

**THE INTERNATIONAL CRIMINAL COURT IN CENTRAL AND EASTERN
AFRICA: BETWEEN THE POSSIBLE AND THE DESIRABLE**

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ABSTRACT OF THE DISSERTATION

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The field of transitional justice has been haunted and enriched by the peace versus justice dilemma and the difficulty of navigating the thin line between the logic of appropriateness and the logic of consequence. These questions have gained renewed urgency over the last two decades as the increasing vigor of international criminal law and the human rights discourse demanded that accountability replace impunity as a general norm after mass atrocities. The goal of this study is to challenge the notion that war crimes courts may undermine peace and stability by adapting this debate to a new institution, the first ever permanent international criminal tribunal, and its first investigations and trials in Central and Eastern Africa. The central thesis of this dissertation is that, in the context of the International Criminal Court’s involvement in Uganda, Sudan, and the Democratic Republic of Congo, the pursuit of justice measures has not undermined peace. I set out to examine whether the court’s multiple interventions in this region of the world have been followed by a deterioration or exacerbation of the conflicts under study and/or the failure of peace negotiations caused by the question of accountability. I conclude that this has not been the case in the contexts under review, and that it is wrong to present the conceptual pairs of peace and justice as opposing or contradictory.

DEDICATION

To my professors, for their support and their guidance.

To my interviewees, for taking time out of their busy schedules to meet with an unknown student.

To everyone that strives to bring peace, justice, or both in some of the most dangerous corners of the planet.

To my parents, for helping me get here.

And to Lisa, for her unconditional love and infinite patience.

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CHAPTER 1

INTRODUCTION: TRANSITIONAL JUSTICE AND THE PEACE VERSUS JUSTICE DEBATE

“Fiat Justitia et Pereat Mundus” (Emperor Ferdinand I).

“It is never a struggle between good and evil, but between the
preferable and the detestable” (Raymond Aron).

The International Criminal Court is facing its first tests of performance in the complicated political environments of Uganda, the Democratic Republic of Congo, Sudan, and the Central African Republic. Still a relatively young institution that has yet to complete its first trial, it is uncertain whether this court will successfully navigate the thin line between the logic of appropriateness and the logic of consequence, law and politics, peace and justice. These dilemmas have haunted and enriched the ever-expanding field of transitional justice, opened new interdisciplinary bridges between international relations and international law, witnessed the proliferation of international courts and truth commissions in detriment of amnesties or inaction, and fueled endless debates about the wisdom or folly of such pursuits in each post-conflict situation.

These questions garnered renewed urgency and prominence in the nineties, as the increasing vigor of international criminal law and the human rights discourse demanded that accountability replace impunity as a general norm after mass atrocities. Supporters attached a long list of expectations and unqualified blessings to the new mechanisms of

international justice, including deterrence, social reconciliation, and peace. Detractors viewed it as an impediment to the prudence and political bargaining necessary to ensure stability and strengthen domestic political institutions. At their most extreme, they dismissed the preventive effect of international criminal law, and predicted, instead, the exacerbation of violence.

The goal of this dissertation is to challenge the notion that war crimes courts may undermine peace and stability by adapting this debate to a new institution, the International Criminal Court, and to today's current environment in the troubled heart of Africa. The central thesis of this study is that, in the context of the ICC's involvement in Africa, the pursuit of justice measures has not undermined peace or peace negotiations. This study was framed by questions about the political overtones of a non-political institution -an independent court focused on individual criminal accountability-, and the appropriateness of weighing the consequences of its actions and letting that interfere with or affect the judicial process. It was inspired by the court's quest to successfully avoid the pitfalls of either legal evangelism or fundamentalist realism. And it was motivated by recurrent discussions over the impact of the perennial peace versus justice dilemma on the tribunal's future. I have set out to examine whether the court's multiple interventions in this region of the world have been followed by a deterioration or exacerbation of the conflicts under study and/or the failure of peace negotiations caused by the question of accountability. I conclude that this has not been the case in Uganda, the Democratic Republic of Congo, and Sudan, and have complemented this with a briefer review of this argument in other scenarios, including the Central African Republic, Sierra Leone, Argentina, Colombia, Afghanistan, Liberia, Republic of Guinea, Kenya, Cambodia, and

the former Yugoslavia. As the following pages will attempt to show, it is wrong to present the conceptual pairs of law and politics, and peace and justice, as opposing or contradictory.

In this introductory chapter, I will elaborate my central thesis and research questions; place my investigation within the pools of relevant literature that it draws upon, and explain the gap that this dissertation intends to fill; and finally, lay out a chapter-by-chapter structure of the text and briefly explain the methodology.

In order to obtain relevant data, I have relied on a variety of sources: academic literature within the fields of transitional justice, human rights, and international security; global and local media outlets, given that the object of study is contemporary and many of the events herein described have unfolded in the last few years or even months; reports from non-governmental organizations, with particular attention paid to Human Rights Watch, Amnesty International, the International Center for Transitional Justice, and the International Crisis Group, as well as population-based surveys and quantitative data aptly compiled by similar organizations; in-depth interviews with individuals with relevant knowledge or expertise, some openly and some confidentially; and field research in the ICC headquarters in The Hague in the summer of 2007, the Seventh Annual Assembly of States Parties to the Rome Statute, which took place in December of 2007 in New York, and in trips to Uganda and Liberia. The interviewees, to which this researcher is indebted and grateful, included academics, international lawyers, representatives of civil society, representatives of international organizations -United Nations, European Union, Organization for Security and Cooperation in Europe, International Criminal Tribunal for Former Yugoslavia-, and even a former peace negotiator. My field research

enabled me to interview ICC personnel representing each of the three main branches of the court -the Presidency, the Office of the Prosecution, and the Registry- and to become familiar with its interactions with member-states and civil society. Discussions with countless members of panels, workshops, and conferences over the last four years have inevitably shaped this dissertation, as well as the useful guidance of my professors.

In a foundational article titled “Trials and Errors: Principle and Pragmatism in Strategies of International Justice” (2003), Jack Snyder and Leslie Vinjamuri criticize what they would characterize as the prosecutorial drive of Human Rights Watch, Amnesty International, and other advocates of global justice. Their case is summarized by the premise “justice does not lead, it follows.” Snyder and Vinjamuri, echoing Goldsmith and Krasner’s skepticism about the virtues of the ‘new international idealism’ (2003), contend that an over-reliance on post-hoc justice risks causing more atrocities that it would prevent, pays insufficient attention to political realities, ignores the fact that potential victims are best served if they are not allowed to become victims in the first place, and cannot and will not succeed unless implemented in a more pragmatic way, one that privileges the logic of consequences over the logic of appropriateness and understands the need for political bargaining. Theirs is a more sophisticated version of Stephen Krasner’s argument that, as the title of one of his articles reads, “after wartime atrocities, politics can do more than the courts” (Krasner, 2001). These and other criticisms led Helena Cobban, in a widely-read article in *Foreign Policy*, to claim that “it is time to abandon the false hope of international justice” (Cobban, 2006).

Can the duty to prosecute prolong political turmoil and even the aggravation of crimes? This ‘peace versus justice’ dichotomy was already prominent during the conflict

in the Balkans and at the time of the establishment of a UN-sponsored tribunal in The Hague. For example, as noted by Theodor Meron (1995), “the gravest atrocity, the Serb massacre of thousands of Muslims living in and around Srebrenica, happened in July 1995, when the tribunal was fully operational and Karadzic and Mladic had both been indicted.” In John Bolton’s less charitable words, “why should anyone imagine that bewigged judges in The Hague will succeed where cold steel has failed?” (quoted in Mennecke, 2007: 324). This discussion has regained currency with the first indictments issued by the ICC. Does the intervention of the court interfere with the amnesty issued by the Ugandan government, or by ongoing peace negotiations? Will the indictments push the rebels back to the bush? Will the Office of the Prosecution factor in politics when deciding the targets and timing of indictments? Can the actions of the court exacerbate reprisals and endanger peace negotiations? If it is a question of sequencing, is peace first and justice later the optimal order? Similar concerns are relevant to the DRC, where Kinshasa lacks control of a great portion of the country and continues to fight with different armed factions. These situations, complicated in their own right, are simpler than that of Sudan, where the government apparatus itself is suspected to orchestrate and support the genocidal actions of the Arab *janjaweed*. What is the Court to do when its actions have immediate consequences? Although this will be discussed more thoroughly in Chapter 3, the provisions of the Rome Statute of the ICC do not settle the case without ambiguity (Arsanjani, 1999, Scharf, 1999, Roht-Arriaza, 1995, Meintjes, 2000, Gropengießer and Meißner, 2005). What are the motivations behind the strategies of the governments of Uganda, Sudan, and the Democratic Republic of Congo vis-à-vis the Court? What implications can we expect for the political variables of power and

sovereignty within those countries, and for the human rights project at large? All these matters hover near the critical intersection between law and politics and sit at the center of this investigation.

I contend that the ICC's experience in Africa provides a strong case for those that argue that the pursuit of justice through war crimes does not undermine peace and stability.¹ I do not expect that all accountability initiatives will have a positive effect in peacemaking, nor do I share the optimism of many international justice advocates with regards to peace, reconciliation, or even deterrence. At times, amnesties have been an ingredient of successful transitions in societies emerging from violence, such as Mozambique, or dictatorship, such as Spain (Grono and Flintoft, 2007: 1). What I contest is the notion, fashionable in many circles, that the ICC has negative, independent effect on peace, security, or the possibility of ending conflicts through peace negotiations. Thus, I do not sustain that there can be no peace without justice, but that the pursuit of justice is not detrimental to the pursuit of peace. In other words, there *can* be peace without justice, but it is harder to imagine a scenario where justice hurts peace. My central proposition is thereby different from both those that argue that peace and justice are on different sides of complicated but necessary trade-offs, as well as those that argue that all good things go together. In the context of the ICC in Africa, the Court's activities have not jeopardized or undermined the peace and stability of the communities involved, and have actually even had a peacemaking effect, albeit a weak one. This does not equate with siding with

¹ Although there are many working definitions of 'peace' and 'justice,' both terms are not understood here in their broadest, richest sense. Thus, peace is not used here as inclusive, sustainable, democratic peace, but in its narrower sense of absence of war. Similarly, justice does not mean justice for all, and it does not take into account the many different connotations this word inspires across individuals and cultures. Instead, justice merely stands for prosecutions of war criminals and, even more narrowly, those most responsible for the worst crimes, to fit the mandate of the International Criminal Court and the general trend of war crimes courts.

the many advocates of international justice that believe in the deterrent power of war crimes courts, as this remains empirically unproven beyond anecdotal evidence.² Given the complexity of factors that constitute a political reality, it is more plausible that a tribunal in The Hague could have an appreciable role in concert with other measures. The limited capacity of the ICC to exacerbate conflicts or to deter war criminals from wrongdoing is two sides of the same coin. Deterrence is, nevertheless, the primary objective of the Court, as stated by the preamble of the Rome Statute.

There is no escaping the fact that taking credit for the peacemaking role of the court implies also the possibility of taking responsibility for the consequences. This is a point often made by human rights activists, generally supportive of international justice initiatives, but too familiar with the plight of the communities caught in warzones to be cavalier about the possible outcomes of the Court's activities. Actions have consequences, and violent retaliation for decisions made in high places is often borne by civilians on the ground. The ICC is not impervious to this logic. However, since the Court's founding treaty entered into force in 2002, countless lives have been put at risk as a result of various strategies, including inaction, military operations, and even peace negotiations.

² Instead, it is likelier that Juan Méndez, Special Adviser on the Prevention of Genocide to the UN Secretary-General, is correct when he says that the preventive role of punishment is an act of faith. Also pessimistic, the former Special Rapporteur on Genocide of the Sub Commission on Prevention and Protection of Minorities pointed out that those personalities psychologically prepared to commit genocide are not always likely to be deterred by retribution (quoted in Mennecke, 2007: 319, 326). There are some indications that Sudanese leaders in Khartoum have expressed privately their serious worries about being sent to The Hague, and that the ICC's preliminary investigations in Colombia prompted some members of the paramilitary to drop their weapons. In the civil war in Ivory Coast, 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, a preventive measure that should not be underestimated given the precedent of Rwanda (Akhavan, 2009: 637-641).

In the realm of political science and global affairs, war crimes courts are seen as intensely political institutions that often engage in strategic legalism or, as former US Secretary of Defense Donald Rumsfeld has put it, ‘lawfare.’³ It is the expected nature of war crimes courts to oscillate between the prospects of justice empowered by the might of international politics and justice hampered by the lack of political will to support it. Borrowing a metaphor from Professor Cassese, international criminal justice resembles a “giant without legs and arms,” lacking an enforcement apparatus and dependent on state action fulfill its mandate (Williamson, 2006: 21-26). A few years after proclaiming *realpolitik*’s death in the Rome Conference, Cherif Bassiouni wrote: “The principal obstacles to the effectiveness of the ICC will always be *realpolitik* and states’ interests. Thus, it must be acknowledged that the ICC is not the decisive word on international criminal justice over states’ interests and *realpolitik* –the tensions between the two will always be present.” (Bassiouni, 2006). As Louise Arbour, former Prosecutor of the International Criminal Tribunal for Former Yugoslavia (ICTY) noted, “charges that decisions are politically-driven are easy to make and harder to rebut.” (Danner, 2003: 512).

However, this tension must happen around the Court, but not become a part of it. In order to maintain its credibility and independence, the Court must independently pursue the judicial track, and hope that the political track catches up to or coincides with it, i.e., that the political circumstances allow for the enforcement of the court’s decisions. It is more accurate to depict the uneasy coexistence of political mediation and international courts as two tracks that converge at times and diverge at others, rather than

³ For an explanation of the meaning of this term used in this context, see Dunlap, Charles J., “Lawfare amid warfare” in *The Washington Times* (August 3, 2007), available at <http://www.washingtontimes.com/news/2007/aug/03/lawfare-amid-warfare>.

as the carrot and stick of a coherent strategy, or two different strategies in permanent collision. Sometimes, the judicial track and political realities go in the same direction. Sometimes, the Court itself can precipitate changes in the political landscape. But often, the Court's decisions cannot be enforced. The ICC is a treaty-based organization without enforcement mechanisms, and its efficacy depends ultimately on the willingness of states to fulfill their obligations of cooperation in good faith. This makes it only one piece in the conflict resolution puzzle, and not precisely one of the most dominant ones.⁴ In any case, it is not the role of the Court to determine what is politically practical, feasible, or desirable. In the words of the late political theorist, Judith Shklar, it can only "choose justice, as a policy" (Bass: 2003, 81).⁵

The ICC has political consequences, but it must resist politicization. Judges and prosecutors are political animals, and law and politics are always intertwined, inasmuch as everything that involves the public sphere is inherently political. However, what this dissertation cautions against is the notion that war crimes courts are *especially* political entities because they function in the realm of international politics. As far as this investigation has been able to determine, politics does not make its appearance at the center of the Court's activities, such as issuing indictments, trying suspects, and handing down sentences, but rather in its external relations, such as in raising funds or obtaining cooperation from intervening countries. The ICC and its most direct precursors are

⁴ An overview of the literature on new civil wars and negotiated settlements has also been helpful (Stedman, 2003; Gartner and Bercovitch, 2006; Nilsson, 2008; Mehler, 2009). Several analyses of the Uppsala Conflict Data Program have yielded the finding that nearly half of all peace agreements break down within five years, and up to ninety percent of the rest enter a limbo of no war, no peace. Similarly, power sharing may be an attractive solution for peace negotiators eager to strike a deal and stop the fighting, but it might be less attractive for the general population.

⁵ As elegantly explained by Allison Marston Danner (2003: 515), "the Prosecutor's ability to make individualized considerations based on law and justice, rather than self-interest or sheer power of any particular state, transforms the Court from a political body festooned with the trappings of law to legal institution with strong political undertones."

perennially accused of being political tools of powerful countries, or of acting on the basis of a certain worldview that is inevitably informed by politics and clouded by partiality. This stems from the perception that the court should be neutral and objective and judge both sides of a conflict even-handedly. These accusations should not be dismissed categorically, but a good rule of thumb is that, if everyone thinks that the court is political, it must be doing something right. There is arguably no better proof of this assumption than the realization that the ICC was established despite the hostile opposition of the most powerful country in the world.⁶

Alternatively, some argue that the main flaw of the Court lies precisely in that it resists politics as part of its decision-making process. For example, while discussing the International Criminal Tribunal for Rwanda (ICTR), Moghalu (2005) complains that the court has tried too hard to avoid the ‘victor’s justice’ label, giving too much leeway to defendants and causing unproductive tension with the Rwandan government by attempting to prosecute members of the Rwandan Patriotic Front. The tribunal would be better served if it embraced political reality and accepted that “we live in an imperfect world.” (Moghalu, 2005: 150). Others view the ICC as weak and counterproductive, designed to alienate the single most necessary country for the implementation of its decisions, the United States. They see no evidence of deterrence, embrace any indication that the universal jurisdiction ‘craze’ has faded away, and believe that amnesties and negotiated settlements are a more effective way out of conflicts. In their view, this should translate into withdrawing the indictments against the leadership of the LRA to help bring

⁶ This does not mean that this process has been painless or without consequences. As one of the Korean delegates stated during the negotiation of the Rome Statute, “it is as if we’re being forced to choose between a court crippled by American requirements or a court crippled by lack of American participation.” For a coherent explanation of US policy towards the ICC, see Johansen, 2006.

the peace negotiations to a favorable conclusion, or refraining from threatening President Bashir and endangering the Naivasha agreement holding the fragile peace between North and South Sudan.

Nonetheless, one should not misjudge the political power of the individuals targeted by the ICC. Proponents of amnesties always speak about the need to strike political bargains and build robust institutions that can enforce the rule of law. However, most of the individuals indicted by the ICC are politically very weak. For example, the rebel gangs in the Congo lack political goals or support among the population. Laurent Nkunda, one of the main reasons behind the prolongation of the war in the Kivus, was despised by the Rwandophone Tutsi he claimed to protect, because his criminal campaigns in Bukavu, Goma, and Kisangani had made life more difficult for them. Despite the very real cleavages and grievances that exist between the Government of Uganda and the northern provinces, the Lord's Resistance Army has no political support among the Acholi. The LRA does not recruit rebels from among the aggrieved Acholi, but abducts them. Paying attention to political realities makes more sense in the case of Sudan, because in this case one of the indicted individuals is the President himself, who has the state apparatus at his disposal and friends in the Arab League and the African Union that can give him political cover. For that reason, the Court may have to accept that it will not be able to execute or enforce its arrest warrants in the short term. Even in this case, nothing indicates that the Sudanese government would have been willing to cooperate had the Security Council not referred the case to the ICC or had the Prosecutor not issued the indictments.

Given that the entire docket of the Court is monopolized by African situations, the ICC is vulnerable to accusations of neo-colonialism. From the African Union and the Arab League to the President of the United Nations General Assembly, critics have complained that the ICC is biased against Africa, and that this is merely another outfit designed to justify outside intervention in the global South.⁷ According to this argument, the Court is not biased because it fails to target all sides of a conflict equally, but because, on a global level, it concentrates on African criminals while casting a blind eye towards the rest.

