivoire, let alone a trial, was not a decisive factor. The genuine prospect of being held accountable before an international tribunal was an incentive to stabilize a volatile situation, thus serving as a tool in the pursuit of peace.

In assessing President Gbagbo's reaction, it is important to situate the specific example of Côte d'Ivoire in the broader context of general deterrence. In light of the precedents of Bosnia and Liberia, where international forces arrested war criminals and transferred them to the ICTY and the Special Court for Sierra Leone respectively, the presence of French troops

35. Juan E. Méndez, United Nations, Statement by the Special Adviser on the Prevention of Genocide (15 Nov. 2004), available at <http://www.un.org/News/dh/infocus/westafrica/mendez-15nov2004.htm>. Human rights advocates openly called for a Security Council referral of the situation in Côte d'Ivoire to the ICC Prosecutor. See FIDH, *FIDH Calls the Security Council to Refer the Situation in Côte d'Ivoire to the International Criminal Court*, 9 Nov. 2004, available at <http://www.fidh.org/FIDH-calls-the-Security-Council-to>.

36. Republic of Côte d'Ivoire, Declaration Accepting the Jurisdiction of the International Criminal Court, signed 18 Apr. 2003, available at <http://www.icc-cpi.int/NR/rdonlyres/74EEE201-0FED-4481-95D4-C8071087102C/279844/ICDEENG.pdf>. See also Schabas, *supra* note 17, at 39. The declaration apparently aimed at bringing the rebels to justice.

37. Committee to Protect Journalists, *Attacks on the Press 2004: Ivory Coast*, 14 Mar. 2005, available at <http://www.cpj.org/attacks04/africa04/ivory.html>.

38. See HOFNUNG, *supra* note 24, at 73.

and other international pressures clearly played an important role in how the government perceived the threat of ICC intervention. The progressive internalization of accountability in the culture of international relations also shapes such political perceptions. By 2004, the precedents of the ICTY and ICTR and the establishment of the ICC had eroded a prevalent culture of impunity and gradually had shifted the boundaries of power and legitimacy. The theory of general deterrence assumes that the threat of punishment is intended to discourage "deviance" by internalizing and reinforcing the existing mores of society. In this light, the most significant effect of tribunals may be their ability to instill inhibitions against mass atrocities and to thereby alter the very conception of sustainable power. Accordingly, the threat of ICC prosecutions simply may have reminded the Ivorian political leaders of the ever more important link between lawful conduct and political survival in the post-ICC era.

B. Defeat Through Isolation: The Case of the Lord's Resistance Army in Uganda

A significant preventive impact of tribunals is how international criminal justice shapes incentives to cut support for military forces responsible for atrocities. The judicial romantics may overlook the fact that military confrontation may be the most immediate way to prevent atrocities. It is an uncomfortable realization for proponents of justice that after-the-fact lengthy court proceedings are hardly reassuring to unarmed civilians facing the impending threat of atrocities by notorious militia. In turn, the political realists may overlook the fact that leaders facing military defeat or loss of power are particularly inclined to request amnesties. In other words, conditioning a peace agreement on an amnesty may itself be the result of a weak bargaining position. Unlike the Nuremberg Tribunal, the ICC does not have a standing army to defeat enemies and occupy countries. The LRA case demonstrates, however, that in certain cases the tribunals' stigmatization of those responsible for mass atrocities can result in international isolation, thereby eroding their political influence and the capabilities of military forces responsible for atrocities.

The debate on whether LRA leaders should be offered an amnesty in exchange for peace disregards the history of this rebel movement and why it has come to the negotiating table with such enthusiasm, only to revert to its habitual violence and cruelty. Since the LRA's inception in 1986, and despite the horrific scale of its atrocities in Acholiland in northern Uganda,³⁹

39. For the earlier history of northern Uganda, including the construction of the Acholi as a distinct population group in the 19th and early 20th century, see ALLEN, *supra* note 16, at 25-37.

the international community has failed to take any decisive steps to help Uganda defeat this ruthless insurgency. The LRA forcibly recruited tens of thousands of children, terrorized them to commit atrocities against their own parents and communities, and instilled a reign of terror by attacking towns and villages and amputating limbs as a signature punishment for those suspected of siding with the government.⁴⁰ Although the LRA claims to represent the grievances of the northern Acholi against the government of President Museveni, almost all of its victims are Acholi. Instead of confronting the LRA, the UN and donor states pursued a policy of pressuring the government to negotiate with LRA leader Joseph Kony—a self-proclaimed prophet whose only cognizable political demand is to establish a state ruled by the Ten Commandments.

During the Sudanese north-south civil war in the 1980s and 1990s, Khartoum supported the LRA's efforts to destabilize Uganda in exchange for its support of the Sudan People's Liberation Army (SPLA) insurgents.⁴¹ With the progressive consolidation of the north-south peace process in 2003, the LRA became less valuable to Sudan. However, the LRA was still sufficiently useful for Sudan's influence in the region that it could justify continued use of bases in Sudanese territory from which to launch attacks against civilians in Uganda. The LRA's ability to retreat into Sudan beyond the reach of Ugandan military forces was a crucial element of its military success. Despite several agreements with the Ugandan government, in which the Sudanese government feigned willingness to stop sponsoring and to disarm and disband the LRA,⁴² the situation did not substantially change until the 2003 ICC referral by the Ugandan government.⁴³ At this critical juncture, the ICC's intervention increased the cost incurred by Sudan for harboring the LRA, thus setting into motion a chain of events that resulted in the LRA

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40. For more information on the atrocities committed by the LRA, see *Report of the United Nations High Commissioner for Human Rights on the Mission Undertaken by her Office to Assess the Situation on the Ground with Regard to the Abduction of Children from Northern Uganda*, U.N. ESCOR, Comm'n on Hum. Rts., 58th Sess., ¶¶ 15–19, U.N. Doc. E/CN.4/2002/86 (2001); HRW, *STOLEN CHILDREN: ABDUCTION AND RECRUITMENT IN NORTHERN UGANDA* (Mar. 2003), available at <http://www.hrw.org/reports/2003/uganda0303/uganda0403.pdf>; Int'l Crisis Group, *Conflict History: Uganda*, available at <http://www.crisisgroup.org/home/index.cfm?id=2346&l=1>; Press Release, Security Council, Security Council Presidential Statement Demands Release of Women, Children by Lord's Resistance Army, Expedient Conclusion of Peace Process, U.N. Doc. SC/8869 (16 Nov. 2006).
 41. For an analysis of the inter-relationships between the conflicts in southern Sudan, northern Uganda, and Darfur, see John Prendergast, *Resolving the Three Headed War from Hell in Southern Sudan, Northern Uganda, and Darfur* (Feb. 2005), available at <http://www.wilsoncenter.org/events/docs/OP003.pdf>.
 42. See *Report of the United Nations High Commissioner for Human Rights*, *supra* note 40, at ¶¶ 32(d), 33(a).
 43. Press Release, Int'l Criminal Court, President of Uganda Refers Situation Concerning the Lord's Resistance Army (LRA) to the ICC (29 Jan. 2004).

losing its ability to launch offensive operations, which led to a sharp drop in violence in Northern Uganda and the consequent willingness of Joseph Kony to negotiate a peace settlement.

Despite a complex range of factors, there is a noticeable link between the ICC's exercise of jurisdiction over the case and the LRA's demise. In November 2003, immediately prior to the referral of the situation to the ICC, the UN Office for the Coordination of Humanitarian Affairs (OCHA) reported that "the humanitarian situation in Uganda continued to deteriorate," "[t]he outlook for 2004 does not look promising due to the expansion of [LRA] attacks," the LRA "continues to use its bases in southern Sudan to launch its operations," and "the number of internally displaced persons . . . has reached a figure of over one million."⁴⁴ Given the high profile of this situation as the first one before the ICC, Uganda's referral made it more difficult for Sudan to continue supporting the LRA. With the ICC stigmatizing the LRA leadership, Sudan was pressured to adopt a March 2004 Protocol—only four months after the ICC referral—allowing Ugandan forces to eliminate LRA bases in southern Sudan.⁴⁵ This move made the International Crisis Group conclude that "[t]he ICC has already had a positive impact on the peace process by sobering the LRA and influencing Khartoum to reduce support."⁴⁶ By November 2004, contrary to its bleak prognosis a year earlier, OCHA reported:

The weakening of the LRA in southern Sudan and northern Uganda by the Ugandan army, the apparent lack of control by the leader of the LRA over his troops in northern Uganda and the numerous defections of LRA commanders and foot soldiers since April 2004 have brought . . . a ray of hope that the end of this long ordeal is getting closer.⁴⁷

The report went on to conclude:

Since July [2004], there has been a marked improvement in the general security situation following high rates of LRA desertions LRA attacks on camps became less frequent, creating a feeling, especially among government officials, that the LRA had been significantly weakened and that the war was about to end.⁴⁸

44. UN OFFICE FOR THE COORDINATION OF HUMANITARIAN AFFAIRS, CONSOLIDATED APPEALS PROCESS: UGANDA 2004, at 1 (Nov. 2003).

45. The operation was called "Operation Iron Fist II." For a brief discussion of this operation, see HRW, UPROOTED AND FORGOTTEN: IMPUNITY AND HUMAN RIGHTS ABUSES IN NORTHERN UGANDA (Sept. 2005).

46. INT'L CRISIS GROUP, *Shock Therapy for Northern Uganda's Peace Process*, Africa Briefing No. 23, 11 Apr. 2005, available at <http://www.crisisgroup.org/home/index.cfm?id=3366&l=1>.

47. UN OFFICE FOR THE COORDINATION OF HUMANITARIAN AFFAIRS, CONSOLIDATED APPEALS PROCESS: UGANDA 2005, at 1 (Nov. 2004).

48. *Id.* at 5.