Though it is true that the ICC has only issued indictments against Africans –from geographically contiguous countries, too-, it is important to remember that African states have played a crucial role in the development of this institution. More than twenty African countries were among the founders of the ICC, and currently more than two-thirds of the states in sub-Saharan Africa have ratified the Rome Statute, amounting to one third of its total roster. The Rome Statute review conference will take place in Uganda in 2010. Ninety African organizations have joined the NGO Coalition for an International Criminal, and Senegal was the first country to ratify the Rome Statute in 1999. Finally, three out of four situations have been referred to the Office of the Prosecution by the governments involved, and the fourth one was referred to the Court by the United Nations Security Council (Du Plessis, 2008: 1-5). The Court receives

⁷ A former supporter of international justice mechanisms, President Kagame of Rwanda, has become one of the loudest critics of both the ICC and the ICTR. This may have to do with the fact that the ICC has so far indicted only Africans, or with the fact that several European prosecutors want to try him for his alleged participation in the killing of his predecessor, an act that precipitated the genocide. At the time, the Government of Rwanda, like the Government of Sierra Leone years later, asked the Security Council to establish an international tribunal, though they would have been much happier if it had been located in Rwanda instead of Tanzania, and it incorporated the death penalty in the repertoire of possible sentences. The President of the African Union Commission, the Gabonese Jean Ping complained that the ICC has turned Africa into the laboratory for new international law, and demanded that Iraq, Sri Lanka, or Colombia be also taken up by the Court (Du Plessis, 2008: 1).

communications from all over the world asking for its involvement, but the majority fall outside of its jurisdiction. After just over a year of its existence, the OTP had already received hundreds of requests, and most dealt with drug trafficking, tax evasion, environmental damage, judicial corruption, or the crime of aggression. The Court has been very transparent about its decision not to prosecute actions that had taken place in Iraq or Venezuela, as well as many others. By 2006, out of almost 2,000 communications, a staggering 80 percent were manifestly outside of the ICC's jurisdiction (Du Plessis, 2008: 1-7). It is neither coincidental nor intentional that all four countries in which the ICC is active are African. In 2002, the year that the treaty entered into force, half of Africa's states were engaged in some form of armed conflict, affecting twenty percent of the continent's population (Lauterbach, 2008: 87). Since the 1990s, Africa has suffered three devastating clusters of wars, centered respectively on West Africa -Liberia, Sierra Leone, Guinea, Ivory Coast-, East Africa and the Horn -Ethiopia, Eritrea, Somalia, Sudan-, and the Great Lakes -Rwanda, Burundi, Democratic Republic of the Congo, Uganda. Notably, since 2002, Africa has experienced a relative decrease in the levels of violence (Williams: 2007: 1028). Finally, and this is perhaps the most important point, the victims are African too.

Some of these questions appear frequently in the ever-growing field of transitional justice, which provided the main pool of literature that this dissertation draws from. Transitional justice refers to the short-term and often temporary judicial and non-judicial mechanisms and processes that address the legacy of human rights abuses and violence during a society's transition away from conflict or authoritarian rule. This literature has focused on issues of institutional design and the optimal conditions for

reaching the idealized –and largely under-theorized- transitional justice goals (Orentlicher, 1991, Popkin and Roht-Arriaza, 1995, Kritz, 1995, Méndez, 1997, Minow, 1998, Hesse and Post, 1999, Bass, 2000, Hayner, 2001, Teitel, 2000). These goals are, alternatively or simultaneously, justice, peace, and truth, and the means employed range from prosecutions to truth and reconciliation commissions to more local and traditional community rituals.⁸ Blanket amnesties, while increasingly discredited within the literature and the international community at large are still proposed as a wiser alternative by critics of the international justice movement (O'Donnell, Schmitter et. al., 1986, Zalaquett, 1992, Benomar, 1993, Snyder and Vinjamuri, 2003, Goldsmith and Krasner, 2003), who believe, as Samuel Huntington does, that it is better “not to prosecute, not to punish, not to forgive, and not to forget” (Huntington, 1991).

Many have weighed in the ongoing debate over the extent to which justice provided by external courts can contribute to peace and reconciliation. Hampson (1996: 231), in a study of the effectiveness of peace agreements, writes that “international tribunals and commissions bring the element of impartiality necessary to restore faith in the judicial process and the rule of law.” Orentlicher (1991) argues that the punishment of war criminals helps prevent future abuses of human rights. Akhavan (2001: 9) states that

⁸ Transitional justice mechanisms range from international and hybrid courts to domestic and foreign trials, to truth commissions, among others. It has been predicted that foreign trials and the doctrine of universal jurisdiction would suffer from political and economic pressure brought by the United States, and the negative impact on the human rights' agenda of a post-9/11 environment. To illustrate this point, much was said about Belgium's modification of its universal competence law in 2003, after considerable pressure from the United States and Israel in the face of criminal suits against General Thomas Frank and Ariel Sharon. However, recent years have not witnessed a decline in the number of lawsuits and trials based on universal jurisdiction. Rather, there has been a proliferation of the use of universal jurisdiction in several European countries, while at the same time there is a trend to limit its scope by requiring that it be linked somehow with the country where the complaint has been filed. For example, by mid-2009 Spanish judges had opened sixteen different investigations against individuals from the United States, Israel, China, Rwanda, and Morocco, among others. Quickly thereafter, a law was passed to limit judges to pursue cases with ties to Spanish citizens or links to Spanish territory (see Whitlock, Craig, “Universal Jurisdiction: Spain's Judges Target Torture” in *The Washington Post*, May 24th, 2009).

“the empirical evidence suggests that the ICTY and the ICTR have significantly contributed to peace building in postwar societies, as well as to introducing criminal accountability into the culture of international relations.” By removing or marginalizing these leaders, the likelihood of private revenge and retaliation by victims diminishes, while deterrence increases. Others, such as Hesse and Post (1999) or Teitel (1999) are less optimistic, and maintain that international courts are not sufficient in and of themselves to bring about social reconciliation. Minow (1998) finds that war crimes courts suffer from politicization and selectivity, which detract from the perception of fairness and credibility that is so crucial to the efficacy of international justice. Even though peace versus justice trade-offs continue to be part of global policymaking, the Secretary-General settled the position of the United Nations in his 2004 report on “the rule of law and transitional justice in conflict and post-conflict societies.” This report supports the notion that peace and justice are not contradictory forces, and when properly pursued they promote and sustain one another, that UN-endorsed peace agreements can never grant amnesties for genocide, war crimes, crimes against humanity, or gross violations of human rights, and that such amnesties do not constitute a bar before UN-created or assisted courts.⁹ The Chief Prosecutor of the ICC, Luis Moreno Ocampo, unfailingly maintains that his duty is to apply the law without political considerations. International jurisprudence has supported the non-recognition of amnesties, including in cases before the ICTY, the Inter-American Court of Human Rights, and the Special Court for Sierra Leone (SCSL). Recently, amnesties have been successfully challenged in a number of national courts, including in Chile and Argentina. Still, amnesties and *de facto* impunity continue to benefit most perpetrators of war crimes, and many of the

⁹ See UN Doc. S/2004/616 (August 3rd, 2004).

transitional justice mechanisms that have been established in different contexts are very weak, often on purpose.¹⁰ At the very least, one can safely say that there is a much higher presumption against impunity than fifteen years ago, and that the debate revolves more often around issues of timing and sequencing, more than around stark either/or choices (Seils and Wierda, 2005: 1-2).

Despite some questions regarding their efficacy and a renewed interest in truth commissions, international criminal courts are the mechanism *du jour*. Advocates and supporting observers frequently attach to international courts an ever-expanding list of promised benefits: enhance prevention by threatening those in positions of power to deter further violence; make possible atonement of the perpetrators and honor the dead; provide a mechanism to enable victims and their families to receive needed psychological relief; channel their thirst for revenge toward peaceful dispute settlement; affirm the Nuremberg Principles at the international level while restoring faith in the rule of law generally; tell the truth of what occurred, thereby preserving an accurate historical account of barbarism that would help prevent its recurrence; heal the wounds of the community and restore the civility of torn societies to achieve national reconciliation (Álvarez, 1998: 343). It is sometimes even suggested that international prosecutions can solve once and for all the problem of human rights enforcement and strengthen or accelerate the democratization of transitional states. Detractors could not be farther from this position, and their reactions range from skeptic dismissal to loud rejection of the

¹⁰ Additionally, many measures that appear in direct contradiction to accountability may also be negotiated, in addition to or instead of full or partial amnesty. These may include measures to integrate ex-fighters, whether state or non-state, measures to allow former rebels to participate legally in the political process, and even form political parties. It may also include measures to allow some or all parties to a conflict a portion of, or stake in the governance of, the state's economic resources (Sriram, 2004).

international justice project, either because it encroaches upon the sovereignty of states or because it is regarded as a danger for peace and stability.

The bibliography on international courts has grown exponentially, typically covering everything from the *ad hoc* courts established by the United Nations to the atrocities committed in the former Yugoslavia and Rwanda, to the mixed or internationalized courts set up in Kosovo, Cambodia, Timor-Leste, and Sierra Leone. But transitional justice as a focus of research and policy emerged even earlier, as a response to a wave of changes that began in Latin America in the 1980s and moved to Eastern Europe, Sub-Saharan Africa, and other parts of the world during the early 1990s. At first, the emphasis was on transitioning out of authoritarian rule or massive violence by dealing with the past in a way that did not reignite the fighting or jeopardize the fragile peace or the nascent democracy. With the end of the Cold War, the establishment of international criminal tribunals, and the arrest of Pinochet, the emphasis turned to ending impunity and holding political leaders, warlords, and military commanders accountable for atrocities. Similarly, many truth and reconciliation commissions set up before 1995 were political façades set up by entrenched authoritarian regimes that had no intention to address human rights violations, and predictably did not strengthen human rights protection or advance democratization. Nowadays, most eyes are on the ICC, the first-ever permanent institution with jurisdiction over genocide, crimes against humanity and grave war crimes, and a truly extraordinary development in the history of public international law.

Within the earlier literature focused on the ICC, many contributions discussed how much an international court can generally contribute to bringing perpetrators to justice and deterring future atrocities, and how effective the ICC would be in performing

these tasks given its specific institutional design (Cassese, 1999, Farer, 2000, Gallarotti and Preis, 1999, Griffin, 2001, Kissinger, 2001, Pejic, 1998, Popovski, 2000, Rudolph, 2001, Smidt, 2001, Smith, 2002, Teitelbaum, 1999). But these contributions under-study how much the Court will contribute to both justice *and* peace, and whether these goals are compatible. Besides, given the short span of time that the Court has been operational and the absence of completed trials, their studies deal more with abstractions and general principles than with the intricacies and day-to-day politics of actual situations. There is, however, a robust literature on the tension between accountability and conflict resolution that pays close attention to the ICC and the peace versus justice debate (Parlevliet, 2002; Lutz, Babbitt, and Hannum, 2003; Putnam, 2002; Bell, 2003; Sriram, 2004; Akhavan, 2009), and this was the thematic focus of a high-level conference in Nuremberg, of all places, in 2007.¹¹

It is now common to read about the internationalization of accountability, the legalization of the international system, and the judicialization of politics. In many jurisdictions, courts enjoy more public support than any other political institution (Tate and Vallinder, 1995). I am not persuaded that, as it is often argued, the proliferation of transitional justice mechanisms is merely the by-product of very industrious and entrepreneurial advocates. Rather, the globalization of the accountability norm is part of a broader phenomenon of legalization and judicialization that goes beyond war crimes courts. This tendency is present generally in human rights, but also increasingly in trade, environment, and intellectual property at the global level. These processes are nested in a

¹¹ According to Lutz (2003: 191), there is a fundamental collision between the post-conflict focus on justice for past crimes of human rights' advocates, and conflict resolvers' post-conflict desire to promote reconciliation, or at least peaceful coexistence, among previously warring parties, and their concern that the human rights community's no-peace-without-justice sloganeering only creates problems.

wider normative shift that incorporates human rights norms as an integral part of international relations and foreign policy and the overarching meta-norm of contemporary society (Sikkink, 2003).

International law and international relations –and, more specifically, the intersection of these two disciplines- provided another body of literature that supports this investigation. For most of the second half of the 20th century in the United States, these two fields were estranged. Morton Kaplan’s *The Political Foundations of International Law* (1961), for example, stood alone for long. International lawyers in general, and positivists and legal process scholars in particular, typically view courts and other legal institutions as apolitical, even in politically charged areas like human rights, and maintain that this is their special virtue (Meron, 1995). A powerful normative impulse sits at the very core of international law as a disciplinary project, and international lawyers frequently write more as advocates than as observers. International relations theory, on the other hand, emerged as a realist political science of interstate affairs that rejected the inter-war idealism that had produced the League of Nations and the Kellogg-Briand Pact but had failed to prevent the Second World War. Most IR scholars in the United States, unlike their counterparts in the English School, viewed international law as irrelevant, if not downright naïve and dangerous. International law texts were dropped from the required reading lists for international relations students in leading research-oriented departments in the United States (Sriram, 2006: 469).

However, during the last decades, beginning with Louis Henkin’s famous *dictum*, “first, law is politics” (Henkin, 1989), this situation has drastically changed. International relations theory has attempted to unbundle the political factors that shape international

law: the interests, power, and governance structures of the actors involved; the institutions and arrangements within which they interact; the ideas and understandings upon which they operate. In 1999, the Annual Meeting of the American Society of International Law focused on the interplay between law and politics and dreamt up prospects of interdisciplinary collaboration. In 2002, the theme of the annual meeting was “The Legalization of International Relations and The Internationalization of Legal Relations.” In the summer of 2000, *International Organization* published an issue devoted to developing an IR approach to questions of international law. Most of these contributions speak of a “two cultures” or “two optics” syndrome in the relationship between international law and international relations theory, long for theoretical synthesis, and discuss the intensely political nature of international legal institutions.¹² Many wrote at the time about the fault lines between politics and law in the international justice project and the war in the Balkans (Bass, 2000; Beigbeder, 1999; Scharf, 1997).

No single theory or theoretical paradigm can adequately explain the evolution of the ICC (Roach, 2008, 6). Anarchy and the distribution of power are insufficient to explain contemporary global affairs, and are clearly not enough in a discussion of the ICC in Africa. Whereas classic international law was more reconcilable with the idea of states as unitary, identical actors with given sets of stable preferences, present-day international law –what David Held dubs ‘cosmopolitan law’ (Held, 1999: 70)- has been rethinking its ontological foundations in an environment of varied and fragmented polities that cannot be assumed to have common objectives (Reus-Smith, 2001: 586). Globalization encourages a more intimate analytic relationship between international and

¹² The IR/IL project is not without its critics (Kennedy, 1999), and some see the schism between the two as irreconcilable (Boyle, 1980).

domestic politics, especially in an African continent where nearly everything of interest happens at the sub-national and transnational levels, where leaders are likelier to be pursuing sub-national, ethnic interests than state-wide interests, and where the degree of political control almost always decreases in relation to the distance from the capital city (Rosenau, 1990 and 1997, Appadurai, 1996).

In the last decade, scholars have begun to explore more systematically the impact of the global human rights movement on governments' behavior (Risse, Kopp, and Sikkink, 1999, Finnemore, 2003, Clark, 2001, Simmons, 2002, Koh, 1997). Some earlier contributions (Henkin, 1979, Chayes and Chayes, 1993) came from legal scholars. Authors alternatively highlight the role of civil society, the personality of the head of the government, the existence of pressure from a hegemonic bloc or country, the influence of transnational legal processes and transnational networks of activists, and the persuasive power of human rights' norms. Some combine all of these factors in spiral models with ever-reinforcing feedback loops. Although studies about compliance and non-compliance with international law have traditionally focused on liberal states, there is an increasing interest in why illiberal and non-democratic countries embrace human rights norms and choose to cooperate with international institutions that can curtail their sovereignty (Guzman, 1998, Subotic, 2005).

Moravcsik's contribution to liberal IR theory is of special relevance to this investigation. In 1997, he revitalized liberal theory by emphasizing state-society relations and insisting on methodological individualism, which considers individuals and private groups as the fundamental actors in international and domestic politics. This is not to say that states are irrelevant, but that their preferences are not exogenously given by their

position in the system or the distribution of power, and rather construed domestically in interstate politics, much richer and fluid than realists and institutionalists would predict. These domestic actors also play a role in a global setting, and transnational processes can mediate their identity and interests. This approach builds on the pioneering work of Robert Keohane and Joseph Nye (1977) and has been developed, albeit with different consequences, by authors of a more realist persuasion (Snyder, 1984, 1991, 2000, 2005).

These authors employ primarily rationalist premises. But it would be a mistake to neglect the importance that constructivism has in the field of human rights and international institutions, as many of its assumptions have penetrated rival paradigms. Constructivists like Ruggie, Wendt, Sikkink, or Finnemore, emphasize that actors are embedded in social structures that have a constitutive effect on them, by shaping their worldviews, interests, and identities. Their choices are not only driven by instrumental rationality, but can be shaped by long-term normative and conceptual developments. Ideational-constructivist arguments do not claim to compete directly with materialist-rationalist explanations, but aim at tracing states' interests to a set of principled ideas and beliefs. What constructivists reject is the notion that states have objectively determined interests that they can pursue by selecting appropriate strategies and designing effective institutions. Rather, they believe that actors operate within a context of shared understandings and norms that are socially constructed and fluid, including concepts like sovereignty or national interest.

This investigation attempts to fill a crucial gap in the literature. First, the 'peace versus justice' debate has just begun to be applied to the ICC, but not in a systematic way, and with little attention to the domestic politics of the affected countries. A

comprehensive study of the political dimensions of the situations currently accepted by the Office of the Prosecution has not yet been pursued. Second, there are too few studies that consolidate, in this context, intellectual findings from international relations theory, international legal scholarship, and transitional justice. The multi-disciplinary IR/IL project that germinated at the turn of the millennium in prestigious conferences and academic journals has not been applied to the politics surrounding the involvement of the ICC in Africa. Third, while the news media is focused on Iraq and Afghanistan, the three worst, conflict-provoked, humanitarian crises in the world are those of Sudan, Uganda, and the Democratic Republic of Congo. These three crises, or “situations,” as the ICC Registry calls them, share borders, common characteristics, and similar neglect from the international community. Especially scant are studies that incorporate comprehensively the three layers of governance –state, sub-state, and supra-state- that interplay. Fourth, analyses of the motivations driving President Kabila and President Museveni to comply and cooperate with the ICC are in short supply. The Rome Statute obligates the court to investigate all sides -including the governments in Kinshasa and Kampala, which have themselves received more than enough criticism from human rights organizations-, and the actions of the ICC may not have a favorable outcome for what the respective governments perceive as national interests. This offers new opportunities for research and analysis on compliance with international law, traditionally focused on liberal democracies rather than on illiberal states or polities in transition. A line of thought has been opened by Jelena Subotić, who argues that illiberal states will accept international norms for very different reasons than those that motivate advocates of international justice: namely, providing international legitimacy, getting rid of domestic political

opponents, obtaining side benefits, or reacting to political uncertainty by simply mimicking already existing models. It is also possible that leaders of illiberal states, aware of the negative consequences brought by non-compliance with international norms, would have an incentive to deceive the international community by embracing these norms only cosmetically, while failing to implement the social change that these reforms would entail (Subotic, 2006).