In the months that followed, LRA leader Joseph Kony retreated into the DRC and attempted to restore discipline within his depleted ranks. On 2 October 2007, Kony killed his second in command, Vincent Otti, because of suspicion that Otti might betray him in a deal with Uganda.⁴⁹ Under these circumstances, Kony, with the conditional support of Uganda and several key donor states, insisted on an amnesty from ICC arrest warrants as a precondition to a peace settlement. By then, the LRA had been so weakened and divided that it no longer posed a serious threat to Uganda, though it continued to commit atrocities in the DRC.⁵⁰ Furthermore, it soon became apparent that Kony had simply used the negotiations as a ploy to buy time so he could rehabilitate the LRA. On 23 July 2008, Ugandan General Aronda Nyakairima explained that the LRA was amassing wealth to purchase more weapons.⁵¹

Absent the political pressure arising from the ICC referral, Sudan may have been less willing to allow for the expeditious elimination by Ugandan forces of LRA bases in the south. The view that ICC arrest warrants were an impediment to peace emerged only after the LRA had been significantly weakened and atrocities in Uganda had ended.⁵² Kony's vulnerability forced him to demand an amnesty, but even then he could not be trusted to negotiate peace in good faith.

One of the issues impacting national reconciliation in Uganda is whether the ICC undermines traditional justice rituals proposed by some Acholi leaders. Some argue that The Hague is too remote to impact Acholiland, the ICC is an elitist institution out of touch with local realities, and Western-style trials are not the only way to achieve justice in a world with pluralistic legal traditions.⁵³ The fact that some northern leaders distrust President Museveni's government for historical reasons also has cast doubt on the role of the ICC as conspiracy theories abound that the referral was

49. See Otti "Executed by Uganda Rebels," BBC News, 21 Dec. 2007, available at <http://news.bbc.co.uk/2/hi/africa/7156284.stm>.

50. These acts were particularly retaliation for "Operation Lighting Thunder," a joint operation launched in December 2008 by Uganda, the DRC, and South Sudan to defeat the LRA and arrest its leaders. The LRA retaliated by killing over 500 civilians. News Release, HRW, DR Congo: LRA Slaughters 620 in "Christmas Massacres" (17 Jan. 2009), available at <http://www.hrw.org/en/news/2009/01/17/dr-congo-lra-slaughters-620-christmas-massacres>.

51. Joshua Kato, *Stop LRA Now, Says Aronda*, New VISION (Kampala), 22 July 2008.

52. Local peace initiatives, such as the Acholi Religious Leaders Peace Initiative have supported the demands for amnesty and have condemned the "interference" of the ICC. See Adam Branch, *International Justice, Local Injustice*, DISSENT, Summer 2004, at 22. For further criticism of the ICC intervention in the situation of northern Uganda, see also Adam Branch, *Uganda's Civil War and the Politics of ICC Intervention*, 21 ETHICS & INT'L AFF. 179 (2007).

53. On traditional forms of justice in Northern Uganda, such as *mato oput*, see ALLEN, *supra* note 16, at 165-68.

actually intended to prolong the war in Acholiland. While elitist institutions must be sensitive to local demands and avoid a neo-colonial approach to justice, the demonization of the ICC as a foreign imposition is unwarranted. It cannot be overlooked that traditional justice mechanisms would not have succeeded in pressuring Sudan in the same way as the imprimatur of the ICC. Furthermore, when the ICTY was established, the common refrain was that it favored European over African victims. The ICC's entanglement with Africa, reflecting the worst atrocities within the Court's jurisdiction, should be viewed as a welcome departure from decades of neglect. In the LRA cases in particular, the focus of the ICC played a role in ending the war exactly because it drew attention to a situation that the international community had disregarded for almost two decades.

Criticism of the ICC also ignores the fact that it issued arrest warrants only against the top five LRA leaders, of whom only three are still alive. This means that all other LRA members, many of whom are victimized child soldiers, can benefit from amnesties or traditional justice mechanisms. From the viewpoint of post-conflict peacebuilding, nothing stands in the way of a local reckoning with the past. From the viewpoint of peace negotiations, Kony's duplicity and bad faith has amply demonstrated the false premise that an ICC amnesty is all that stands in the way of a peace agreement. Rather, it was the involvement of the ICC that generated the strenuous but indispensable negotiations between the Ugandan government and the LRA on how to deliver justice to the victims of the conflict. Without the ICC threat, it is unlikely that the issue of individual accountability would have been addressed seriously or that the LRA leaders would have accepted anything like the Agreement on Accountability and Reconciliation. Its annex, signed in early 2008, provides that "[a] special division of the High Court of Uganda shall be established to try individuals who are alleged to have committed serious crimes during the conflict."⁵⁴ While this agreement seems to be directed at challenging ICC jurisdiction and also questions Kampala's support for the ICC,⁵⁵ the recent willingness to sincerely negotiate how to deliver justice to the Acholi people, whether domestically or in The Hague, cannot be overemphasized. Possible ICC proceedings had a similar, positive

54. *Annexure to the Agreement on Accountability and Reconciliation* (19 Feb. 2008), ¶ 7, available at http://www.iccnw.org/documents/Annexure_to_agreement_on_Accountability_signed_today.pdf. However, after the conclusion of this agreement, the Ugandan President reportedly promised the LRA leaders that instead of trials, a "traditional blood settlement mechanism" would be used. AMNESTY INT'L, UGANDA: AGREEMENT AND ANNEX ON ACCOUNTABILITY AND RECONCILIATION FALLS SHORT OF A COMPREHENSIVE PLAN TO END IMPUNITY 8 (Mar. 2008), available at <http://www.amnesty.org/en/library/info/AFR59/001/2008>.

55. The Ugandan government also committed itself to requesting the Security Council to defer the ICC investigations and prosecutions in Northern Uganda. Security Council Report, Uganda/LRA: Update Report No. 1, 11 Apr. 2008, available at <http://www.securitycouncilreport.org/site/c.gKWLeMTIsG/b.4018489/>.

impact on the delivery of justice in Kenya with respect to investigating the January 2008 post-election violence. A commission of inquiry recommended the establishment of a special, internationalized tribunal to investigate and prosecute those most responsible for the violence and announced that it would hand a list of the chief suspects to the ICC Prosecutor if a tribunal was not set up quickly.⁵⁶

However promising the delivery of local justice may be to the interests of victimized communities, such a grassroots, victim-centered approach must be balanced against broader implications for Africa and the international community. The Acholi people of Northern Uganda are clearly not the only constituencies of this situation before the ICC.⁵⁷ While every effort should be made to ensure local empowerment and a cessation of war, the effect of impunity in a situation already before the ICC would have far-reaching consequences elsewhere, especially in Africa. Even a superficial observer would recognize that an amnesty precedent for Joseph Kony would have catastrophic consequences for the ICC's credibility in the Darfur situation where leaders such as President Bashir of Sudan are eager to find a pretext to escape liability. Although it may be desirable to take into account the concerns of local communities, the constituency of international criminal justice extends far beyond this local level.

C. Stigmatization Is Better than Nothing: The Case of Darfur

The unwillingness of the international community to effectively confront Sudan's genocide by attrition in Darfur is a conspicuous failure. Absent economic sanctions, no-fly zones, and an effective UN-African Union (AU) peacekeeping force with a robust mandate, Sudan's reign of terror has continued unabated. Moral condemnation intended for public consumption has masked a policy of appeasement motivated by Security Council members' geopolitical concerns such as the "war on terror," energy security, and the arms trade. China has invested heavily in the Sudanese oil industry and is,

56. For more information, see News Release, HRW, Establishing a Special Tribunal for Kenya and the Role of the International Criminal Court (25 Mar. 2009), available at <http://www.hrw.org/en/news/2009/03/25/establishing-special-tribunal-kenya-and-role-international-criminal-court>. See also *EU in Kenya Poll Tribunal Threat*, BBC News, 18 Nov. 2008, available at <http://news.bbc.co.uk/1/hi/africa/7736011.stm>; Luis Moreno-Ocampo, Chief Prosecutor, ICC, Address to the Assembly of States Parties 2 (14 Nov. 2008), available at <http://www2.icc-cpi.int/NR/rdonlyres/50F9D0FA-33A0-48B3-942E-4CFF88CA3A27/0/ICCASPASP7StatementProsecutor.pdf>.

57. For a discussion on the different constituencies in international criminal law, see Frédéric Mégret, *International Prosecutors: Accountability and Ethics* 29–37 (Leuven Ctr. for Global Governance Studies, Working Paper No. 18, 2008), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1313691.

together with Russia, the most important supplier country of military equipment to Sudan.⁵⁸ Antiterrorism collaboration with Khartoum intelligence also has become increasingly valuable for the United States in gathering information about al-Qaeda and Iraqi insurgent groups,⁵⁹ with the Department of State labeling the Sudanese government "a strong partner in the War on Terror."⁶⁰ This alliance explains the rather ambiguous role the United States has played in condemning—but not seriously challenging—Khartoum for its Darfur campaign. Moreover, no Western government wanted to endanger the sensitive negotiations leading to the 2005 Comprehensive Peace Agreement, which ended the decades-long war between northern and southern Sudan. In the words of an analyst, "Khartoum effectively held the carrot of peace in front of the noses of the international community while it wielded the stick in Darfur."⁶¹

This political context has sent the message to Sudan's leaders that mass murder of groups deemed to be threats to the absolute power of Khartoum's ruling clans is an effective policy. Against this backdrop, the Security Council's referral of the Darfur situation to the ICC in 2005⁶² is a pretence of decisive action rather than a genuine effort to end the ongoing violence, especially given the Security Council's subsequent lack of pressure on Sudan to cooperate with the ICC and surrender accused persons. Despite the Prosecutor's periodic reports to the Security Council on Khartoum's non-cooperation, no concerted action has been taken.⁶³ The arrest warrant against Sudan's President Hassan al-Bashir has been criticized as judicial folly and