The rest of the dissertation will be structured as follows. The second chapter, “The Others: *Ad Hoc*, Hybrid, and Domestic Mechanisms of International Justice,” looks for examples of non-ICC processes that have wrestled with the same peace versus justice dilemmas, so as to explore comparisons and test the validity of this investigation’s central argument. It chooses one example each from the other models of adjudication for war crime and crimes against humanity: first, UN-sponsored, *ad hoc*, international courts; second, hybrid courts made up of national and international judges; and third, municipal adjudication, either in the countries where the atrocities were committed, or through the application of the doctrine of universal jurisdiction. Special attention is paid to the International Criminal Tribunal for Yugoslavia (ICTY), the Special Court for Sierra Leone (SCSL), and the attempts, both at home and abroad, to prosecute Argentine military junta leaders.

The ICTY is the perhaps the clearest precedent of this peace versus justice dilemma surrounding an *ex ante* international criminal court. The ICTY faced significant political pressure aimed at avoiding indictments or arrests of the main players, who at the time were also involved in peace negotiations. After postponing Milosevic’s indictment for several years, it was unclear whether the international tribunal had encouraged the

tyrant to cling to power and commit atrocities in Kosovo, or, rather, had marginalized the ultra-nationalist elements within the Serbian elite and provoked a wholesale defection in the following elections. This debate still rages on today, as the death of Milosevic, the resurgence of the ultra-nationalists, the negotiations to join the European Union, and the refusal to arrest Ratko Mladic add more twists to an already convoluted narrative. The Special Court for Sierra Leone deserves a close look, as it set out to learn from the most notorious flaws of the Yugoslavia and Rwanda courts, successfully avoided them, and became arguably the most-praised operation of international criminal justice to date. Significantly, the ICC attempts to emulate the Special Court for Sierra Leone in several key aspects of its design and strategy. At the time, the SCSL was accused of undermining the prospects of peace, especially by issuing an indictment against Charles Taylor while he was attending peace negotiations in Ghana. Finally, I chose domestic and foreign trials of Argentine military leaders as pertinent examples of municipal adjudication. The mid-80s trials and the backlash that they provoked are often mentioned as illustrations of the need to let justice take a backseat to peace and stability.

Chapter three, “Amnesty in the 21st Century: The Case of the ICC” contains a brief historical background of the Court, introduces its general framework and functioning, and outlines some relevant provisions from its founding treaty, the Rome Statute. Afterward, it surveys the role and prevalence of contemporary amnesties, and explores whether they are compatible with the institutional design of the ICC and its general mission. In this section, the proliferation of war crimes’ courts and the consolidation of the accountability paradigm stand in contrast with the resilience of

amnesties as a ubiquitous instrument of conflict resolution. The Rome Statute can give us hints as to whether the court is equipped to deal with peace versus justice questions.

Chapter four, “The International Criminal Court in Northern Uganda: Peace First, Justice Later?” applies the central thesis of this investigation to the situation in Uganda, and the twenty-year-old war between the government and the LRA rebels. A veritable avalanche of media and scholarly articles has followed the ICC indictment of the leadership of the Lord’s Resistance Army, including the elusive Joseph Kony. This coincided with a fresh round of peace negotiations that seemed to have better prospects to succeed than ever before. The questions raised are, again, whether peace hinges on amnesty for brutalities, whether the amnesty offers of the government of Uganda are compatible with the activities of the ICC, and whether the peace-first-justice-later pronouncements are preferable to the court’s approach. A separate but relevant set of questions involve the wishes of the victims, and of Ugandans in general, and the motivations that lie behind President Museveni’s referral of this case to the ICC, particularly given the criminal neglect of the northern provinces and the IDP camps, and the participation of Ugandan armed forces in other conflicts across the region. Currently, the situation of northern Ugandans has improved considerably since the beginning of the decade, as the LRA has been displaced to neighboring countries and the camps have been dismantled. However, despite the collapse of the Juba peace talks in 2008, rumors about a possible one-year suspension of the indictments persist.

Chapter five, “In the Heart of Darkness: The International Criminal Court in the Democratic Republic of Congo,” takes us to the eastern provinces of this vast country, afflicted by violence and gross violations of human rights for many years. This situation

has yielded three out of the four suspects currently held in The Hague –and all four of them are Congolese- and is the one where the peace versus justice dilemma has been less felt. Still, many would prefer to prioritize peace and stability rather than the pursuit of justice, and fear that the court might rock the boat in an extraordinarily complex environment. This chapter will assess the impact of the court’s involvement on peace and security, and whether investigations and trials have had a negative or positive effect on the other developments to which the international community has devoted its resources, such as disarmament and security sector reform, the celebration of the first democratic elections since independence, and the presence of the largest contingent of United Nations peacekeepers in the world. Several years after the first indictments and arrests of these warlords, the province of Ituri in which they operated is much more peaceful, while the provinces of North and South Kivu have remained intermittently mired in conflict.

Chapter six, “The Hardest Case: The International Criminal Court in Sudan,” deals with the precedent-setting situation of Darfur. It is the first time that the United Nations Security Council refers a case to the ICC, the first time that the ICC targets a country whose government is openly hostile to its operations, and the first time that a sitting head of state has been indicted. It is feared that this indictment, as well as previous arrest warrants issued against a high-ranking minister and a militia leader, might jeopardize the possibility of a negotiated settlement, or collapse the fragile peace agreement between the North and the South of the country. By examining the conduct of the government of Sudan vis-à-vis the court, this chapter tests the limits of the principle of deterrence, as well as the limits of enforcement. Advocates for a peace-first-justice later approach felt vindicated when the indictment of President Bashir provoked the

expulsion of thirteen humanitarian agencies that provided a lifeline for hundreds of thousands of internally displaced Darfuris. However, the overall level of violence has been declining, the worst massacres and atrocities predate the involvement of the ICC, and since the Security Council mandated the Court to take up this case, there have been two serious rounds of peace negotiations, in Abuja in 2006 and in Doha in 2009 and 2010, that have resulted in partial but promising agreements between several rebel groups and the central government.

Finally, the concluding chapter will restate the central thesis, consolidate the dissertation's intellectual findings, and survey the current landscape of transitional justice initiatives, with special focus on those that touch upon similar dilemmas. It will include a brief introduction to the court's fourth situation under review, referred by the Central African Republic, and it will broaden the context of the ICC in Africa by painting with broad brushstrokes recent developments in Afghanistan, Colombia, Kenya, Guinea, Cambodia, and Liberia.

CHAPTER TWO

THE OTHERS: *AD HOC*, HYBRID, AND DOMESTIC MECHANISMS OF INTERNATIONAL JUSTICE

1. Introduction:

The International Criminal Court sits at the top of a long and variegated list of transitional justice initiatives and mechanisms of accountability. It is a novel and ambitious development, and its mandate aspires to be broad and permanent. But it shares the stage with many other institutions, aimed at similar goals but working through very different arrangements. As Roht-Arriaza aptly put it, transitional justice can be broadly defined as “anything that a society devises to deal with a legacy of conflict and/or widespread human rights violations, from changes in criminal codes to those in high school textbooks, from creation of memorials, museums and days of mourning, to police and court reform, to tackling the distributional inequities that underlie conflict” (Roht-Arriaza, 2006: 2). Most works in this field narrow their scope down to criminal prosecutions and truth and reconciliation commissions.

This investigation focuses specifically on criminal prosecutions, and leaves the ‘truth vs. justice’ debate to others.¹³ Thus, for the purposes of background, comparisons, and the search for lessons, this chapter will deal with the other models of adjudication for war crimes and crimes against humanity: UN-sponsored, *ad hoc*, international courts; hybrid courts made up of national and international judges; and municipal adjudication,

¹³ Among the most cited, see for example Ruti G. Teitel’s *Transitional Justice* (2000); Naomi Roht-Arriaza and Javier Mariezcurrena’s *Transitional Justice in the Twenty-First Century: Beyond Truth versus Justice* (2006); Gary Jonathan Bass’ *Stay the Hand of Vengeance* (2002); and Priscilla B. Hayner’s *Unspeakable Truth: Confronting State Terror and Atrocity* (2000).

either in the countries where the atrocities were committed, or through the application of the doctrine of universal jurisdiction. Since trying to cover such an expansive range in a short space would be futile, I have chosen one example from each category: the International Criminal Tribunal for Yugoslavia (ICTY), the Special Court for Sierra Leone (SCSL), and the trials, both at home and abroad, to prosecute Argentine military junta leaders.

2. The International Criminal Tribunal for Former Yugoslavia:

Between 1991 and 1999, on a scale not seen in Europe since 1945, hundreds of thousands of Bosnians, Croats, Serbs, and Albanians were killed, raped, or tortured by their fellow citizens, and many more were forcibly displaced. If one counts the less remembered Yugoslav attack on Slovenia in 1991, which lasted only a few weeks, and the 1993 war between the Croats and the Muslims in Bosnia over a part of Herzegovina, there were five wars over the course of that decade. The much bloodier conflicts in Croatia, Bosnia, and later in Kosovo include some well-known and tragic episodes: the years-long siege of Sarajevo, which resulted in the destruction of one of the last truly multi-ethnic, multi-lingual, and cosmopolitan urban centers of the eastern Mediterranean and central Europe; the massacre of 7,400 Muslims in Srebrenica, the worst mass murder on European soil since World War Two; and the expulsion of nearly a million Albanian Kosovars to improvised camps in neighboring territories. The main geopolitical consequence of these conflicts was the breakup of Yugoslavia, which had until then consisted of the union of “six republics, five nations, four languages, three religions, and two alphabets, all held together by a single party” (Judt, 2005: 665).

The Yugoslav wars also resulted in a very significant institutional development. On May 25th 1993, the United Nations Security Council, acting under Chapter Seven of its Charter, established the International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Law Committed in the Territory of the Former Yugoslavia Since 1991.¹⁴ After a slow and difficult start -it took the tribunal three years to choose a Prosecutor-, the ICTY has now indicted 161 individuals, concluded proceedings against 116 of them, and only two remain at large, including the prominent case of Ratko Mladic.¹⁵ Under pressure from the United States, which had heretofore been the court's main backer, and the United Nations Security Council, the ICTY announced a completion strategy that aimed to finish trials by 2008 and appeals by 2010, a goal that can only be met by the transfer of many of the remaining cases to domestic courts in Bosnia, Croatia, Serbia, and Kosovo.¹⁶

As an *ex ante* tribunal, the ICTY is the most pertinent and direct precedent to the questions addressed by this investigation regarding the ICC. *Ex ante* tribunals are those established in the midst of the conflict in which the alleged crimes occurred, that is, before military actions, diplomatic settlements, or exhaustion have put an end to the hostilities. In that sense, the Nuremberg and Tokyo trials, which signify the birth of the global fight against impunity, were *ex post* tribunals, and had to deal with a different set of concerns (Arsanjani and Reisman, 2005: 385). But for the purposes of this research,

¹⁴ Commonly known as International Criminal Tribunal for Former Yugoslavia, and from now on cited as ICTY for the purposes of brevity.

¹⁵ For up to date figures on the tribunal's proceedings, see ICTY, Key Figures of ICTY Cases, available at <http://www.un.org/icty/glance-e/index.htm>. Radovan Karadzic, the former political leader of Bosnian Serbs, was apprehended on July 22nd 2008, after spending more than an entire decade on the run. A jubilant Richard Holbrooke, the US diplomat that brokered the Dayton Peace Accord, stated that "the Osama Bin Laden of Europe has finally been captured." He is currently awaiting trial (BBC, "Serbia Captured Fugitive Karadzic," at <http://news.bbc.co.uk/2/hi/europe/7518543.stm>).

¹⁶ For more information on this matter, see Zoglin, 2005; Williams, 2006.

focused on the political consequences of criminal investigations or indictments absent a clear end to the conflict –such as protracted violence in eastern DRC, northern Uganda, and western Sudan-, the ICTY offers the most interesting parallels. After all, when the community leaders of the Acholi condemn the ICC indictments against the leaders of the Lord’s Resistance Army (LRA), and diplomats worry about the destabilizing effect of the involvement of the court in the delicate political environments of the Congo and Sudan, one is surely reminded of the clash between principle and pragmatism that characterized every stage of the ICTY’s work during the Balkan wars, and most especially the indictment of Slobodan Milosevic.

2.1. Criticism and praise:

Since its inception more than a decade ago, the ICTY has received more than its fair share of criticisms, to which the court’s advocates have responded to by pointing at its accomplishments. One of the drafters of the ICTY Statute, Ralph Zacklin, wrote in 2004 that “the ad hoc Tribunals have been too costly, too inefficient, and too ineffective. As mechanisms for dealing with justice in post-conflict societies, they exemplify an approach that is no longer politically or financially viable” (Zacklin, 2004: 541). Slow and costly rank high among the most cited complaints. In a widely-read and controversial article, Helena Cobban compared the court’s \$100 million yearly budget with the cost of South Africa’s Truth and Reconciliation Commission, which processed more than seven thousand amnesty applications for less than \$4,300 per case (Cobban, 2006: 22). In 1995, less than 2 percent of the ICTY’s budget was allocated to pursue crucial prosecutorial tasks such as tracking down witnesses and recording and translating their accounts

(Scharf, 200: 934). The first convictions were four years in coming, and these concerned low-level operatives like Dusko Tadic.¹⁷ Even naming the first prosecutor, South African Richard Goldstone, became a long, tortuous, and politicized process (Hazan, 2004: 54-56).¹⁸ Of course, the ballooning of the court's timelines and costs is partly explained by the generous protections available to defendants, crucial in the procedural legitimacy of the court. Given the nature of the crimes, the evidentiary demands are complex, and the difficulties of tracking down willing and reliable witnesses in countries ravaged by war lead to long preparation periods for each case.¹⁹ Most importantly, the ICTY needs cooperation from other players to obtain arrests, and for several years this was not forthcoming from the international troops on the ground or from the intervening countries.²⁰

¹⁷ Tadic became the first individual to be tried in the ICTY. He was a thug, a part-time traffic policeman in Prijedor district, and a torturer at the Omarska camp. Geoffrey Robertson wrote the following about his trial: "This vile man will go down in history as the person whose case settled the principles and scope of international criminal law at the end of the twentieth century. The most interesting question must be whether he was worth it: an ordinary Serb turned into a vicious torturer by two or three years of racist propaganda, but hardly a person with any command authority or ability to influence events" (Robertson, 2002: 329).

¹⁸ As an illustration of the lack of funding that plagued the court's activities during its first years, Richard Goldstone had to pay his own fare when he flew to New York to accept his new appointment at the UN headquarters (Stephen, 2004: 105). Soon after his appointment, he was introduced to the former British Prime Minister Edward Heath, who asked Goldstone: "Why did you accept such a ridiculous job?" (Hagan, 2003: 60).

¹⁹ Much has been debated over the initial financial woes of the institution, including the implication that its backers were depriving it of resources so as to impede its functioning. This hypothesis holds that the Security Council had established the court as fig leaf for its inaction in the face of mass conflict and concentration camps in Europe, but French or British diplomats did not want it to get in the way of their mediation efforts. In an interview with the author, Ralph Zacklin, UN Assistant Secretary-General for Legal Affairs and one of the drafters of the ICTY's statute, dismissed this notion, claiming instead that the United Nations had no experience in setting up *ad hoc* tribunals at the time and grossly underestimated the amount of resources that would be needed. In addition, several states engaged in a protracted debate demanding that the court's budget be funded by voluntary donations, and excessive spending on the part of the Office of the Prosecution caused serious auditing problems. Interview with Ralph Zacklin, on file with author (November 28th, 2006).

²⁰ One NATO official was widely quoted as saying that "arresting Karadzic was not worth the blood of one NATO soldier." Failure to cooperate was illustrated dramatically when the ICTY Chief Prosecutor was denied access to Kosovo in the wake of the Racak massacre of January 1999, under the full glare of the international media. This meant that forensic evidence could not be collected or preserved, and the

It was evident from the beginning that the tribunal would have a public outreach problem in the former Yugoslavia.²¹ The location of the ICTY outside the region made it difficult for the tribunal to relate its trials and indictments to the actual conflict on the ground (Teitel, 1999: 189). The proceedings were broadcast, but very few would pay attention to them, preferring instead the reporting offered by the official media in their countries, which often was highly manipulative.²² In one bizarre instance during the Celebici trial, the defense noticed that one of the three judges, Adolphus Karibi-Whyte, had slept through thirty hours of the case (Stephen, 2004: 155). In typical fashion, these unfortunate anecdotes would stick in the public mind and overshadow the impressive – and in many cases unprecedented – achievements that the court had begun to accrue after its rocky, early years.

The polls measuring public perceptions in the Balkans have never been kind to the court. The Serbs overwhelmingly see it as an illegitimate, unfair, political tool to legitimize NATO's intervention and victimize and demonize the Serbs.²³ Even among the minority of supporters of the ICTY, mainly Belgrade liberals, many viewed it as “an idealistic Western dream rather than a Balkan reality” (Saxon, 2005: 562). The Croats' early enthusiasm for the Hague tribunal decreased markedly as soon as indictments were

investigators had to rely on external sources, such as refugee centers in Albania and Macedonia, military intelligence, and NGOs operating in the region (Weller, 2001: 210).

²¹ Outside of Belgrade, the court's outreach efforts were reportedly weak (Interview with Aisling Reidy, June 15th 2006).

²² The highly technical and formalistic proceedings of the trials did not attract the interest of television audiences. Court Television, which had a negotiated contract to show the entire trial of Dusko Tadic, ended their live coverage after only a month (Wilson, 2005: 927).

²³ At the time, Serbs were supported in this view by many Western left revisionists. Perhaps one of the most widely read books in this line is Michael Parenti's *To Kill a Nation: The Attack on Yugoslavia* (2000). For an excellent account and critique of this perspective, see Marko Attila Hoare's “Genocide in the Former Yugoslavia” (2003). Paradoxically, other polls showed that the Serbs' opposition to the ICTY was perfectly compatible with their overwhelming support of Serbia's eventual accession to the EU. However, according to the same surveys, only 6 percent think, correctly, that extraditions to the ICTY are a condition for EU membership.

issued for Croats deemed as “heroes” of the Homeland War. Kosovars cry foul when Albanians are sent to the dock, and Muslims in Bosnia deem the sentences as ridiculously lenient.²⁴ According to many authors, rather than helping the reconciliation of communities by individualizing guilt, the ICTY seems to have reinforced ethnic cleavages (Snyder and Vinjamuri, 2004: 21). Others note that the court’s task is not to be popular, but to deliver justice, and that politicians, civil society, and other players must join in the effort for it to be effective. Some venture that other non-judicial mechanisms of transitional justice would have helped reconciliation, in lieu of or as a complement to the protracted and potentially polarizing exercises of criminal trials. But it is undoubtedly one of the most remarkable features of the ICTY that despite investigating and prosecuting suspects of all ethnic groups involved in an apparently evenhanded manner, the majority of Serbs, Croats, Kosovars, and Bosnian Muslims invariably criticize the court of being biased against them.