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58. On the alleged use of these weapons in the Darfur conflict, see AMNESTY INT'L, *SUDAN: ARMS CONTINUING TO FUEL SERIOUS HUMAN RIGHTS VIOLATIONS IN DARFUR* (May 2007), available at <http://www.amnesty.org/fr/library/info/AFR54/019/2007/en>.
 59. Greg Miller & Josh Meyer, *U.S. Relies on Sudan Despite Condemning It*, L.A. TIMES, 11 Jun. 2007, at A1. See also Ken Silverstein, *Official Pariah Sudan Valuable to America's War on Terrorism*, L.A. TIMES, 29 Apr. 2005, at A1; Scott Shane, *C.I.A. Role in Visit of Sudan Intelligence Chief Causes Dispute Within Administration*, N.Y. TIMES, 18 Jun. 2005, at A7; Ewen MacAskill, *CIA Recruits Sudanese to Infiltrate Arab Jihadi Groups*, GUARDIAN, 12 Jun. 2007, available at <http://www.guardian.co.uk/world/2007/jun/12/usa.israel>; RES PUBLICA, *THE DARFUR RESISTANCE: WHO THEY ARE, WHAT THEY WANT, AND WHAT THEY NEED TO HELP CREATE A NEW SUDAN* 28 (2006).
 60. OFFICE OF THE COORDINATOR FOR COUNTERTERRORISM, U.S. DEP'T OF STATE, *COUNTRY REPORTS ON TERRORISM 2006*, ch. 3 (30 Apr. 2007), available at <http://www.state.gov/s/ct/rls/crt/2006/82736.htm>.
 61. Prendergast, *supra* note 41, at 2. See also GÉRARD PRUNIER, *DARFUR: THE AMBIGUOUS GENOCIDE* 122 (2005); JULIE FLINT & ALEX DE WAAL, *DARFUR: A SHORT HISTORY OF A LONG WAR* 128 (2005).
 62. *Referring the Situation in Darfur Since 1 July 2002 to the Prosecutor of the International Criminal Court*, adopted 31 Mar. 2005, S.C. Res. 1593, U.N. SCOR, 60th Sess., U.N. Doc. S/RES/1593 (2005).
 63. Only one presidential statement was issued after the June 2008 briefing of the Prosecutor, in which the Security Council urged the government of Sudan to cooperate with the Court. *Statement by the President of the Security Council*, U.N. SCOR, 5912th mtg., U.N. Doc. S/PRST/2008/21 (2008).

an impediment to peace negotiations,⁶⁴ despite the mandate entrusted to the ICC Prosecutor by the UN Security Council. But even in this seemingly impossible situation, there is evidence to suggest that tribunals can help prevent atrocities by creating pressures and exacerbating internal divisions among perpetrators as they attempt to use each other as scapegoats. There are indications that, following the ICC's investigation, accountability has become an important factor in Khartoum's political calculus. The pressures to assign blame to others has created appreciable fractures in Khartoum's alliance with the notorious Janjaweed militia and increased incentives to negotiate a peace settlement.

On 27 April 2007, the ICC issued arrest warrants against Janjaweed militia leader Ali Kushayb and Sudan's Minister of Humanitarian Affairs, Ahmed Harun.⁶⁵ On 14 July 2008, the ICC Prosecutor requested an arrest warrant against Bashir,⁶⁶ which was issued on 4 March 2009.⁶⁷ As an immediate reaction to the arrest warrant, the Sudanese government expelled more than a dozen humanitarian aid organizations, leaving more than one million people without access to food, water, and healthcare services.⁶⁸ Despite the fact that the issuance of the arrest warrant and a strenuous reaction from the government had been widely expected,⁶⁹ Western governments seemed staggered and were criticized for not anticipating Khartoum's move.⁷⁰ This strategy of presenting the arrest warrant as a cause of further suffering of Darfuris—under the pretext that humanitarian organizations had provided the ICC Prosecutor with information⁷¹—has proven to be successful to a certain

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64. See, e.g., *Darfur Mediator Says Bashir Warrant Imperils Talks*, REUTERS, 26 Mar. 2009.
 65. Prosecutor v. Harun, Decision on the Prosecution Application Under Article 58(7) of the Statute, ICC-02/05-01/07-1 (27 Apr. 2007).
 66. Situation in Darfur, Sudan, Public Redacted Version of Prosecution's Application Under Article 58 Filed on 14 July 2008, ICC-02/05-157 (12 Sept. 2008).
 67. Prosecutor v. Al Bashir, Warrant of Arrest for Omar Hassan Ahmad Al Bashir, ICC-02/05-01/09-1 (4 Mar. 2009). The Pre-Trial Chamber confirmed the charges of war crimes and crimes against humanity but did not follow the Prosecutor's view that there were reasonable grounds to believe that Bashir had acted with genocidal intent.
 68. UN Office for the Coordination of Humanitarian Affairs, Sudan: Situation Report #2 (13 Mar. 2009); Darfur: UN-African Peacekeeper Shot, as Concern Grows Over Humanitarian Aid, UN NEWS CTR., 10 Mar. 2009.
 69. Already after the Prosecutor's application, Sudan had denounced the ICC and threatened that it could no longer guarantee the safety of UN-AU peacekeepers in the Darfur if an arrest warrant was issued. See, e.g., Sara Darehshori & Suliman Baldo, *Sudan, Justice and Peace*, HRW, 16 July 2008, available at <http://www.hrw.org/en/news/2008/07/15/sudan-justice-and-peace>.
 70. Eric Reeves, *Khartoum's Expulsion of Humanitarian Organizations*, SUDAN TRIBUNE, 26 Mar. 2009, available at <http://www.sudantribune.com/spip.php?article30643>.
 71. The Prosecutor has refuted this allegation. See *ICC Prosecutor Says He Received "Zero" Information from NGO's in Sudan*, SUDAN TRIBUNE, 21 Mar. 2009, available at <http://www.sudantribune.com/spip.php?article30580>. Reportedly the Sudanese government only waited for a chance to expel the organizations. See Lynsey Addario & Lydia Polgreen, *Aid Groups' Expulsion, Fears of More Misery*, N.Y. TIMES, 23 Mar. 2009, at A6.

extent. Numerous members of the African Union and the Arab League harshly criticized the arrest warrant, including Libya's leader Muammar Gaddafi, who decried the ICC as a "new form of world terrorism."⁷² Moreover, Western governments felt obliged to balance support for the Court against concern for displaced populations relying on the assistance of humanitarian agencies, thus strengthening Bashir's bargaining position. Ignoring the arrest warrant and Sudan's obligation to cooperate with the Court under Security Council Resolution 1593, the Security Council only urged the Sudanese government to reverse the expulsion in a non-binding statement.⁷³ Sudan also enlisted the support of the African Union and Arab League in calling for a Security Council deferral of the case under Article 16 of the Rome Statute on the grounds that it was an impediment to the peace process. So far, however, Western veto powers in the Security Council have blocked such a deferral, and support from African Union leaders for Bashir is clearly not as solid and unanimous as portrayed by Khartoum. In the context of Bashir's visit to a summit in Ethiopia, for instance, an African diplomat spoke of "an ironic show of solidarity" by African leaders who fear that if Bashir is sent to The Hague, they could be next.⁷⁴

Despite this overt posture of defiance, Sudan has taken considerable steps to relieve pressure on its senior leader. In October 2008, the Janjaweed leader Ali Kushayb was arrested to face prosecution before Sudan's own national courts. There is little doubt that he was being used as a scapegoat for the Darfur atrocities in order to preempt the ICC's exercise of jurisdiction, a fact noted by the international community and the media.⁷⁵ Several months earlier, in March 2007, *Time* reported: "Cracks are beginning to appear in the ranks of Darfur's feared Janjaweed militia" as a result of "fear that the Sudan government may betray Janjaweed commanders to the [ICC]."⁷⁶ A Darfur rebel leader remarked, "Khartoum hired the Janjaweed to kill their brother Darfurians. Now the Janjaweed have found out they were deceived—and they suspect the government will sell them out to the I.C.C. We are expecting the number of defectors to increase by the day."⁷⁷ And while Bashir has been

72. *Sudan Leader in Qatar for Summit*, BBC NEWS, 29 Mar. 2009, available at <http://news.bbc.co.uk/2/hi/africa/7970892.stm>.

73. Patrick Worsnip, *Darfur Mediator Says Bashir Warrant Imperils Talks*, REUTERS, 26 Mar. 2009.

74. Peter Heinlein, *Sudan Gives Sudan's Bashir a Warm Welcome*, VOA NEWS, 21 Apr. 2009, available at <http://www.voanews.com/english/2009-04-21-voa25.cfm>.

75. The *New York Times* observed that this "move is widely being interpreted as a way for Sudan to improve its image abroad and try to head off the possible genocide prosecution of the country's president, Omar Hassan al-Bashir, in the International Criminal Court." Jeffrey Gettleman, *Sudan Arrests Militia Chief Facing Trial*, N.Y. TIMES, 13 Oct. 2008, at A9.

76. Alex Perry, *Defections in Darfur?*, TIME, 21 Mar. 2007, at 42–43.

77. *Id.* at 43.

trying to portray himself as a national hero defying neo-colonialist attempts in the form of judicial intervention, support for him is far from unanimous in Sudan. In particular, Darfuris have been most outspoken in supporting Bashir's surrender, arguing that "the arrest of al-Bashir will bring freedom to people of Sudan. . . . Sudan will enter a new period."⁷⁸