Even the “trial of the century,” which ended abruptly with Milosevic’s death while awaiting sentence in 2006, had a complicated start for such a groundbreaking endeavor: it was, after all, the first time in recorded history that a world leader had been brought before a court that could validly represent the nations of the world, and perhaps the most important moment for international justice since the trial of Adolf Eichmann in 1961 (Bass, 2003: 83). The first witnesses were poorly prepared, badly chosen, and were easy prey for Milosevic, who pointed out the inconsistencies of their testimonies, and used drawn-out courtroom appearances as a bully pulpit from which to re-traumatize

²⁴ According to a 2002 survey, for example, trust ratings of the ICTY are very low in Serbia (8 percent) and even lower in the Republika Srpska (4 percent). However, this mistrust also affects other national institutions, with the government, the domestic judiciary, or the police, hovering at around 20 percent (Wilson, 2005: p. 941).

victims and perpetuate the feelings of hatred still harbored by many Serbs (Cobban, 2006: 22; Gow and Zverzhanovski, 2004: 905). Similar thoughts were pervasive more than six decades ago, the Allied officials who planned the Nuremberg tribunals had also worried that Nazi leaders would use the trials as a forum to justify their actions, present themselves as martyrs, and send a message to their political sympathizers (Bass, 2003: 83). However, the Milosevic trial was able to overcome these initial setbacks. Nearly 300 witnesses seemed to prove, beyond reasonable doubt, that Serb units committed war crimes and that Milosevic had command control (Stephen, 2004: 220). Milosevic's performance was less intimidating when he sparred with Paddy Ashdown or Ibrahim Rugova,²⁵ and especially as high-ranking witnesses began to flock to The Hague to prove that there was a project of "Greater Serbia" and that he was the architect.²⁶

The governmental apparatus behind the wars was meticulously laid out and chronicled in the course of the proceedings. It has been a long-held assumption in socio-legal scholarship that courts are inappropriate venues to construct wide-ranging historical narratives of past conflicts.²⁷ For others, however, the judgments handed down by the

²⁵ His rants about a Western conspiracy to bring about the demise of Yugoslavia sounded more and more delusional. At one point, blaming the Srebrenica massacre on renegade Serbs paid by the French secret service—for no apparent reason—he exclaimed: "Ask Jacques Chirac about Srebrenica" (Stephen, 2004: 190).

²⁶ Most especially, the testimonies of Milan Babic, president of the Republika Sprska-Krajina from 1991 to 1995; General Aleksandar Vasiljevic, head of the counter-intelligence arm of the JNA in 1991 and later deputy head of the same department during the Kosovo war; Milan Milanovic, deputy defense minister in the RSK; and several former "Red Berets" members that testified under protection. These witnesses proved, among other things, that the notorious Arkan's Tigers were under the direct control of the Ministry of the Interior of Serbia, and that the majority of the officer corps in the Croatian Serb military, and all RSK military personnel were formally members of the VJ and were on its payroll (Gow and Zverzhanovski, 2004: 910-912).

²⁷ Hannah Arendt is one of the most influential proponents of the claim that courts should not assume the responsibility of elaborating comprehensive historical explanations of mass atrocities. In her famous book *Eichmann in Jerusalem: A Report on the Banality of Evil* (1964), she criticized that the trial of Nazi bureaucrat Adolph Eichmann had been used for national mythologizing, and the fact that his crimes had been construed as crimes against the Jewish people in the context of a long history of anti-Semitism through the centuries, instead of as crimes against humanity at large.

ICTY proved the opposite, and adjudicating between competing views of history was crucial (Wilson, 2005: 909).²⁸ Furthermore, several important defendants have pleaded guilty to charges, thus undermining the ability of some communities to deny wrongdoing and to claim that the ICTY is biased (Zoglin, 2005: 43).²⁹ Many share Akhavan's assertion that "the dramatic dethronement of these once seemingly invisible architects of Greater Serbia and ethnic cleansing has gone far beyond what most observers imagined possible when the ICTY was first established" (Akhavan, 2001: 8).

2.2. Political bias?

An oft-heard complaint about the ICTY is that its establishment was a public relations maneuver, mere window dressing to deflect attention from Western military inaction and the inability of the United Nations to stop the Balkan wars. As Gary Jonathan Bass puts it, "the establishment of the Hague tribunal was an act of tokenism by the world community, which was largely unwilling to intervene in ex-Yugoslavia, but did not mind creating an institution that would give the *appearance* of moral concern." (Bass, 2002: 207; Maogoto, 2004: 144-145). In this sense, it is undeniable that the decision by the Security Council to set up the international court was primarily a political one, rather than legal or moral.³⁰

²⁸ The Tribunal rejected the view held by the Tadic defense that lingering hatreds from World War Two explained by themselves the violence in the 1990s. Instead of emphasizing events from 1941, or even 1389, the court's judgments point at the 14th Congress of the League of Communists of 1989, and the 600th anniversary of the 1389 Battle of Kosovo, as the first precipitating factors (Wilson, 2005: 933).

²⁹ Bass (2003: 85) notes one such watershed moment: "In one of the biggest victories to date, Biljana Plavsic –a wartime Bosnian Serb leader so delusionally nationalist that she once told a senior UN official that Serb babies were being fed alive to the animals in the Sarajevo zoo- expressed remorse and pleaded guilty to one count of crimes against humanity."

³⁰ In an interview with the author, Ralph Zacklin ventured that several members of the Security Council did not expect that this initiative would lead to the outcome that was obtained, since the legal difficulties

Others see the Hague tribunal as inherently biased against the Serbs because it provided legal justification for NATO's military intervention (Hagan and Ivkovic, 2006: 394). Meernik and King addressed precisely this question, with a thorough study that analyzed the sentences handed down by the Tribunal, and determined the absence of political bias. The sentences were fairly consistent, with similar punishment accorded to similar cases regardless of nationality, and the Office of the Prosecution seemed more concerned in ensuring that those indicted would enjoy fair processes and procedures than in achieving convictions. In their view, the court acted following a legal, rather than a political model, and their reference was the ICTY Statute and Rules of Procedure and Evidence, rather than other considerations (Meernik and King, 2001; Meernik, 2003).³¹

These findings are consistent with one of the theses of this investigation: that politics makes its appearance not so much at the center of the court's activities –issuing indictments, trying suspects, handing down sentences-, but in its external relations, such as raising funds or obtaining cooperation from intervening countries. Contrast Carla Del Ponte's vehement denial of political influence in her work with that of Gabrielle Kirk McDonald, second President of the Tribunal, who said that “during my presidency, it seemed to me that my duties as a judge were subjugated by the political demands of the office. I was required to spend an inordinate amount of time seeking international political support to overcome the effect of state non-cooperation, especially by the Federal Republic of Yugoslavia.” (Kirk McDonald, 2004: 568).³² Sometimes, the judicial

involved in setting up the court seemed insurmountable. Interview with Ralph Zacklin (November 28th, 2006). On file with the author.

³¹ The list of ICTY critics that believe in a political model, rather than a legal one, is long. See for example Creta, 1998; Hayden, 1999; Johnson, 1998; Jokic, 2001.

³² In 2007, Florence Hartmann, former spokesperson of the ICTY, published an insider account of the political pressures that surrounded the court. Her book, available in French but still not translated to English, looks at the intersection of international justice and international politics and contains the most

process seemed to be coordinated with the political process, with indictments and demands of extradition as the stick, and possible EU accession as the carrot.³³ Just as often, they appeared to be at odds with each other, and definitely far from synchronized.

It is also difficult to establish whether the ICTY represents another example of “victor’s justice,” because it is not clear who the victors are. Those that believe that the ICTY was an instrument of the international community to orchestrate the breakup of Yugoslavia and subjugate the Serbs may believe so, but this claim requires a very daring dose of historical revisionism.³⁴ Before NATO’s bombing in 1999, the victors of the wars that took place in Yugoslavia had been Serbia and Croatia, in detriment of Bosnia. In that case, it is significant that most of the defendants are leaders and officers of the victorious parties to this conflict. Few expected, for example, that Croats could be indicted for crimes against Serbs during Operation Storm in 1995, because the United States supported this military operation (Hoare, 2002: 561). And yet, one of the trials currently taking place in The Hague is that of Ante Gotovina, captured in the island of Tenerife (Spain) in December 2005, and deemed a war hero by many Croats.³⁵ And the fact that

politically incendiary assertions made to date by someone that worked in the court. Hartmann reports, among other things, that Wesley Clark mentioned to Louise Arbour that if Karadzic were arrested, he would allege the existence of an immunity deal made with then Secretary of State Warren Christopher. In fact, Hartmann explains that the United States, the United Kingdom, and France, wanted to avoid or delay the arrest of Mladic and Karadzic, as both men could reveal embarrassing information in their testimony. According to Hartmann, Srebrenica was the price that Western powers paid in order to obtain a peace deal with Milosevic, who wanted to ensure the contiguity of Serbian territory in Bosnia (Hartmann, 2007).

³³ Interview with Marcus Brand on June 7th 2006 (on file with the author). Brand worked as political liaison in the OSCE mission in Kosovo during the conflict.

³⁴ The ICTY investigated but did not indict NATO officers for the bombing of non-military targets: the bombing of a bridge as a train was crossing it; the bombing of the Chinese embassy in Belgrade; and the bombing of Serbia’s national television headquarters. It has been also suggested that the United Nations and NATO should be liable for their failure to protect civilians either in Sarajevo or Srebrenica, both of which had been declared “safe haven” by the UN.

³⁵ Ivo Sanader, the Croatian Prime Minister, welcomed the news of Gotovina’s arrest and transfer to The Hague, noting that “the rule of law has no alternative.” General Gotovina was the most sought-after individual after Mladic and Karadzic, and his capture, coupled with Croatia’s cooperation, sped up negotiations for the entry of that country in the European Union (Times Online, “Croatian War Crimes Suspect Arrested in Tenerife,” at <http://www.timesonline.co.uk/tol/news/world/article755030.ece>).

Serbs and Croats have begun to try their own war criminals in their home countries may constitute one of the ICTY's biggest achievements (Zoglin, 2005: 59)

Biased or not, the actions of the court do have political implications. It has been observed, for example, that the activities of the ICTY brought about the collapse of two reformist governments in Serbia and Croatia.³⁶ No other development illustrates this point more tragically than the assassination of Serbia's first post-Milosevic Prime Minister, Zoran Djindjic, by a criminal group who referred to themselves as "anti-Hague patriots," and dubbed their operation as "Stop the Hague." Djindjic had cooperated with the ICTY, and many think he paid with his life for it (Holliday, 2005).³⁷ Meanwhile, the Serbian Radical Party, an extreme, hard-line, nationalist party whose leader and founder, Vojislav Seselj, is in The Hague, retains the largest number of seats in Parliament (Judah, 2006: 67).³⁸ Successive coalition governments have kept it out of power, and internal fights within the leadership –between Seselj and Nikolic over EU accession, for example–

³⁶ Some maintain that Carla Del Ponte's indictment of four Serbian generals just before a presidential election dealt a deathblow to the reformist government of Zoran Zivkovic, which subsequently collapsed. Carla Del Ponte has replied that it is not part of her responsibilities to care about the political impact of indictments, but that she did warn Serbian authorities six months ahead (Judah: 2004, 23-24).

³⁷ An alternative and valid interpretation of this event sustains that the assassination of Djindjic was motivated by the Prime Minister's actions against organized crime. In Serbia, the criminal gangs are often indistinguishable from the militias who fought in the Yugoslav wars. The Red Berets –popular name for the JSO, Serbia's special antiterrorist unit organized under Milosevic in 1994–, accused of the killing of Djindjic, are known to surpass other mafias in the Balkans in profiting from illegal smuggling of asylum seekers and economic migrants, opium and heroin in transit from Afghanistan and Burma, small arms, and traffic in women, among other illegal activities (Glenny, 2003: 32-33). Although Djindjic was not very popular as a Prime Minister, the public outrage at his death defied expectations. A headline in the main liberal daily, *Danas*, proclaimed the day after the funeral, "Farewell, Serbian Kennedy." The fallout of the raids and detentions following the magnicide resulted in the first time in more than a decade that a government anywhere in the Balkans had seriously confronted the mafia (Gow and Sherzhanovski, 2004: 903). According to Chris Stephen, "the killing of Djindjic changed everything. Initial fears that the door to cooperation would be closed were replaced by the realization that something much more profound was about to happen. Suddenly, high-grade witnesses started to come forward" (Stephen, 2004: 203).

³⁸ In the 2007 elections, the Radical Party had its strongest showing to date, profiting from the growing gap between the Democratic Party in Serbia (DS) of President Boris Tadic and the Democratic Party of Serbia (DSS) of Prime Minister Vojislav Kostunica. However, a fragile coalition of these two and other smaller parties continues to keep the radicals out of power.

have weakened it, but the political appeal of hard-line nationalism in Serbia is undeniable.

However, it would be unfair to argue that the ICTY created or inflamed Serbian nationalism, and unrealistic to expect it to do much to advance national reconciliation in the short term.³⁹ Even though the UN resolutions that established the court assert that one of its goals is “to contribute to the restoration and maintenance of peace,” its fulfillment depends highly upon domestic political developments over which the Tribunal has little direct control. The provision of justice and accountability should stop being equated with a stepping stone into truth-telling and social reconciliation with the past. They are separate functions, and should remain so. As it is often pointed out, it took a generation for Nuremberg to have an impact among Germans, and it required much more than a trial.⁴⁰ In addition, just as Austrians have dealt with their Nazi past in a different way than the Germans –which may partly explain the strength of far-right political parties in today’s Austria-, Serbs have been afforded a certain degree of denial. Their country was bombed, but not occupied, and the sense of absolute defeat was largely absent.⁴¹ The political leaders responsible for the wars of the 1990s carried on for a couple of years at the helm, and only now, almost a decade after the last war, are Serbs realizing the full extent of their loss. Besides, although only anecdotal evidence supports this view, the trial may have begun to reduce myth-making in Serbia, especially regarding Srebrenica.⁴²

³⁹ Reidy, Aisling. Interview with the author (June 15th 2006).

⁴⁰ In the 60s and 70s, the new generation of Germans held war crimes trials of their own, in Frankfurt and Düsseldorf, to prosecute the men who ran Auschwitz and Majdanek (Bass, 2003: 95).

⁴¹ Interview with Marcus Brand, June 7th 2006.

⁴² Just as plausible, a greater degree of acknowledgement of the massacre among Serbs may have had to do with the discovery of more mass graves in and around of Srebrenica, as well as by the 2005 release of a videotape documenting some of the executions, as well as featuring an Orthodox priest blessing the executioners.

2.3. The ICTY and the ‘peace versus justice’ debate:

At its inception, the Tribunal was conceived as a useful tool to deter the commission of further war crimes in the midst of the Yugoslav wars. For many of those involved in its creation, the ICTY embodied the hope that the rule of law could restore peace where UN troops and diplomats had failed. However, the existence of the court and the threat of indictments did not deter Mladic in Srebrenica, or Milosevic in Kosovo, leading many to assert that the court was not useful as an instrument of peace or deterrence.⁴³

But deterrence is a contentious concept, and one should not confuse specific, short-term deterrence, with general, long-term deterrence. Vague threats of criminal prosecution in the midst of savage war are unlikely to stop the atrocities, but a consistent record of convictions should inhibit wrongdoing in the long run, and prevent the expected cycle of revenge. Furthermore –and this point should be made more often- Srebrenica took place not only *after* the court had been established and issued indictments, but also *after* several diplomatic efforts were underway, including the negotiations that led to the Dayton accords. In that sense, the Bosnian Serbs were not only being oblivious to the authority of lawyers and judges in The Hague, but also to the authority of the diplomats to which they had made direct promises. In addition, although the massacre of Srebrenica in 1995 was by far the bloodiest single event, the overwhelming majority of the atrocities

⁴³ Theodor Meron, president of the ICTY until 2005, noted that “the gravest atrocity, the Serb massacre of thousands of Muslims living in and around Srebrenica, happened in July 1995, when the tribunal was fully operational and Karadzic and Mladic had both been indicted (Meron, 1997: 2). With regards to Kosovo, Helena Cobban writes that “Milosevic was warned explicitly on several occasions about the threat of prosecution. He had witnessed the ICTY indict the leader and top general of the Bosnian Serbs, and he had seen NATO troops arrest war criminals in Bosnia. Still, he decided to proceed with abuses in the restive province of Kosovo and, ultimately, the ethnic cleansing of most of its Kosovar inhabitants” (Cobban, 2006: 26).

took place in Sarajevo, Bukovar, Mostar, and Banja Luka, in the early 90s and when the Tribunal did not yet exist.⁴⁴

Rather than inhibiting Serbian leaders from committing war crimes, the existence of the court made them more alert to hide the evidence, such as removing bodies from mass graves and avoiding the use of written documents to distribute orders. Nonetheless, in some instances, the pressure of the international community did lead to immediate, specific deterrence, as when Simo Drljaca, former Deputy Minister of Interior in the Serb Republic of Bosnia, acknowledged in an interview that they had released 1,500 Muslim and Croat prisoners so as not to anger the great powers (Akhavan, 1998: 751).

But the central question at the time was whether the creation of the Tribunal made the interests of peace conflict with the interests of justice. It was argued that indicting political and military leaders such as Radovan Karadzic and Ratko Mladic would undermine the prospects of a peace settlement, because they would not have incentives to negotiate an end to the fighting without assurances of immunity. Diplomats like David Owen, Richard Holbrooke, or Cyrus Vance believed that it was necessary to avoid the pitfalls of judicial romanticism, and that the only credible and durable peace would be one reflecting power realities instead of lofty ideals (Akhavan, 1998: 740). The ICTY Prosecutor at the time, Richard Goldstone, added the genocide charge to the indictment of Karadzic and Mladic right in the middle of the Dayton negotiations, and has maintained that an indictment was not issued against Milosevic for reasons that had

⁴⁴ Regarding deterrence, another point of contention is the court's capacity to inhibit or deter subsequent private revenge on the part of the victims, such as Bosnian Muslims and Kosovars. Again, this is open for interpretation. It could be argued that Kosovars' retaliation against Serbs has been random and relatively restrained. Others, including Marcus Brand, would undoubtedly say that the court had the opposite effect, and that it effectively encouraged acts of private revenge against Serbs. In his view, Kosovo Albanians felt that the court itself provided a justification for their actions, and that the court was on their side (Interview with Marcus Brand, June 7th 2006). Their expectations were also confounded when the ICTY indicted KLA leaders.

nothing to do with politics: “Nothing would have delighted me more than to have an indictment against Milosevic. It was well known what he did. The thing was to get the evidence to prove it beyond doubt –that’s something many people have difficulty in understanding. They sort of assume that you can use what’s in the media as proof” (Stephen, 2004: 106).

This dilemma repeated itself beyond Bosnia and Herzegovina and all over the region. For Jack Snyder and Leslie Vinjamuri, the ICTY investigations complicated a peace settlement between the Macedonian government and ethnic Albanian former guerrillas accused of committing atrocities. In their view, the democratization and pacification of the Yugoslav successor states happened *despite* the tensions provoked by the Tribunal and not *because* of it (Snyder and Vinjamuri, 2003/2004: 12, 20).⁴⁵

The short counterargument is, of course, that the Tribunal did not prevent the Dayton peace agreement of 1995, and may in fact have made it possible by keeping Karadzic and Mladic away from the negotiating table (Moghalu, 2006: 58-59). Slobodan Milosevic attended the Dayton Accords even at risk that there might be a sealed arrest warrant against him somewhere. Some may even speak of an effective articulation of politics and justice, or what Pierre Hazan calls “strategic legalism” (Hazan, 2002) and Judith Shklar called “the use of justice as policy.” (Bass, 2003: 83).⁴⁶ In fact, the peace

⁴⁵ In their view, the ICTY’s decision to investigate rebel atrocities led the guerrillas to destroy evidence of mass graves, creating a pretext for hard-line Slavic Macedonian nationalist to renew fighting in November 2001. However, the prevention of a war between Albanians and Macedonians in 2001 is often cited as a successful case of deterrence and a positive example of intervention by the international community. So successful even that everyone wants to take credit, including OSCE, the ICTY, the EU, and the UN and its deployment of a thin line of UNPROFOR peacekeepers to the hills separating Kosovo and Macedonia (Interview with Marcus Brand, June 7th 2006).