Beyond fractures between the government and the Janjaweed, the looming threat of ICC arrest warrants has also created an incentive at least to feign a willingness to end the war in an apparent attempt to extract an amnesty for good behavior. In November 2008, Bashir announced a ceasefire with the Darfur rebels. Although its significance should not be overemphasized given that a series of previous peace agreements has failed, this ceasefire was directly linked to the imminent arrest warrant by the government itself. Based on local sources, the BBC reported: "the government hopes this plan will be enough to convince the international community to defer the case against Mr. Bashir." Indeed, Sudan's Foreign Minister asserted: "If we come up with the clear roadmap for Darfur, then I think we can have the moral authority to begin to ask . . . whether they could defer the decision by the ICC."⁷⁹ Although Bashir has traveled to several non-state parties to the ICC in clear defiance of the arrest warrant, he is obviously concerned about appearing in a good light and has even promised justice to the victims in Darfur. One month after the issuance of the arrest warrant, he stated that once reconciliation was achieved, the crimes committed in Darfur would be investigated and prosecuted by the Sudanese authorities.⁸⁰ Clearly, the issue of justice and accountability is on the table and is being discussed more seriously in Sudan. This trend is illustrated by the proposal of the leader of the opposition Umma party, Sadiq al-Mahdi, to establish a hybrid court consisting of Arab, African, and Sudanese judges,⁸¹ while the most prominent opposition leader, Hassan Al-Turabi from the Popular Congress Party, was detained for two months after openly calling on Bashir to surrender to the Court.⁸²

The political posturing by Sudan to deflect attention from President Bashir's ICC indictment should not be overestimated. Standing alone, the ICC can embarrass and isolate the Sudanese leadership and exact a minimal cost,

78. See HRW, *Voices from Sudan*, 4 Mar. 2009, available at <http://www.hrw.org/en/news/2009/03/04/voices-sudan?print>.

79. *Sudan Declares Darfur Ceasefire*, BBC NEWS, 12 Nov. 2008, available at <http://news.bbc.co.uk/2/hi/africa/7724220.stm>.

80. *Sudan President Says Reconciliation to Precede Justice*, SUDAN TRIBUNE, 8 Apr. 2009, available at <http://sudantribune.com/spip.php?article30804>.

81. *Sudan Ex-PM Proposes Hybrid Court to Try Darfur Suspects*, SUDAN TRIBUNE, 28 Mar. 2009, available at <http://www.sudantribune.com/spip.php?article30667>.

82. *Sudan's Turabi Says Position Unchanged on Bashir and ICC*, SUDAN TRIBUNE, 10 Mar. 2009, available at <http://www.sudantribune.com/spip.php?article30451>.

but it cannot radically alter the political equation in Darfur. While much of the ethnic cleansing is a *fait accompli*, atrocities against civilians continue in the face of international indifference to the victims and diffidence to those in power.⁸³ In view of the facts however, it is difficult to conclude, as some have suggested, that the ICC's intervention is exacerbating the atrocities in Darfur by cornering President Bashir and thus providing a disincentive to peace. While there is ostensible solidarity with him in defiance to the ICC, there is no telling how his international stigmatization and falling political fortunes may be used by competitors to usurp his authority in the long run. Bashir's dedicated efforts to distract the international community from focusing on the arrest warrant reveals his true concerns about the elections scheduled for early 2010. If anything, his defiant statements underscore the tremendous importance that he attaches to the ICC arrest warrant against him. A notable instance is his statement to the April 2009 African Union summit in Ethiopia where he emphasized:

We went to this summit to show those who said we couldn't travel outside Sudan that we can travel outside Sudan. . . . Unlike what people might think, the issued arrest warrant has rather strengthened our bond with countries of [the] African Union (AU), Arab league and also with international organizations. . . . It also has strengthened the unity of the Sudanese people.⁸⁴

At the very least, President Bashir has understood that the arrest warrant has significantly undermined his standing as an international statesman, which could be detrimental to his political fortunes within Sudan itself, where many opponents may seize on his isolation to advance their own ambitions and interests.

Even if it is not possible to demonstrate with any certainty that the ICC has had an effect on preventing atrocities in the Darfur, it cannot be said that the situation has somehow been exacerbated as a result. It beguiles the imagination to accept the argument that after years of massive atrocities against civilians, all that stands in the way of peace is the demand for what has thus far amounted to symbolic justice. Against a backdrop of shocking indifference to the "ethnic cleansing" campaign in the Darfur, it is difficult to see how this assertion is a realistic assessment of a dire situation in which the ICC arrest warrants appear to be the only glimmer of hope. The proposition that Khartoum would improve its behavior absent ICC indictments is at

83. See, e.g., *Report of the Secretary-General on the Deployment of the African-Union-United Nations Hybrid Operation in Darfur*, U.N. SCOR, ¶ 15, U.N. Doc. S/2008/443 (7 July 2008); *Report of the Secretary-General on the Deployment of the African-Union-United Nations Hybrid Operation in Darfur*, U.N. SCOR, ¶ 33, U.N. Doc. S/2008/781 (12 Dec. 2008).

84. *Sudan's President Arrives in Ethiopia Amid Western Boycott*, SUDAN TRIBUNE, 22 Apr. 2009, available at <http://sudantribune.com/spip.php?article30957>.

best utterly naïve and at worst a cynical appeasement of power motivated by questionable political ends. The stigmatization of President Bashir is surely the very least that the international community can do in the face of such abominations.