⁴⁶ In the opinion of Aisling Reidy, who worked in Kosovo for the Council of Europe and the ICTY before joining Human Rights Watch, this was also strategically and politically wise. The alternative –to not indict the Bosnian Serb leaders- would be taking them to the peace table with all the options open for the taking. At least the indictments brought with them the availability of amnesties and immunities as a possible offer

agreement contained several important provisions calling for the cooperation of the parties with the ICTY. But in order to debate whether the political efforts of the United States and Europe were undermined or reinforced by the activities of the court, one would have to establish that the key players had a coherent political strategy that would lead to peace in the Balkans. And this was not the case.

On one hand, it would seem that the efforts of Western diplomats were decidedly in favor of appeasing the Serbs. Every single Western peace plan for Bosnia was based on the premise of Bosnia's partition, and every one gave the Bosnian Serbs a much larger share of Bosnia than their proportion of the population would warrant. The Dayton accords granted the Republika Srpska far greater rights than those ever offered to Kosovo Albanians. The Europeans enforced an arms embargo against Bosnia until the end, affecting the Bosnians' ability to defend themselves, and NATO did not bomb Serbia until 1999 and over a different conflict (Hoare, 2003: 549-550). Influenced by the examples of legendary Swedes Folke Bernadotte and Raoul Wallenberg, who rescued tens of thousands of Jews by negotiating with Eichmann and Himmler, American diplomats agreed to negotiate with Karadzic and Mladic in spite of the indictments (Akhavan, 1998: 799-800). With the benefit of hindsight, it is astonishing that so many British, French, and American diplomats believed that peace in the Balkans could only be delivered by Karadzic, Mladic, or Milosevic, and that they could be co-opted with a diplomatic approach that included more carrots than sticks.⁴⁷ Milosevic, the main

during subsequent negotiations. Furthermore, indicting Mladic and Karadzic *after* signing a peace treaty with them would have made much less sense (Interview with the author on June 15th 2006).

⁴⁷ UN's top military commander in the former Yugoslavia, General Bernard Janvier, sat through a fourteen-hour meeting with Ratko Mladic in which the Bosnian Serb stormed out of the room at least four times, and spent the entire meeting insulting General Janvier, his family, and boasting that they did not fear NATO's airpower and would not negotiate (Block, 1995: 9). A Sarajevo joke eloquently summed up the mood of the early nineties: "When someone kills a man, he is put in prison. When someone kills twenty people, he is

architect of the Yugoslav wars and Greater Serbia, left Dayton hailed as peacemaker and receiving these kind words from President Clinton himself: “I know this agreement would not have been possible without you. You made Dayton possible” (Stephen, 2004: 123). Moreover, it is not the only time that the full weight of the international community has problems deterring or constraining a rogue leader. Protected by the trappings of a national, sovereign state, as well as its security forces, Milosevic probably felt some measure of self-assurance and confidence that inured him to the threats leveled at him by Wesley Clark and others. And finally, it is not clear that anything at all could be done to get Milosevic to back down, as long as he truly believed that he was on the right side of history and that Serbia was not fighting a war of aggression or persecuting a national minority.⁴⁸

On the other hand, Secretary of State Eagleburger’s speech in 1992 blaming Milosevic and the Serbs was not just about the triumph of international law over *Realpolitik*. It also implied a political rejection –or the admission of exhaustion- of the Vance-Owen plan, which would have left Bosnia as a single state partitioned into cantons determined by ethnic composition, and was premised on the equal moral worthiness of the parties involved (Upcher, 2005: 807). This speech, and Clinton’s subsequent actions, opened a gap in the political positions of the United States vis-à-vis its European allies. On the eve of the Kosovo war, people like Madeleine Albright, Javier Solana, and Jacques Chirac told Milosevic repeatedly that he would be held personally responsible if he did not back down, to no effect. After years of being courted by certain Western diplomats, and aware of the international community’s overarching reluctance to redraw

declared mentally insane. But when someone kills 200,000 people, he is invited to Geneva for peace negotiations” (Robertson, 2002: 303).

⁴⁸ Interview with Marcus Brand (June 7th 2005).

international boundaries, Milosevic had good reason to be over-confident of his ability to manipulate and outmaneuver foreign statesmen (Judt, 2005: 681).⁴⁹ But the political environment had changed, and not only because the ICTY had gained its own momentum as an institution, or that other developments had put human rights' protection higher up in the agenda. The United Kingdom, for example, had played a double diplomatic game of publicly endorsing the international court while privately opposing it on the basis that it would be an impediment to a negotiated peace. That changed when Tony Blair arrived in office in 1997 promising an ethical foreign policy and joining efforts with the Clinton administration on the Balkans question. The United States' position had also evolved significantly from 1991, when Secretary of State James Baker famously said "we've got no dog in this fight" (Soderberg, 2005: 94-95).

During the early nineties, the peace negotiations failed time and again. For example, a peace process sponsored by the European Community yielded ten broken ceasefires in less than three months. Even the response of the international entities involved –UN, EC, NATO, and OSCE- was disjointed and haphazard. With little coordination, the United Nations concentrated on peacekeeping while the European Community focused on peacemaking, resulting in mutually incompatible policies (Maogoto, 2004: 149). Those that believe that the ICTY sacrificed the interests of peace in the altar of justice too easily forget that the efforts of diplomats and politicians were

⁴⁹ For an excellent study on why Milosevic failed to sign Rambouillet in spite of the threat of NATO bombings, see Hosmer, Stephen T., *The Conflict Over Kosovo: Why Milosevic Decided to Settle When He Did* (2001). See also Weller, 2005.

already full of blunders, contradiction, and failure, and all of it prior to the court's meddling.⁵⁰

The ICTY did not prevent or jeopardize the Dayton peace accords, even though it doubled up its charge in the middle of it. The agreement laid down important provisions to ensure that the parties involved cooperated with the court, established that no one indicted by the Hague Tribunal could stand for elections in Bosnia and Herzegovina, and led to the deployment of NATO's Implementation Force to conduct the arrests of accused war criminals. Furthermore, the diplomats of the key countries did not interfere with the ICTY once it got started. In a very candid interview, Prosecutor Louise Arbour told a reporter that "if the Security Council didn't want us to indict Milosevic, they could stop us any time. Until the phone rang I felt I have been asked to do something and I'm going to do it." (Moghalu, 2006: 59). It should be remembered that the United States is the main financial backer of the court, as well as of the main force behind the bombing of Serbia in 1999, the support to Croatia in Operation Storm in 1995, and the independence of Kosovo until today. And yet the court did not hesitate to indict General Ante Gotovina –a hero of the Homeland War for his fellow Croats- or Ramush Haradinaj, who was elected Kosovo's prime minister in a national election after a career as a leader of the Kosovo Liberation Army.⁵¹

⁵⁰ This passage from Bass (2003: 89) is illustrative of the attitude of the Serbian leadership vis-à-vis negotiations. Bass quotes a fragment of one of the most telling testimonies at The Hague, in which Lazarevic, a subordinate of Milosevic, explains their reaction towards the UN-sponsored Vance Plan requiring the demobilization of the Krajina Serb army: "What we did, we changed the uniform overnight from military olive-green into the police blue and within a very short period of time, I'd say within ten hours, we have repainted all the military vehicles (...). The idea was not to agree on anything. That was very simple to follow."

⁵¹ The case of Haradinaj is one of the most interesting. He was indicted only three months after winning the election, and had excellent relationships with most of the Western diplomats involved, including Bernard Kouchner, Richard Holbrooke, Robin Cook, and Joseph Biden, who praised Haradinaj on the Senate floor and wished him luck in The Hague. Haradinaj, enormously popular in Kosovo, resigned immediately, told

As is suggested throughout this dissertation, it is perhaps more accurate to depict the uneasy coexistence of political mediation and international courts as two tracks that converge at times and diverge at others, rather than as the carrot and stick of a coherent strategy, or two different strategies in permanent collision.⁵² It is also too early to measure the court's contribution to the stabilization of the region, because the court has not finished its activities, and the international community continues to have several thousand troops on the ground. It should be noted that few people argue that the Balkans would be better off today if the ICTY had never existed. Most commentators warned about the eruption of mass violence in the wake of Kosovo's unilateral secession in February of this year, perhaps even the resumption of military hostilities, thereby dealing a decisive blow to the ICTY as an instrument of peace. They spoke of Kosovo as the Balkans' Jerusalem, or Tikrit, and when more than a hundred thousand people took to the streets of Belgrade in protest, and a mob of about a thousand youth attacked the US embassy, they saw it as an ominous sign of more violence to come. And yet, what is striking is rather how quiet Serbian society's reaction was to the loss of Montenegro, first, and Kosovo, second. The events of February 21st 2008 were disturbing enough, but it should be noted that demonstrations many times larger met the assassination of Djindjic, or asked for democratic elections and the removal of Milosevic in 2000. The

his followers to stay calm, submitted himself in 2005 (Finnegan, 2007: 76). His trial began in 2007 and resulted in his acquittal in 2008.

⁵² For more detailed accounts of the ebb and flow of the politics behind the diplomatic efforts of Europe and the United States, see Pierre Hazan's *Justice in a Time of War* (2004), and Rachel Kerr's *The International Criminal Tribunal for the Former Yugoslavia: An Exercise in Law, Politics and Diplomacy* (2004).

most consequential action undertaken by the Serbian government since Kosovo's secession was to arrest Radovan Karadzic and transfer him to The Hague.⁵³

Domestic courts have begun to take on a bigger caseload, and Serbs are more willing to face the realities of Srebrenica.⁵⁴ In Bosnia, for example, it is often heard that convictions of local killers and organizers of wartime ethnic cleansing has made it easier for families to return, and this stands in contrast with eastern Bosnia, where very few people were indicted and the rate of return has been far lower (Judah, 2004: 23).

But even those that believe the court has been a positive tool to advance both peace and justice are aware that national reconciliation is still lacking, and the latter may prove to be the most elusive goal.⁵⁵ After all, the ICTY can establish a factual record of what happened, but it cannot control how that information is internalized by its recipients. A Truth and Reconciliation Commission launched by Serbian President Kostunica in 2001 did not do the trick either, rather predictably.⁵⁶ It does not only depend on the political and intellectual elites of the countries involved, but it implies broader societal change. After all, many in the former Yugoslavia are not interested in reconciliation, because they believe that it somehow implies that everyone was both a victim and a perpetrator and there is a need to meet halfway. Civil wars are especially

⁵³ Regarding Kosovo, the worst levels of instability took place in 2004, when widespread rioting included mob attacks against the remaining Serb and Roma minorities, and resulted in 19 deaths, hundreds of injured and destroyed homes. The anger of Kosovars was also directed at the United Nations, which lost scores of vehicles during these events (Finnegan, 2007: 73).

⁵⁴ The most notorious of these domestic trials resulted in the conviction of four Serbian paramilitary police officers for the killings of Bosnian Muslims in Srebrenica. The verdict, which came through in April of 2007, was the first conviction in a Serbian court of a crime that can be linked to Srebrenica. However, many at the ICTY express concern regarding the low level of readiness in Serbia or Croatia to continue with this task as the court in The Hague closes down (Williams, 2006).

⁵⁵ In a study published in 2005, James Meernik found that the arrests and trials of war criminals had only a limited effect on improving relations among Bosnia's ethnic groups (Meernik, 2005).

⁵⁶ In March 2001, Serbian president Kostunica, a firm opponent of international justice, established by decree the Serbian Truth and Reconciliation Commission, the only of its kind in the former Yugoslavia. The commission was disbanded in 2003 without producing any official report of its findings.

difficult to overcome, and it is not easy to stamp out such intense and long-held nationalism.⁵⁷ It takes more than an international court and at least a generation.

3. Sierra Leone's civil war:

Among international judicial bodies, the most novel structure is that of hybrid, mixed, or internationalized criminal courts. Operating in places such as Sierra Leone, Kosovo, Timor Leste, and Cambodia, they incorporate a mixture of international and national/local features, whether in the composition of panels of judges or in the drafting of statutes. As with *ad hoc* international courts, hybrid courts have been at the center of the peace versus justice debate, especially the special court created to address the atrocities of Sierra Leone's civil war.

In March 1991, rebel forces from the relatively unknown Revolutionary United Front (RUF) staged guerrilla attacks along the southern and eastern borders of Sierra Leone. The incursion was led by Foday Sankoh, an ex-corporal of Sierra Leone's army, and supported by Charles Taylor, the rebel leader of the National Patriotic Front of Liberia and future president of that country.⁵⁸ The goal of the RUF was to overthrow the government of Joseph Saidu Momoh, deemed illegitimate and corrupt. Charles Taylor sought to benefit from Sierra Leone's mineral wealth, particularly its diamonds. Furthermore, Sierra Leone had been serving as a base of operations from which the

⁵⁷ Research shows that states that undergo civil wars are very likely to experience mass violence again in the short term (Meernik, 2005: 271).

⁵⁸ Sankoh and Taylor met in Libya, where both of them received military training and the support of Qaddafi. Taylor had fled Sierra Leone in the 1980s after being accused of embezzling nearly \$1 million of government funds as a senior procurement officer. He was arrested and detained in a high security prison in Boston in 1984, but escaped from it soon thereafter (Moghalu, 2006: 109).

Economic Community of West African States (ECOWAS) was getting in the way of Taylor's insurgency in Liberia against the unpopular Samuel Doe.⁵⁹

The civil war lasted throughout the entire decade, with a series of regime changes in the central government and unsuccessful attempts at peace negotiation.⁶⁰ Momoh was overthrown in 1992 by a segment of his own army, unhappy about low salaries or not being paid at all.⁶¹ The military established the National Provisional Ruling Council under the leadership of a young Valentine Strasser, who tried in vain to reach a settlement with the RUF, to no avail. After another coup in 1996, President Kabbah was elected on a peace platform, and soon began to negotiate with the rebels. This led to an agreement in Abidjan on November 1996, which pardoned the rebels with a general amnesty. However, lingering resentment among the military led to another coup, this time engineered by Johnny Paul Koroma and his Armed Forces Revolutionary Council (AFRC). The AFRC formed a government with the RUF until ECOMOG troops restituted Kabbah to the presidency in 1998 and captured Foday Sankoh in Nigeria. With Sankoh in jail but the RUF in control of the eastern part of the country and the diamond-rich regions, the rebels launched "Operation No Living Thing" against Freetown in 1999, perhaps one of the most brutal episodes of the civil war. In the stalemate that followed, Sankoh was released from prison and the government and the rebels signed a peace agreement at Lomé, Togo, on July 1999.⁶²

⁵⁹ In a statement that will surely be quoted in his upcoming trial, Taylor infamously said that "Sierra Leone will taste the bitterness of war." See Ayissi and Poulton (2006), pp. 15-16.

⁶⁰ For more detailed background of the conflict, see Hirsch (2001).

⁶¹ Throughout the 1990s, there was widespread discontent in the Sierra Leonean Army. The state had collapsed and was unable to collect revenues from customs and pay its soldiers their salaries. Furthermore, on separate occasions, it resorted to hiring private security forces, such as Executive Outcomes and Sandline.

⁶² Peace Agreement Between the Government of Sierra Leone and the Rebel United Front of Sierra Leone, July 7th 1999, at <http://www.sierra-leone.org/lomeaccord.html>.

The Lomé peace accord was highly controversial, because it issued a blanket amnesty and rewarded Sankoh with the chairmanship of the Commission for the Management of Strategic Minerals Resources. At the signing of the agreement, the Special Representative of the Secretary-General of the UN, Francis Okelo, formulated a reservation to the amnesty provisions, insisting that it could not apply to genocide, crimes against humanity, and other serious violations of international humanitarian law (Schabas, 2006: 22; Barria and Roper, 2005: 9).⁶³

Despite the peace agreement, RUF rebels continued to commit atrocities against civilians and launched many attacks against UN peacekeepers. This provoked the breakdown of the peace process, greater involvement of international troops –especially British and Nigerian-, the capture and imprisonment of the main rebel leaders, and the beginning of a post-conflict phase that would be characterized by the presence of a large peacekeeping force (UNAMSIL), the disarmament and demobilization of rebels and militias, and the establishment of the Special Court for Sierra Leone and a Truth and Reconciliation Commission.

Most accounts of Sierra Leone's civil war include descriptions of atrocities of a cruelty and savagery beyond understanding or imagination. Put simply, it is commonly

⁶³ For a detailed account of how amnesty was negotiated in Lomé, see Hayner (2007). Interestingly, the RUF delegation was the one that insisted on accountability provisions for economic crimes of corruption, which they claimed was the primary reason behind their insurgence. When they were alerted that the introduction of such provisions in the agreement would open the door for human rights accountability as well, the RUF dropped their demand for justice measures. The amnesty was offered by the government quickly and without hesitation, because the rebels were negotiating from a position of power, including their control of two-thirds of the country and their recent attack on Freetown. Francis Okelo's reservation to the amnesty was introduced the day before the signing, after receiving instructions from then Secretary General Kofi Annan. It came as a surprise, and it signaled a sea change in the United Nations' position vis-à-vis amnesties. In 1996, in Abidjan, the blanket amnesty had been the least controversial item of negotiation.

depicted as a predatory war for diamonds fought by ruthless, drugged-up teenagers.⁶⁴ In the areas controlled by the RUF, the rebels sold diamonds to traders linked to Charles Taylor for one tenth of their value, and received weapons in return. Research on Sierra Leone's civil war concentrates on the use of child soldiers and its role in society as both victims and perpetrators, the use of sexual violence as a weapon of war, and so-called blood diamonds.⁶⁵ However, issues of transitional justice also figure prominently in the literature, most especially the relationship between the Special Court for Sierra Leone and the Truth and Reconciliation Commission, as well as between these transitional justice mechanisms and the amnesty provisions of the Lomé accords.

3.1. The Special Court for Sierra Leone (SCSL):

The SCSL is a hybrid court created at the request of the government of Sierra Leone and in conjunction with the United Nations. It is mandated to bring to justice those who bear the greatest responsibility for war crimes and crimes against humanity in the civil war in Sierra Leone since the Abidjan peace agreement of 1996.⁶⁶ Its jurisdiction includes crimes against humanity, war crimes, and other serious violations of international and Sierra Leonean law. Its design has the intention of overcoming the weaknesses of the UN-sponsored *ad hoc* courts for Yugoslavia and Rwanda, especially

⁶⁴ Interestingly, the final report of the Truth and Reconciliation Commission concluded that the use of drugs by child soldiers, although significant, had been exaggerated. Similarly, it established that diamond smuggling cannot be viewed as the principal cause of the conflict, and that the recruitment of child soldiers began with the British colonial forces, who coined the term "Small Boys Units" and recruited Sierra Leoneans when they were in their early teens, including the military leaders of both the RUF and pro-government militias (Schabas, 2006).

⁶⁵ For a detailed account of the use of sexual violence, see Human Rights Watch, "We'll kill you if you cry: sexual violence in Sierra Leone conflict" (2003).