V. CONCLUDING REMARKS: TOWARDS A NEW JUDICIAL REALISM

The experience of the ICC demonstrates that even outside the confines of the courtroom, tribunals can make important contributions to achieving peace and preventing atrocities. Even without victor's justice and even where tribunals do not operate in ideal circumstances with substantial support from the international community (which conditions judicial cooperation by recalcitrant states on important national interests), the introduction of legitimacy can shape incentives to end or prevent human rights abuses. The mere threat of prosecution during a critical time of escalating violence, the political isolation and military decline that result from being stigmatized as an international fugitive, a weakened bargaining position after the issuance of an arrest warrant and the consequent search for scapegoats—these scenarios illustrate the manifold ways, some subtle and others blunt, in which accountability can impact the cost-benefit calculus of using atrocities as an instrument of power.

I began by reducing the peace versus justice debate to the caricature of the naïve "judicial romantic" blindly pursuing justice in contrast with the cynical "political realist" indulging the dictates of power. The debate has become far more complex since it first arose in the context of the ICTY. Both sides have now tempered their expectations, whether in regard to how much tribunals can realistically achieve in preventing atrocities or the real political costs of leaving genocide, war crimes, and crimes against humanity unpunished. The judicial romantics are now somewhat sober, and the political realists somewhat softer, but the underlying tension between the pursuit of ideals and the constraints of political reality remains. When considering these different ends of the spectrum, one must not forget that while prosecuting heads of state and other leaders before tribunals is no longer unimaginable, the balance is still firmly on the side of political expedience and submission to power rather than to justice. The still emerging culture of international accountability continues to navigate through the tenacious remnants of the culture of impunity that prevailed throughout much of the UN era. While the idea of the ICC is appealing to the many states that have ratified its statute, and the Security Council has for the first time referred a situation to the ICC, support is still lacking at crucial moments when international pressure is required to ensure execution of arrest warrants and other forms of judicial cooperation. The failure to do justice will likely remain a far bigger problem

when compared to the fear that tribunals will stand in the way of peace negotiations. Indeed, as the reality and implications of prosecutions before tribunals becomes increasingly apparent in a variety of contexts, elites who are both the primary actors in the international lawmaking and institution-building processes and the potential defendants at the ICC will constantly reassess their view of the utility of international criminal justice.

Tribunals may experience alternating periods of expansion and retreat; there may be a concern with consolidating global tribunals or a preference for local justice at the grassroots level. The process of learning by trial and error will continue, especially as the "complementarity" scheme envisaged under the Rome Statute begins to unfold in a broad range of contexts. But there is no going back to the pre-ICTY world in which genocide could be committed with impunity. Against all odds, the rules have changed, or at least are moving in the direction of fundamental justice.

A mutually reinforcing equilibrium between peace and justice will be achieved only through a concerted, though gradual, process of internalizing accountability as a fact of political life, as an inescapable ingredient of sustainable power. The cost of an amnesty in a particular situation must always be weighed against the imperative of transforming the habits of those in power. Every exception sends the message that criminal liability for the most serious international crimes can be negotiated. The challenge in this historical evolution of behavioral norms is to balance the exigencies of local contexts with the long-term requirements of ushering in a new global ethos that bridges the gap between ideals set forth in the 1948 UN Declaration of Human Rights with the realities of governance. The preamble of the Declaration recognized that "the inherent dignity and . . . the equal and inalienable rights of all members of the human family is the foundation of freedom, justice and peace in the world."⁸⁵ We witness, more than sixty years later, the catastrophic toll that disregard of this admonition has brought upon humankind.

Beyond considerations of global governance, we should also consider what our pursuit or lack of commitment to justice says about our fundamental self-conception. One human rights lawyer who was interviewing distraught Darfur refugees at a camp in Chad was repeatedly asked, "When will Bashir be tried? . . . We are here because of [him]."⁸⁶ In contrast to the weighty pronouncements of theorists and bureaucrats, the pithy speculations of pundits and policymakers, it is the voices of the survivors, reflecting the

85. Universal Declaration of Human Rights, *adopted* 10 Dec. 1948, G.A. Res. 217A (III), U.N. GAOR, 3d Sess. (Resolutions, pt. 1), at 71, pmb., U.N. Doc. A/810 (1948), *reprinted in* 43 AM. J. INT'L L. 127 (Supp. 1949).

86. Sara Darethshori, Op-Ed, *Doing the Right Thing for Darfur—An ICC Indictment of Sudan's President Serves Peace and Justice*, L.A. TIMES, 15 July 2008.

intimate horrors of genocide, that most forcefully remind us that justice is not a mere utilitarian abstraction. It is those who are left with nothing but the desire to redeem their lost humanity who remind us of who we are as humankind, and of the empathy and moral solidarity with the oppressed that is the basis for true civilization. The fact that we are forced to invoke utilitarian rationales to justify justice is itself a reflection of the sorry spiritual condition into which we have sunk. Perhaps in the coming years and decades, the unfolding moral impact of tribunals on global consciousness will lead us to a new understanding in which impunity for *génocidaires* as an incentive for peace will be ridiculed as a far-fetched illusion of a dark past.