⁶⁶ The choice of this event as the starting point of the court's temporal jurisdiction was very contentious. Before 1996, most of the fighting took place in the countryside, giving the impression that atrocities committed in the capital, Freetown, from 1996 to 1999, somehow mattered more.

by concentrating on a very short list of suspects and headquartering the tribunal in the country where the crimes were committed. The SCSL owes its hybrid nature to the mixture of national and international staff. The government of Sierra Leone, for example, appoints one trial judge, two appeals judges, and the deputy prosecutor (Horovitz, 2006).⁶⁷

The Special Court began operations in July of 2002 and issued its first indictments in March of 2003.⁶⁸ Because the court is not a UN body, but the result of a treaty between the government of Sierra Leone and the United Nations, its funding is dependent upon voluntary donations –mostly coming from the United Kingdom and the United States-, and lacks Chapter VII powers of enforcement or third-party extradition procedures. Added to the debate over trying juveniles, the coexistence of the SCSL with the TRC, and the abandonment of the blanket amnesty granted at Lomé, these have been the most important issues the court has had to wrestle with (Schocken, 2002: 437).

The two features that draw the most praise from observers are the decision to target ‘big fish’ instead of ‘small fry’ –a strategy that the Office of the Prosecution of the International Criminal Court was expected to follow-, and its ambitious and innovative outreach program.⁶⁹ Partly due to these efforts, and its reliance on national staff, the majority of Sierra Leoneans have a positive view of the court, but there are many

⁶⁷ This has not entirely rid the court from the accusation of representing “white man’s justice,” a charge that rang louder when the head of the investigations team, Peter Halloran, was convicted of sexually molesting a Sierra Leonean child (Okello, 2005: 24).

⁶⁸ To date, it has indicted offenders from the RUF, the AFRC, and the pro-government Civilian Defense Forces (CDF). Three of these individuals have died, including Foday Sankoh and his deputy Sam Bockarie. Recently, the SCSL issued its first convictions, and transferred Charles Taylor to The Hague. Updated information is available at the court’s website: www.sc-sl.org.

⁶⁹ Human Rights Watch and Amnesty International thought that David Crane’s interpretation of the court’s mandate was too narrow, and advocated the indictment of regional and mid-level commanders as well as top-level officials. See Human Rights Watch, “Bringing Justice: The Special Court for Sierra Leone accomplishments, shortcomings, and needed support (September, 2004).

exceptions. Some deem it unfair that the leaders of the pro-government Civilian Defense Forces (CDF), such as Chief Sam Hinga Norman, ended up at the dock after their role defending the democratically elected government and resisting the RUF.⁷⁰ Others think that if Norman had to stand trial, so should President Kabbah.⁷¹ The opposite view is also common: why should commanders be in custody rather than the man who actually cut off a hand or burned down a house? Some also fear that prosecutions can destabilize the fragile peace. Many would prefer that the international community would spend the money in rebuilding houses and villages, rather than on criminal procedures, and there are those whose discontent is based on the discrepancies between local and international standards in terms of maximum punishment and detention conditions (Horovitz, 2006: 59-60; Sriram, 2005: 103-104).

The coexistence of the court and the truth commission led to considerable confusion among the population and the participants.⁷² In the past, truth and reconciliation commissions have often been viewed as an alternative to criminal justice that, in some cases, obviates or suspends the need for prosecutions. In Sierra Leone, the two institutions operated contemporaneously (Schabas, 2006: 21). A common misconception was that the TRC was the investigative arm of the Special Court and that testimonies presented during the commission's hearings could be used against them later

⁷⁰ This impression has subsided as atrocities committed by CDF soldiers have come to light (Horovitz, 2006: 59-60). It is interesting, however, that support for the SCSL is measured as stronger among former RUF, who were forcibly recruited, or feel deceived and betrayed by their commanders, than among former CDF (Sriram, 2005: 104).

⁷¹ As several other high-level indictees –including the RUF leaders Sankoh and Bokarie, and possibly AFRC's Johnny Paul Koroma-, Sam Hinga Norman died in 2007 before receiving a sentence.

⁷² This is not so surprising. Eighty percent of Sierra Leone's population is illiterate, but, as William Schabas puts it, one would be hard pressed to find in Europe or the United States many people able to distinguish between the European Court of Human Rights and the European Court of Justice, explain the different roles of the Attorney General and the Chief Justice of the Supreme Court, or have a clear view of which is which among the four international courts that currently sit at The Hague, to name but a few examples (Schabas, 2006).

in court. Prosecutor David Crane helped matters by categorically denying that both institutions would share information with each other. In the end, there was no formal agreement of cooperation between the two bodies, and very little communication at all in more informal channels (Schabas, 2006: 36). The commission's main challenges were others, including funding and staffing. Between those that preferred to forgive and forget rather than to dig up uncomfortable truths, and those that saw it as irrelevant because it had no power to punish, the commission's sessions were poorly attended (Shaw, 2004).⁷³

Currently, the court is rushing to bring the ongoing trials to a close, while the most important case has been transferred to The Hague for security reasons. Charles Taylor's trial was scheduled to begin in the first half of 2007, but has been postponed and rescheduled several times. Taylor complained of inadequate defense, fired the lawyer that had been assigned to him, claimed indigence, and did not show up at the opening remarks session held on June 4th 2007.⁷⁴ His trial is currently taking place, and a few dozen witnesses of the prosecution have testified.⁷⁵

3.2. From amnesty to trials:

The case of Sierra Leone is a valid reminder of the dangers of blanket amnesties.⁷⁶ The amnesty offered in Lomé in 1999 was similar to that offered in 1996 in Abidjan, which did not prevent the war from resuming. The agreement reached in Lomé

⁷³ Many individuals thought that healing would take place through 'social forgetting.' It was not uncommon for entire communities to refuse to give statements, or to give statements but withhold information that might be damaging to families living among them.

⁷⁴ For a critical view, see Boateng, 2007.

⁷⁵ For an update, see <http://www.sc-sl.org/Taylor.html>. The proceedings are streamed live over the internet.

⁷⁶ Human Rights Watch and Amnesty International were among those more strongly opposed to the amnesty provisions, calling the peace accord "unacceptable." See Human Rights Watch, "U.N. Must Clarify Position on Sierra Leonean Amnesty," July 12th 1999, at <http://hrw.org/press/1999/jul/s10712.htm>; Amnesty International, "Sierra Leone: A Peace Agreement But No Justice," July 9th 1999, at <http://amnesty-usa.org/news/1999/15100799.htm>.

in 1999 was a particularly unpalatable capitulation, because it not only pardoned the most brutal offender, Foday Sankoh, but also rewarded him by making him deputy leader of the government and giving him control of the diamond mines.⁷⁷ This did not satisfy the RUF, which continued to attack both pro-government forces and the newly arrived UN peacekeepers. In May 2000, the RUF precipitated a major crisis, killing four Kenyan peacekeepers during a skirmish over disarmament. Within days, the RUF had taken close to 500 UN peacekeepers and military observers hostage, shot down several UN helicopters, and killed nine more peacekeepers and two journalists (Dougherty, 2004: 318). The consequences of its pact with the devil had turned both embarrassing and alarming for the United Nations.

Nonetheless, when the Special Court was created in an agreement between the United Nations and the government of Sierra Leone, the ‘peace before justice’ chorus raised their criticism once again.⁷⁸ Some suggested that transitional justice efforts should be suspended for at least five years so as not to imperil the success of other UN efforts, such as the now fully-teethed peacekeeping operation (UNAMSIL) and the DDR campaign (Sriram, 2005: 109).⁷⁹ To the consternation of many Sierra Leoneans, and

⁷⁷ Robertson (2002) has harsh words for the diplomats involved in this deal, most especially Reverend Jesse Jackson: “Discredit for the Lomé Peace Agreement belongs principally to the Reverend Jesse Jackson, who chummed up with Charles Taylor and expressed admiration for the imprisoned Foday Sankoh, likening him to Nelson Mandela (...). Jackson’s ignorance and moral blindness does not excuse the Western and UN diplomats who agreed to release Sankoh from prison and bestow upon him an apparently valid amnesty (Robertson, 2002: 466).

⁷⁸ See, for example, Penfold (2002). In an excerpt of the final report of the TRC, the President of the Commission, William Schabas, wrote “it is not clear why the United Nations accepted amnesty in November 1996 and rejected it in July 1999 (...). *Those who argue that peace cannot be bartered in exchange for justice, under any circumstances, must be prepared to justify the likely prolongation of an armed conflict* (emphasis added).” Quoted in Schabas, 2006: 29.

⁷⁹ In email correspondence with Giorgia Tortora, Liaison Officer of the SCSL, I was told that the court had benefited from the relative success of the DDR campaign and the British actions against the rebels, effectively disbanding them and undermining their ability to retaliate and intimidate victims and witnesses. This contrasts with the case of the International Criminal Tribunal for Rwanda, where a substantial

possibly President Kabbah himself, the Special Court indicted not just Sankoh, Koroma, or Bokary, but also Sam Hinga Norman, a former Deputy Minister of Defense and leader of the Kamajor militia (CDF) that contributed greatly to the eventual defeat of the RUF.⁸⁰ Just as the ICTY had not hesitated to indict Tudjman or Gotovina, the SCSL sent to the dock one of Sierra Leone's heroes. Similarly, while NATO escaped the scrutiny of the ICTY, the statute of the SCSL established that ECOMOG troops did not fall under its jurisdiction, and could only be prosecuted in their own countries, once again waiving the regional enforcers of criminal responsibility (Moghalu, 2006: 108).⁸¹

From a legal point of view, the amnesty provisions of the Lomé accord, which was a valid agreement signed by two parties, seemed to clash with the creation of the court. Several defendants challenged the jurisdiction of the court on these grounds. Article 10 of the Statute explicitly denies that any amnesty would represent a bar to prosecution. As mentioned above, the United Nations' representative at Lomé issued a reservation, limiting the effects of the amnesty to Sierra Leonean law and Sierra Leonean courts. Secondly, the United Nations was not a party to the agreement between the government and the rebels, but its guarantor. The Sierra Leonean government was, however, a party to the agreement, and thereby legally bound by it. It is argued, however, that the rebels had previously nullified the peace accord with their continued violations, and the government did not need to respect it (Sriram, 2005; Williams, 2005; Cassese, 2004; Macaluso, 2001; Gallagher, 2000). It should be noted that, although some argue

presence of Rwandan Interahamwe in neighboring DRC has proved very disruptive for the activities of the court (February 13th 2006, on file with author).

⁸⁰ In his letter to Kofi Annan requesting an international court, President Kabbah made it clear that he wanted a court that would indict and prosecute RUF leaders, and not all sides.

⁸¹ Complaints of abuses and crimes committed by Nigerian peacekeepers were fairly frequent. See Human Rights Watch, "Getting Away with Murder" (July 1996), at <http://www.hrw.org/reports/1999/sierra/SIERLE99.htm>.

that a customary norm against amnesties for certain crimes is crystallizing, amnesties remain an available tool, and the debate over their lawfulness will be revisited in the next chapter.

The peace versus justice dilemma reached its climax with the indictment of Charles Taylor, at the time sitting President of Liberia. This indictment was served by Prosecutor David Crane in June 2003, precisely when Taylor and other West African heads of state were attending peace talks in Accra, Ghana, to put an end to Liberia's civil war. Taylor hurried to return to Monrovia on a presidential jet put at his disposal by President of Ghana, and resigned soon thereafter. In a deal brokered by ECOWAS, the AU, the UN, and the US, Nigeria offered asylum (Moghalu, 2006: 109-111). For a variety of reasons, African leaders saw the indictment as an insult proffered by an overzealous prosecutor seeking publicity and jeopardizing an important peace initiative intended to put an end to Liberia's suffering. In their view, an American was once again engaging in hegemonic excess by indicting a sitting head of state while at peace talks with other heads of state. Perhaps some feared they would be next. For most, however, it was yet another example of "white man's justice" clashing with African realities. Most of the criticism concerned the timing of the indictment, but there were procedural issues as well. Court Registrar Vincent submitted the indictment to authorities in Ghana via electronic mail. Even though Vincent maintains he warned the relevant UN authorities and the Ghanaian High Commission in Freetown, the government of Ghana claims that they learned of the news when it was broadcast on BBC (Gberie, 2003: 644-645).

For Moghalu (2006), the indictment of Charles Taylor is a quintessential example of war crimes' justice as political justice. The indictment resulted in Taylor's resignation

as President of Liberia, an outcome that the Bush Administration seemed determined to achieve. Added to the pressure exerted by a US warship sent to Liberia's coast, and the sanctions imposed by the Security Council, the SCSL was just another component of a coherent strategic goal of the American government: taking Taylor out of the picture and overthrowing yet another rogue leader.⁸²

But to make the claim that the indictment was a political move, or that the SCSL was engaging in political justice, one should be prepared to answer the following questions: what and whose politics? This investigation argues that political justice must be more than a vague "everything-is-political." Did David Crane serve the indictment at that time because it would help the strategic goals of the American government? At the time, the indictment embarrassed the American officials that were sponsoring the peace talks in Ghana and made the White House very nervous, especially because Crane kept toying with the possibility of indicting Qaddafi as well. The relationship between the prosecutor of the SCSL and the Bush administration was rather tense, and Crane's support in Washington was primarily in Congress. The White House was visibly unhappy with the timing of the indictment and the Congressional reward offered as bounty for Taylor's capture, and brokered the deal that gave Taylor asylum in Nigeria (Dougherty, 2004: 325; International Crisis Group, 2003: 14-17). And the American government's opinion should matter, because the United States was the leading donor to the court. The United States, the United Kingdom, and the Netherlands contributed over eighty percent of the budget in the court's first years. The US was not interested in encouraging the

⁸² It should be noted that, by the summer of 2003, eliminating tyrants had become a crucial aspect of the Bush Administration's self-image. Moghalu, however, mentions that it could be interpreted as an act of vengeance for Taylor's favoring China over the US in granting concessions to exploit Liberia's offshore oil (Moghalu, 2006: 122).

prosecution of political leaders, and expressed frequent opposition to the ICC and Belgium's long-armed universal jurisdiction.

Critics claim that the SCSL had overstepped its functions and entered the realm of politics, because the indictment clearly weakened Taylor and forced his resignation. Perhaps the US warship in Liberia's coast, the rebels' growing pressure, and the UN sanctions weighed more heavily in his decision to step down. Paradoxically, the same African leaders that criticized the indictment had gone to Accra to convince Taylor to resign in the interests of peace. Since the indictments, both Sierra Leone and Liberia have experienced some improvement, and even a small measure of relative peace and stability.⁸³ It should not be forgotten that the Lomé agreement in 1999 was the fourth attempt at peace negotiations in a decade, and the second comprehensive peace agreement. All of them failed or were broken by at least one of the parties.

Among international prosecutors, David Crane has been singularly outspoken in his admission that politics played a big part in his decisions. Crane took up the job with the warning that he might indict a few heads of state, including Libya's Muammar Qaddafi and Burkina Faso's Blaise Compaoré, which purportedly financed and armed Taylor and the rebels, and Sierra Leone's Ahmad Kabbah (Crane, 2006).⁸⁴ He has

⁸³ In late 2005, Ellen Johnson-Sirleaf became Africa's first female head of state after winning Liberia's presidential elections. In September of 2007, Sierra Leone celebrated its first general election since the UN withdrew the majority of its peacekeeping forces, and they were considered largely orderly and significant step towards democratic transition and the consolidation of peace. However, the loser Solomon Berewa challenged the win of his opponent, Ernest Bai Koroma, and there were many reports of disrupted vote counting, ballot stuffing and rigging, as well as the political mobilization of former combatants for less than noble purposes (see Christensen and Utas, 2008).

⁸⁴ It could be easily concluded that Crane's threat of indictment might have persuaded Qaddafi to normalize relations with the West. After all, the prosecutor's tenure coincided with Qaddafi's abandonment of weapons of mass destruction programs and reestablishment of relations with several Western countries. It is not yet known whether it was this –Crane maintains that he showed Qaddafi all the evidence he had compiled against him– or other events, such as the United States' invasion of Iraq and subsequent capture of Saddam Hussein. Perhaps both explanations miss the point, because Qaddafi's collaboration with the

mentioned more than once that he restrained himself from issuing these indictments out of fear that the international community would stop funding and supporting the court. But this may have more to do with his own judgment of what could happen and his concerns about the viability of the court, given that the US government had resisted Taylor's indictment so vigorously, rather than explicit threats from the court's main funders. If the United Kingdom, the Netherlands, or Canada had expressed their preference one way or the other, David Crane would have probably given details about such pronouncements. The United States did try to stop Taylor's indictment, but American foreign policy was divided between an unsupportive White House and a supportive Congress. The Bush administration delayed the transfer of \$10 million dollars that Congress had appropriated for the court, which Congress counter-acted, successfully, by threatening to cut funding for the new embassy in Freetown (Dougherty, 2006).

One point that is almost never mentioned is that peace negotiations, as opposed to international prosecutions, can also be instrumental in the commission of atrocities, and manipulated by a party to the negotiating table in order to further his case or advance his position. As evidenced by both the historian Stephen Ellis –an Amnesty International investigator during the conflict- and the statements emanating from Liberia's Truth and Reconciliation Commission, it seems more than plausible that the infamous Camp Carter massacres of June 6th 1993 were carried out by Taylor's NPFL as a means for increasing the pressure for a ceasefire, and with the purpose of blaming the Armed Forces of Liberia (AFL). In this massacre, which took place in the midst of peace negotiations sponsored

international community dates back to 1999, regarding the Lockerbie plane bombing, and the terrorist attacks of September 11th 2001, after which he offered the cooperation of his intelligence service.

by the United Nations and ECOWAS, approximately 600 displaced women and children were killed at the Firestone Plantation (Gberie, 2008: 460).

For the following years, Taylor stayed in Nigeria, comfortably living in a seaside villa in Calabar.⁸⁵ Under pressure from Western and Nigerian lawyers and human rights organizations, as well as the United States, the European Union, and the United Nations, Nigeria refused to extradite Taylor, claiming that it would only do so when Liberia had a democratically elected government. The opportunity presented itself in 2006, when Ellen Johnson-Sirleaf became the first female head of state in Africa, defeating former soccer star George Weah. Johnson-Sirleaf had initially supported Taylor's rebellion, and then lost to Taylor in a landslide in the 1997 elections. In March 2006, Johnson-Sirleaf asked Nigerian President Obasanjo to extradite Charles Taylor so that he would stand trial at the special court. Some argue that Johnson-Sirleaf was not interested in accountability, but was responding to the political pressure coming from the international community. If so, she did so risking domestic political capital, given that she had received the backing of Taylor's supporters in the 2006 election, and that important associates of Taylor, including his wife, still occupy key positions in Sierra Leone's politics (Moghalu, 2006: 119-120).⁸⁶

⁸⁵ See Olujinmi (2005) for an explanation of Nigeria's reasons to offer asylum.

⁸⁶ The statements and public hearings compiled in Liberia's own Truth and Reconciliation Commission, established in 2005, reflect a portrait of Charles Taylor largely coincident with that sketched out by the prosecution in the neighboring country's special court. Interestingly, the Truth and Reconciliation Commission has been somewhat of an embarrassment for President Johnson-Sirleaf. In one of the first sessions, she witnessed how one of her closest aides and music star, Sundaygar Dearboy, was accused of brutal atrocities. In another session, the former leader of the Butt Naked Brigade, a band of naked child fighters who believed that nudity protected them from bullets, confessed that he was personally responsible for 20,000 deaths during the war. Yet, he has become the leader of a popular church in Monrovia, and enjoys a good life. In many aspects, Liberia's Truth and Reconciliation Commission has manifested some of the worst features of these bodies, and many international observers have expressed their discontent with the proceedings. For example, "even the Commissioners, looking un-shocked, would smile or laugh, the early solemnity of the proceedings abandoned. Worse, onlookers, including some Commissioners, would giggle when victims narrated unusual forms of atrocities, including particularly creative forms of rape. In

After Taylor's capture and transfer to Freetown, he was quickly sent to The Hague for security reasons. Charles Taylor remains hugely popular among many war-hardened, unemployed, and disenchanted men in Liberia and Sierra Leone, and retains the ability to mobilize a fighting force of armed young that could attack the court from the surrounding hills and threaten the fragile and newfound peace in the country. All of the key decision-makers involved, including the UN, the Netherlands, the United States, the United Kingdom, Sierra Leone, and Liberia, agreed to it. Apart from security reasons, the transfer may placate some Liberians that would doubt the fairness of a trial in Sierra Leone, and may allow both Sierra Leone and Liberia to concentrate on the gargantuan task of rebuilding their shattered nations.⁸⁷ Some newspapers complained that trying Taylor in Europe would be an outrage upon African dignity and a confiscation of local ownership of the process. Others have written that they should simply "leave the man alone." But while Idi Amin, Milton Obote, Mengistu Haile Meriam, or Hissène Habré lived lavish and undisturbed exiles in Saudi Arabia, Zambia, Zimbabwe, and Senegal, respectively, no African government tried to bring them to justice, out of fear of opening Pandora's box, attracting scrutiny to them, and provoking instability in the region. Oddly enough, the trial that will define the court is the only one that will take place outside of Sierra Leone, and involves the former leader of a foreign state, who supposedly never set foot in Sierra Leone and neither did his armed forces.⁸⁸ To date, however, he is almost universally considered the main culprit of West Africa's brutal civil wars. By eroding the

fact, the Commissioners often tend to subject victims to more probing examination, as in actual trials, than they do alleged perpetrators." (Gberie, 2008: 459).

⁸⁷ The relocation of the trial has also some negative consequences, as distance undermines the engagement and participation of those most affected by Taylor's deeds. The need to transport judges, prosecutors, court staff, victims, and witnesses will increase the financial costs of the process.

⁸⁸ Taylor's defense will probably focus on disproving this linkage. See Petrou, 2007.

impunity of Africa's 'Big Men,' Taylor's trial is hoped do for Africa what the Pinochet case did for Latin America.

4. Argentina's struggle against impunity, at home and abroad:

The literature on municipal adjudication of international crimes devotes most of its attention to the doctrine of universal jurisdiction, and some famous cases like those of Augusto Pinochet from Chile or Hissene Habré of Chad. The doctrine of universal jurisdiction holds that some crimes represent such an affront to the world community that the domestic courts of any country can and should bring the perpetrators to justice. Some countries, like Spain or Belgium, have been more prone to use this doctrine than others.⁸⁹ The proceedings opened against Pinochet in Spain and other European countries, followed by the domestic attempts to bring him to the dock upon his return to Chile, had powerful symbolism, but the former dictator's death in 2006 prevented a trial (Roht-Arriaza, 2005).⁹⁰

I have chosen Argentina's struggle with impunity as an illustration of municipal adjudication for several reasons. Firstly, municipal adjudication encompasses both domestic trials and foreign trials, and Argentine military leaders have been tried both at home and abroad. Secondly, the Argentine case embodies the positive interaction between both the local and the global in the transnational justice context, known in the literature as the "justice cascade" (Lutz and Sikkink, 2001). This theory holds that when

⁸⁹ Belgium's activism, which began with a set of new laws in the wake of the Rwanda genocide and peaked at the 2001 conviction of four Rwandans in Belgium, was curbed in 2003 by Belgium's Supreme Court and the International Court of Justice, which denied Belgium's judiciary of a right to try Israel's Sharon or Congo's Yeroia. Belgium's legal revolution had opened the gates to a flood of lawsuits against many sitting heads of state and cabinet members, including several American officials.

⁹⁰ Technically, Spain's legal crusade against Pinochet in 1998 and 1999 had more to do with extraditions and immunities than with universal jurisdiction, even though the doctrine was frequently invoked.

domestic opportunity structures are closed, such as in authoritarian regimes, international activism is used as an alternate option to seek justice. As new norms and practices of transnational justice begin to cascade and feedback from the global to the local, domestic trials proliferate and the need for foreign venues diminishes. Thirdly, Argentina's trials of military leaders in the mid-80s and the attempted coups that followed are often mentioned as illustrations of the need to let justice take a backseat to peace and stability. Finally, Argentina has in many ways spearheaded the end-of-the-century revolution in the transnational justice movement. Its truth commission was the first important one in the world, triggering an avalanche of similar initiatives around the world in the following decades, and the 1985 trials constituted the first trial of leaders of authoritarian regimes in Latin America for human rights violations.⁹¹

On March 24th 1976, Jorge Rafael Videla led a military coup to overthrow a democratically elected government, initiating the bloodiest and most repressive period of Argentina's recent history. The military junta was presided first by Videla –with Emilio Massera and Orlando Agosti-, followed by Roberto Viola and, finally, Leopoldo Galtieri. The junta waged a *dirty war* against 'subversion', an elastic term that was defined broadly, encompassing Peronist union members, journalists, clergy, intellectuals, students, professors and anyone with a hint of ties to the left. The tragic toll was the 'disappearance' of thousands of civilians and widespread and systematic torture. Pregnant women were deliberately kidnapped to send their children to military families loyal to the junta once they had given birth (Robertson, 2002: 264). The military junta

⁹¹ It could be argued that the Bolivian Congress moved against members of the military government of General García Meza in 1984, but the proceedings did not begin until 1986 and the decisive phase of the trial took place from 1989 to 1993. In the rest of the world, the only precedents of domestic trials were the post-Nuremberg trials of Nazis in German courts and the 1974 trials of the colonels in Greece (Sikkink and Walling, 2006: 306).

ruled until 1983, when the embarrassing defeat against the United Kingdom in the Falkland Wars struck a crushing blow to the credibility of the military regime (Roehrig, 2002: 36-40).

Since 1976, human rights activists in Argentina had sought to bring these atrocities to light through the Inter-American Commission on Human Rights, to no avail. However, as soon as President Alfonsín was elected in 1983, an opportunity opened at home. Raúl Alfonsín did not hesitate to abrogate the amnesty that the military had bestowed on themselves, on the grounds that it was imposed by an authoritarian government and did not emanate from the democratic process. He set up a Commission on the Disappeared, and its report, *Nunca Más* (*Never Again*) became the slogan of the transitional justice movement.⁹²

In 1985, nine military junta leaders were tried. Five of them were convicted – although subsequently pardoned by President Carlos Menem five years later- and several army rebellions forced him to abandon further proceedings against more junior officers (Robertson, 2002: 281-288).⁹³ The trials provoked a military backlash of such magnitude that Alfonsín felt compelled to enact the Full Stop and Due Obedience Laws, also known as Amnesty Laws. Alfonsín himself barely missed assassination while visiting an army base in 1986. After that, Lieutenant-Colonel Aldo Rico launched two military coups in April 1987 and January 1988, followed by more rebellions in December 1988 and the end of 1990, already with Menem in the *Casa Rosada* (Roehrig, 2002: 69-73). By pardoning the military leaders when he took office, Menem sacrificed justice purportedly in favor of

⁹² See *Nunca Mas: The Report of the Argentine National Commission on the Disappeared* (New York: Farrar, Straus & Giroux, 1986).

⁹³ The two most important members of the first junta, Videla and Massera, were sentenced to life in prison.

national reconciliation, and the Supreme Court gave the Amnesty Laws constitutional rank.

Analysts concluded that human rights trials were not viable because they would provoke coups and undermine democracy. For Sikkink and Walling, this analysis misinterprets the actual sequence of events and misreads the Argentine lesson. The coup attempts were not a reaction to the sentences against the military leaders, but to the beginning of more far-reaching trials against junior officers. The amnesty laws did not reverse or overturn the previous trials, but simply blocked the possibility of more trials. The five junta leaders convicted served four years of their prison terms before being pardoned by President Menem, and their guilty verdicts still stand. Rather, it should be argued that the military learned the lesson very well, and that the strength of Argentina's democracy owes much to the military's evolution from its traditional praetorianism to its present subordination to constitutional government (Acuña and Smulovitz, 1997).

On November 2, 1998, Spanish magistrate Baltazar Garzón took up several cases filed by Spanish prosecutors since 1996 and indicted 98 members of the military junta for crimes of genocide and terrorism in a process parallel to that of Pinochet. But ex-President Videla had been sent to preventive prison already on June 9th of the same year, three months prior to the arrest of Pinochet in London. And in the mid-90s, the Mothers of the Plaza de Mayo had managed to raise the profile of the campaign to kidnap minors, obtaining convictions in courts against lower level military officers and the adoptive families (Sikkink and Walling, 2006: 314-316). In 1995, Navy officer Adolfo Scilingo and General Balza had confessed that the military systematically used torture, abusive tactics, and 'death flights,' bringing the issue to the forefront of the public debate and

redoubling the demand for justice (Roht-Arriaza, 2005: 97).⁹⁴ A heterogeneous and informal human rights coalition emerged over time on a transnational scale, linking domestic groups like *Madres de la Plaza de Mayo* with other organizations with broader scope: Amnesty International, Lawyers Committee for Human Rights –now known as Human Rights First-, World Council of Churches, International Commission of Jurists, United Nations Quaker Office, International League for Human Rights and Human Rights Watch (Eguizábal, 2000: 4, Peruzzoti, 2002: 87).

Although Spanish magistrate Baltasar Garzón conducted the most significant and persistent effort against the military junta by a foreign court, similar proceedings were opened in Italy, France, and Germany. At first, President Carlos Menem's staunch opposition to the extradition requests obstructed Garzón's efforts. Menem refused to cooperate, claiming that Spain's involvement was encroaching upon Argentina's national sovereignty, and labeled the proceedings as 'judicial colonization'.⁹⁵ His successor, Fernando de la Rúa, issued a decree in 2000 prohibiting automatically the acceptance of any extradition request that concerned the military. The combination of Argentina's sense of nationalism and the growing demand for justice, both at home and abroad, somehow forced the government to take action so that the trials would take place in Argentine courts. After Videla, Massera was also placed under pre-trial detention.

⁹⁴ Death flights (*vuelos de la muerte*) were a form of extrajudicial killings practiced in Argentina during the Dirty War. Victims were drugged with Pentothal and boarded into planes or helicopters, and were then thrown naked into the Atlantic Ocean or the Río de la Plata. In a typical flight, more than a dozen victims would be dumped from the air. According to Adolfo Scilingo, who confessed to participating in at least two of those flights, the Argentine Navy conducted approximately two hundred death flights in 1977 and 1978 (see BBC News, "Grim Account of Argentine Deaths," January 20th 2005, available at <http://news.bbc.co.uk/2/hi/americas/4193341.stm>).

⁹⁵ See "Menem acusa a Garzón de invadir la soberanía de Argentina." (Menem accuses Garzón of invading Argentina's sovereignty). *El Mundo* (November 4th 1999).

However, Argentina's deep transformation had already started to take place. The Full Stop and Due Obedience Laws, approved by Congress in 1986 and 1987 respectively, were declared unconstitutional, null and void, by Federal Judge Gabriel Cavallo in a landmark judgment handed down on March 6th 2001 at the Fourth National Court for Criminal Correctional Matters.⁹⁶ The National Chamber of Appeals unanimously confirmed this ruling and several judges –including Claudio Bonadio, Reinaldo Rubén Rodríguez, Carlos Skidelsky, and then Attorney-General Nicolás Becerra- began to follow this precedent through 2002 and 2003. Finally, in June 2005 the Supreme Court found the amnesty laws unlawful by a 7-1 vote, effectively reopening human rights cases that had been closed for the past fifteen years.

The change of leadership in Argentina accelerated this transformation. President Néstor Kirchner has taken resolute steps to find a remedy to the heavy legacy of human rights violations and impunity that has permeated Argentina's recent history. His government repealed Decree No. 1581/01, which prohibited the extradition judicially requested by other countries. As a consequence, the Federal Chamber of Buenos Aires reopened several judicial proceedings against some of the military leaders that Garzón had indicted, especially related to the grotesque practice of throwing their victims from airplanes over the Atlantic Ocean. Garzón reiterated in July 2003 his accusations against 46 Argentinean military leaders. Instead of the opposition he encountered in 1999, Argentina's government and judiciary cooperated enormously in the process, and

⁹⁶ Both laws had been repealed in March 1998, but their repeal did not have retroactive effects and the violations committed under the military regime continued to be covered by them.

declared publicly that they would not block the extradition.⁹⁷ By July 2003, most of the military members indicted by Garzón had been arrested in Argentina. In the end, the Spanish government refused to issue the formal request, on the basis that Argentine courts were already taking adequate measures to judge them on their soil. In an unexpected development, Mexico extradited Ricardo Miguel Cavallo, another military officer, to Spain.⁹⁸ Adolfo Scilingo was convicted in early 2005 for his role in murdering prisoners, and France insists on requesting the extradition of Alfredo Astiz (Sikkink and Walling, 2006: 319).

The unconstitutionality of the amnesty laws has led to more domestic trials in Argentina. Videla is currently in a military prison, after being in house arrest for years.⁹⁹ Jorge 'Tigre' Acosta, Miguel Etchecolatz, and the Catholic priest Christian von Wernich, all received life sentences. Von Wernich, accused of killing seven people, torturing thirty-four, and kidnapping forty-two, was the first one to be convicted of genocide.¹⁰⁰ And perhaps the most notorious case remains that of Bussi and Menéndez, also sentenced to life in prison. Antonio Bussi was convicted by a court in the northern province of

⁹⁷ "El Gobierno argentino asegura que no bloqueará la decisión judicial sobre las extradiciones." (The Argentine government assures that it will not block the judicial decision on extraditions). *El Mundo*, July 26th 2003.

⁹⁸ Cavallo's extradition represent the first time that a country had extradited an individual to another country for human rights crimes allegedly committed in a third. The Spanish government had requested this extradition in 2000, following Cavallo's indictment by Judge Garzón. After the amnesty laws were declared unconstitutional in Argentina, Spain decided to send Cavallo back to Argentina for trial, and some confusion and delay with the extradition request led to Cavallo's short-lived release from prison. However, he was rearrested and extradited to Argentina in early 2008 (see *BBC*, "Cavallo Case Sets Precedent," June 29th 2003, available at <http://news.bbc.co.uk/2/hi/americas/3030030.stm>, and *El País*, "Serpico llega a Argentina para ser juzgado por los crímenes de la ESMA," March 31st 2008, available at http://www.elpais.com/articulo/internacional/Serpico/llega/Argentina/ser/juzgado/crimenes/ESMA/elpepuint/20080331elpepuint_15/Tes).

⁹⁹ *El País*, "El dictador Videla, trasladado de su casa a una prisión militar," October 11th 2008, available at http://www.elpais.com/articulo/internacional/dictador/Videla/trasladado/casa/prision/militar/elpepuint/20081011elpepuint_13/Tes.

¹⁰⁰ Marirrodiga, Jorge, "El Sacerdote del Horror" in *El País*, October 11th, 2007, available at http://www.elpais.com/articulo/internacional/sacerdote/horror/elpepuint/20071011elpepuint_10/Tes.

Tucumán, a province whose governorship he had won in the elections of 1995 and 1999. In 2003, he was elected mayor of San Miguel de Tucumán, the capital of the province, even though the judicial process against him had already begun. Although he will not go to jail due to his age –he attended his trial on a wheelchair and aided by an oxygen mask– the conviction of such a divisive, yet still popular figure, represents a powerful symbol of Argentina’s judicial independence.¹⁰¹

As of the end of 2009, more than 600 accused face criminal counts before federal courts, and sixty two have already been sentenced. Current prosecutions include not only key leaders, but also direct perpetrators, and although the focus is still military personnel, civilians that contributed in diverse ways to the crimes, including priests, judges, and former ministers, have also been charged.¹⁰² It is fair to consider Argentina as a leader and a trendsetter in international justice. Its judiciary, with a past of complicity with and/or acquiescence to human rights violations, has turned around to produce some of the most outspoken judges in international criminal law. Federal Judge Rodolfo Canicoba Corral, for example, initiated proceedings against dictators from other Latin American countries, including Chilean Augusto Pinochet, Bolivian Hugo Bánzer and Paraguayan Alfredo Stroessner, and asked the US State Department for permission to interrogate Henry Kissinger with respect to his knowledge of *Operación Cóndor*, a transnational operation aimed at the physical elimination of subversive elements in the South Cone. The Chief Prosecutor of the International Criminal Court is the Argentine Luis Moreno

¹⁰¹ Marrirodriga, Jorge, “Condenados a perpetuidad dos represores de la dictadura argentina” in *El País*, August 29th 2008, available at http://www.elpais.com/articulo/internacional/Condenados/perpetuidad/represores/dictadura/argentina/elpepuint/20080829elpepuint_1/Tes.

¹⁰² See ICTJ Briefing, “Criminal Prosecutions for Human Rights Violations in Argentina” (November 2009), available at http://www.ictj.org/static/Publications/briefing_Argentina_prosecutions.pdf.

Ocampo, who had gained fame for his participation in the 1980s in the junta trials.¹⁰³

Finally, Argentina was one of the first countries to sign, ratify, and incorporate the Rome Statute to domestic law. It is powerfully iconic that one of the best models of international justice initiative is an important country in the global South.

Argentina's efforts to bring to justice past crimes have been imitated across the region, from Chile to Peru, Colombia, and Central America. In recent years, Kathryn Sikkink and Carrie Booth Walling have done a thorough analysis of human rights trials in Latin America and concluded that "there is not a single transitional trial case in Latin America where it can be reasonably argued that the decision to undertake trials extended or exacerbated conflict." (Sikkink and Walling, 2007: 440). No other region of the world has taken more steps in the last few years against impunity than Latin America

¹⁰³ Prior to his appointment as Chief Prosecutor of the ICC, Moreno Ocampo was already a legal celebrity in his country. He comes from a military family that considered him a traitor when he participated in the junta trials. As the Argentine consul in New York, Héctor Timerman, puts it, "every young law student in Argentina wants to be Moreno Ocampo."

CHAPTER 3

AMNESTY IN THE 21ST CENTURY: THE CASE OF THE ICC

1. The origins of the International Criminal Court:

The ICC has been heralded as the most significant new international organization since the creation of the United Nations, and the last great institution created in the 20th century. In a diplomatic conference that took place in July of 1998, 120 nations signed the Rome Statute that established the first permanent international tribunal with jurisdiction over genocide, crimes against humanity, war crimes, and, eventually, the crime of aggression. And only four years later this treaty entered into force when it received the ratification of 60 states. For many, it was the culmination of the hopes and aspirations of a global justice movement that had been gathering impetus for decades, silent at times and loud and assertive at others. Its central goal was to replace the prevailing impunity that had dominated world politics with accountability, and to ensure that sovereignty and the trappings of statehood did not trump human rights. In this sense, the symbolic power of the Rome Statute went beyond the strictures of its legal provisions.

But the road to Rome was tortuous and centuries-long. As early as 1474, the historical record indicates that an international military court sentenced Sir Peter Von Hagenbach to death for war crimes committed by his troops around the town of Breisach,

in what is today Germany.¹⁰⁴ 16th and 17th-century jurists like Lucas de Penna, Alberico Gentili, and Hugo Grotius had written on behalf of the codification of international humanitarian law and the respect for the customs of war. The earliest such codification in the modern era was perhaps the Lieber Code in 1863, by which the United States embedded international customary laws of war into the U.S. Army regulations on the law of land and warfare. By 1872, one of the founders of the International Committee of the Red Cross, Gustav Moynier, was ardently proposing a permanent court in response to the crimes of the Franco-Prussian War. And with the turn of the century, the first peace conferences took place in the Dutch city of The Hague, in 1899 and 1907. The Martens Clause of the Hague Conventions, for example, emphatically supported the principle that fundamental human rights norms do not cease to be applicable during armed conflict (Roach, 2006: 20-22).

After the First World War, a War Crimes Commission listed thirty-two violations of the laws and customs of war committed by the Axis powers, including the mass rape of Belgian women, and it declared that certain types of crimes called for trials before an international tribunal, composed of judges appointed by the Allied governments. The Americans disapproved of the creation of such court, unprecedented in the practice of nations, and rejected the notion that a head of state, such as the German Kaiser himself, could be brought before a court set up by his enemies. Nevertheless, lists containing hundreds of names of high-placed offenders were compiled by the French, the British, the

¹⁰⁴ Von Hagenbach had been ordered by the Duke of Burgundy to terrify the local population into submission. When defeated by a coalition formed by Austria, France, Bern, and the towns and knights of the Upper Rhine, instead of executing him summarily or sending him before a local court, the archduke of Austria decided to set up a special tribunal with 28 judges chosen from the ranks of each member of the coalition. Von Hagenbach was charged with “trampling the laws of God and man,” specifically with ordering murder, rape, and other wrongdoings. His defense was that he was simply following orders and that he did not recognize the court as legitimate. He was beheaded.

Belgians, and others. Like in today's Khartoum or Belgrade, protests erupted in major German towns to denounce the international court, and to oppose the surrender of any Germans to foreign authorities. As a compromise, Germany proposed to try these individuals in Germany, at the Supreme Court of the Reich at Leipzig. The Leipzig trials, which began on May 23rd 1921, were farcical. Altogether, only twelve men were tried, and half of those were convicted. The sentences were short, ranging from six months to two years. The two with the longest sentences soon escaped from detention under suspicious circumstances (Healy, 2002: 24).

In 1937, a draft statute for a court to try international terrorists was produced by the League of Nations, and then discarded. After World War Two, the victors set up the International Military Tribunals for Nuremberg and Tokyo (1945-1946), which encompassed the trials of more than twenty of the most important captured leaders of Nazi Germany.¹⁰⁵ Although stained by the accusation of victor's justice, Nuremberg set an enduring precedent and a framework of principles that would inform the development of international criminal justice in the following decades. The International Law Commission tasked with the creation of codifying international humanitarian law and drafting the statute of an eventual court based much of its work in the Nuremberg Charter. During the first session of the United Nations General Assembly in 1946, the United States sponsored Resolution 95, which affirmed "the principles of international law recognized by the Charter of the Nuremberg Tribunal and the judgment of the tribunal." (Maogoto, 2004: 204; Roach, 2006: 24-27).

Between the end of World War Two and the 1990s, the United Nations produced dozens of treaties and conferences devoted to human rights' protection, in an era

¹⁰⁵ Lesser war criminals were tried under Control Council Law No. 10, also in Nuremberg.

characterized by high-minded rhetoric and lip service coupled with a complete absence of enforcement. These documents, which represent the pillars of international human rights law, include the Universal Declaration of Human Rights (1948), the Convention on Prevention and Punishment of the Crime of Genocide (1948), the four Geneva Conventions (1949) and their two Additional Protocols (1977), the International Covenant on Civil and Political Rights (1967), and the Convention against Torture and Other Cruel, Inhuman, or Degrading Treatment or Punishment (1985). The Rome Statute drew heavily from them, and set out to add some teeth to their provisions.

In 1947, the General Assembly directed the Committee on the Codification of International Law -immediate precursor of the International Law Commission- to codify all offenses against the peace and security of mankind. Towards the end of the decade, the ILC, composed of eminent jurists, had begun to work on a draft code, with a special rapporteur assigned to prepare a draft statute for the establishment of an international criminal court.¹⁰⁶ However, it was immediately clear that the project had no chance of being accepted, was politically premature, and had to be shelved (Maogoto, 2004: 205-206). The main point of friction revolved around the crime of aggression and the inability to arrive at an agreed definition that was acceptable to the great powers. To date, this contentious issue has not been resolved. There were also divergent interpretations of the criminality of apartheid and the legality of the threat or use of nuclear weapons. It was tabled until the late 1980s, when the General Assembly, led by Trinidad and Tobago and a group of fellow Caribbean states, requested the ILC to prepare a report on international criminal jurisdiction for the prosecution of persons engaged in drug-trafficking.

¹⁰⁶ The ILC's approved text of the Draft Code consisted of five articles and listed thirteen separate international crimes, and was submitted to the General Assembly in 1954, where it was tabled for further discussion.

Interestingly, drug-trafficking, which posed a threat to the security of Caribbean nations, ended up not being included in the Rome Statute.¹⁰⁷ A draft statute in 1994 laid out the basis upon which the General Assembly established the Ad Hoc Committee on the Establishment of an International Criminal Court, first, and a Preparatory Committee a year later, in 1995 (Moghalu, 2006: 126-129). This committee met several times from 1996 to 1998 in the United Nations headquarters in New York.

Based on the draft of the Preparatory Committee, the United Nations General Assembly decided to convene the UN Conference of Plenipotentiaries on the Establishment of an International Criminal Court. This diplomatic conference was held in Rome from June 15th to July 17th 1998, drawing hundreds of NGOs –grouped under the umbrella of the Coalition for an International Criminal Court (CICC)-, more than 160 states, and numerous international organizations. After five weeks of frantic negotiations, 120 states signed the treaty, 21 abstained, and seven voted against it: China, India, Iraq, Israel, Libya, Qatar, and Yemen. The United States did not sign the Rome Statute until December 31st 2000, the last day in which it was open for signature, while the chairman of the Senate Foreign Relations Committee, Jesse Helms, announced that the Rome Treaty would be ‘dead on arrival’ in Congress.¹⁰⁸ The Bush Administration nullified this signature in 2002, the first of many gestures of opposition to the court.¹⁰⁹

¹⁰⁷ Mikhail Gorbachev also suggested it as a measure against terrorism, which had been the original idea of the League of Nations (Robertson, 1999: 347).

¹⁰⁸ Bill Clinton had personally called for the creation of the court, most explicitly during his apologetic visit to Rwanda in 1998, but he wanted a court that could be controlled by the United States through the United Nations Security Council (Robertson, 1999: 349).

¹⁰⁹ United States opposition to the court has included the conclusion of Bilateral Immunity Agreements with scores of countries, with the effect of excluding American citizens and military personnel from the jurisdiction of the court by threatening to otherwise withhold US military aid, and the passage of the American Servicemembers’ Protection Act, mockingly known as The Hague Invasion Act. This law, adopted by Congress in August 2002, contains provisions restricting US cooperation with the ICC, makes US support of peacekeeping missions contingent on impunity for all US personnel, and even grants the

In the end, the Rome Statute is the product of a compromise forged between a coalition of forty like-minded states, mostly European, which wanted a powerful court independent of the United Nations, on one hand, and the United States and China on the other, demanding a court that would have narrower jurisdiction and less independence, so that it could never bring prosecutions against American citizens or inhibit the use of American force. Other opponents of the court had different reasons. India, for example, was about to test-explode a nuclear weapon. Israel, a state symbolically attached to the Nuremberg principles and the protagonist of one of the most famous exercises in universal jurisdiction with the Eichmann trial in 1961, voted against it after the conference agreed to make forced settlement of occupied territory a war crime (Robertson, 1999: 351).

Finally, a Preparatory Commission was charged with the drafting and negotiation of complementary documents for the functioning of the court, such as Rules of Procedure and Evidence, Elements of Crime, the Relationship Agreement between the Court and the United Nations, and the Agreement on the Privileges and Immunities of the Court (Broomhall, 2003: 75). It was a testimony to the symbolic appeal of the ICC that it obtained the required sixty ratifications in a few years, when it was expected that it would take decades. In fact, many did not believe they would see a permanent international court in their lifetime, nor in their children's lifetime.

President permission to use military force to free US citizens and allies from ICC custody. For more information on US opposition to the ICC, see Bolton (1998), Johansen (2006), Goldsmith (2003), Scharf (2001), Scheffer (2002), Roach (2006), Ralph (2005), and Wedgwood (1999).

2. Basic framework of the court: structure, jurisdiction, and some highlights from the Rome Statute:

One hundred and eleven states, of which approximately one third are African, are party to the 1998 Rome Statute, the ICC's constitutive document. Currently, the ICC is working on four situations: the Democratic Republic of Congo, Darfur, northern Uganda, and the Central African Republic. There are no active investigations in relation to crimes committed in any other country in the world, although more than two thousand communications have been received by the Prosecutor, and his office is at least conducting preliminary analysis of situations in a number of countries, including Chad, Kenya, Afghanistan, Georgia, Colombia, Guinea, and the Palestinian territories.

The Assembly of State Parties oversees the management and administration of the court, decides and adopts its budget, elects the judges, and considers any question of non-cooperation on the part of a member-state. They cannot interfere with the judicial functions of the court. In several conversations at The Hague with ICC staffers, I was repeatedly assured that there was no political pressure from the member-states concerning the ICC activities. For example, by becoming the largest contributor to the court's budget, Japan did not gain any political leverage within the court with regards to its judicial activities. Political payoffs and other considerations might take place in questions such as election of judges and other officers –as I could witness at the Assembly of State Parties convened in New York in 2007.¹¹⁰ In my interviews, I was assured that the major donors had not expressed any concern that the ICC might be endangering stability or peace negotiations, or whether it should consider the timing and

¹¹⁰ As with the United Nations and other international institutions, geographic balance and regional solidarity often trump competence or merit in the selection of ICC officers.

sequencing of its actions. If anything, the opposite was true. To justify to their respective citizens the yearly financial contributions to the court, the occasional diplomat would express impatience with the court's slow pace and excessive prudence, which in its turn was caused less by political calculations than by the impossibility of guaranteeing the safety of investigators or witnesses.

The Court is composed of four organs: the Presidency, the judges, the Office of the Prosecution, and the Registry. The Presidency is responsible for the administration of the Court, and is formed by three of its sitting judges, elected for three years by their colleagues. Currently, the President of the Court is Sang-Hyun Song from the Republic of Korea, and two other judges serve as first and second vice president. The ICC judges elected him in March 2009 to replace Philippe Kirsch.

The judicial division of the Court consists of eighteen judges organized into the Pre-Trial Division, the Trial Division, and the Appeals Division, according to the qualifications and experience of the individual judges. Currently, eight ICC judges are from European countries –Italy, Belgium, France, Bulgaria, United Kingdom, Latvia, Finland, and Germany-, five from Africa –Uganda, Botswana, Mali, Kenya, and Ghana-, three from Latin America, -Brazil, Costa Rica, and Bolivia-, and two from Asia – Republic of Korea and Japan. They are elected for nine-year terms, but resignations are not infrequent.

The Office of the Prosecution, headed by the Argentine Luis Moreno Ocampo, enjoys considerable independence from the other organs of the tribunal. Moreno Ocampo was elected by the Assembly of State Parties in 2003, and will likely remain in this position until 2012, when his term expires. He has full authority over the management

and administration of his office, and is responsible for the reception of referrals and communications on crimes within the jurisdiction of the Court, their careful examination, and the conduct of investigations and prosecutions. The Prosecutor is assisted by a Deputy Prosecutor –currently the Gambian Fatou Bensouda-, a Director of the Jurisdiction, Complementarity and Cooperation Division, and the Head of the Investigations Division. The Division of Jurisdiction, Complementarity and Cooperation is the one that most directly wrestles with political considerations, as it is tasked with obtaining the cooperation of member-states.

The Registry is responsible for the non-judicial aspects of the administration of the Court, and is headed by a Registrar –currently the Italian Silvana Arbia- elected for a five-year term by a plenary session of the judges. This office deals with the provision of protection of victims and witnesses, the conduct of outreach programs, administrative support to the investigative teams of the OTP, and detention. Other semi-autonomous offices fall under the Registry for administrative purposes but function independently for all other practical purposes, such as the Office of Public Counsel for Victims, the Office of Public Counsel for Defense, and a Trust Fund established by the Assembly of States Parties for the benefit of victims and their families.

The most unfortunate characteristic of the structure of the court is that it houses together its judicial and prosecutorial branches, in a non-descript office building temporarily borrowed from the European Union.¹¹¹ Similarly, the Registry, which runs the Victims and Witnesses Unit, must remain neutral, but it does not escape anyone that

¹¹¹ It is no wonder that American students express so much puzzlement and confusion at the potpourri of tribunals sitting in The Hague. The ICC shares stage with the International Court of Justice, hitherto dubbed ‘the world court,’ the ICTY, and the Special Court for Sierra Leone, which is borrowing ICC space to conduct the trial of Charles Taylor.

by arranging the counseling of victims and witnesses of the prosecution, the defendant and his or her legal team is put at a disadvantage (Robertson, 1999: 354).

The Court's jurisdiction encompasses four offenses: genocide, crimes against humanity, war crimes, and the crime of aggression, which cannot be used in any prosecution until the member-states agree on a definition. Genocide is defined in article 6 of the Rome Statute in the same manner as in the Genocide Convention of 1948: "For the purpose of this Statute, genocide means any of the following acts committed with intent to destroy, in whole or in part, a national, ethnical, racial, or religious group, as such: a) killing members of the group; b) causing serious bodily or mental harm to members of the group; c) deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part; d) imposing measures intended to prevent births within the group; and e) forcibly transferring children of the group to another group. To date, the ICC has not charged any defendant with genocide.

Crimes against humanity, defined and enumerated in article 7 of the statute, are crimes committed deliberately "as part of a widespread or systematic attack directed against any civilian population, with knowledge of the attack," and they include murder, torture, rape and other forms of sexual violence, unlawful persecution or deportation, the crime of apartheid, enslavement, and enforced disappearance of persons. Article 7 ensures that the ICC will confine itself to the most heinous offenses, carried out systematically and "pursuant to or in furtherance of State or organizational policy to commit such an attack." Crimes against humanity can be committed by non-state actors, such as rebel groups or paramilitaries, who have the characteristics of state actors either

by affiliation to them or by the ability to carry out a policy through their control of territory, people or both (Robertson, 1999: 358).

War crimes, “in particular when committed as part of a plan or policy or as part of a large-scale commission of such crimes,” are detailed in article 8. They are divided in categories relating to their commission in internal or international armed conflicts, although with considerable overlap. For example, attacks on UN peacekeepers is within the jurisdiction of the court, and it is the main reason why the Prosecutor may request arrest warrants against Sudanese rebel leaders responsible for such attacks against UNAMID forces. Some of the crimes listed were not incorporated in the Geneva Conventions, such as conscripting children under the age of fifteen, but were included in the Statute to address the issue of child soldiers in rebel groups and regular armies, such as in Liberia, Sierra Leone, the Congo, and Uganda. In fact, the first individual taken to The Hague for trial, Thomas Lubanga, was only charged with that count.

There are several ways by which the court can be triggered into taking action. The most direct mechanism is provided under article 13 (b), whereby a situation is referred to the Prosecutor by the United Nations Security Council as part of a Chapter VII resolution. Through this article, the jurisdiction of the ICC potentially covers the territory of every state in the world, whether or not party to the statute. That is how Sudan, which signed the treaty but did not ratify it, is now under ICC investigation. If the matter or situation is referred by a state party or initiated *proprio motu* –on his or her own initiative- by the Prosecutor, the Court’s jurisdiction is much more restricted. It cannot acquire jurisdiction unless the conduct in question occurred on the territory of a state-party, or was allegedly committed by a national of a state-party. According to article 15,

the initiation of an investigation *proprio motu* by the Prosecutor is subject to approval by a Pre-Trial Chamber of judges, so as to avoid baseless and politically motivated prosecutions.

Crucially for this study, article 16 states that “no investigation or prosecution may be commenced or proceeded with under this Statute for a period of 12 months after the Security Council, in a resolution adopted under Chapter VII of the Charter of the United Nations, has requested the Court to that effect; that request may be renewed by the Council under the same conditions.” Thus, the Security Council retains the power to defer a prosecution, presumably to constrain the court’s activities when they interfere with peace and security. This article is often central to the peace versus justice dilemma, as some are tempted to view the Security Council as the necessary brake on the Court’s potential prosecutorial zealotry or overreach. Because a Security Council resolution requires the affirmative vote or at least the abstention of all five permanent members, it was initially deemed improbable that it would ever be used. And yet, at least three veto-holding countries have publicly expressed their willingness to use article 16 to defer the indictment of the President of Sudan (Ciampi, 2008). And, to the dismay of the court’s supporters, article 16 has already been used by the Security Council. In 2002, Resolution 1422 gave immunity for one year to peacekeepers from non-ICC countries, patently and unashamedly to appease the United States.¹¹²

The Prosecutor might also suspend an investigation “in the interests of justice.” Article 53, section 1(c), states that “in deciding whether to initiate an investigation, the Prosecutor shall consider whether (...) taking into account the gravity of the crime and the interest of victims, there are nonetheless substantial reasons to believe that an

¹¹² See S/RES/1422 (2002).

investigation would not serve the interests of justice.” An article 53 suspension is also subject to approval by a three-judge panel in the Pre-Trial Division. There is a vibrant debate over what ‘interests of justice’ mean, as some interpret it, rather, as ‘interests of peace’ –given that interests of justice is redundant with the general purpose of the Statute- and others view it more narrowly as referring to the protection of victims or potential victims, who may be too traumatized to give evidence or testify, or be susceptible to retaliation (Robinson, 2003; Arsanjani and Reisman, 2005; Majzub, 2002; Goldstone and Fritz, 2000; Gropengießer and Meißner, 2005).¹¹³ In my conversations with ICC personnel, it was always the second view that seemed to prevail. Nonetheless, even this narrower reading of the provision is problematic as well. By admitting so openly that he will not prosecute if it endangers the victims, Moreno Ocampo is subjecting the Court to potential blackmail by suspects with the capacity to inflict immediate harm on civilian populations.

At least in the case of Uganda, it appears as if Moreno Ocampo did deliberately delay his office’s investigation to give Betty Bigombe’s peace negotiations a chance. Thus, he would be adopting the peace-first-justice-later mantra that many prefer. Non-governmental organizations and even member-states expressed their exasperation at the continued delays in the investigation in the Congo. In confidential interviews, ICC officials assured me that decisions involving the timing or sequencing of the court’s activities did not have to do with political considerations, or with the peace versus justice dilemma, but depended on the creation of an environment where justice could be pursued

¹¹³ This concept of interests of justice is similar to considerations of public interest in domestic jurisdictions of the common law tradition. Besides considerations of gravity of the crime and circumstances of the victim and the accused, questions about the impact of the proceedings on stability and the public interest may determine the decision to proceed, as well as whether there are appropriate alternatives to prosecution.

safely –for the communities involved as well as for the ICC investigators themselves. In this light, the arrest warrants against the leaders of the Lord’s Resistance Army would have been under seal strictly for security reasons, and not for political expectations regarding the possible success of ongoing peace negotiations.

Although the word ‘complementarity’ is never used in the Statute, this principle is one of the most important features of the treaty, as it positions the ICC as a court of last resort whose jurisdiction can be activated only when national judiciaries are unwilling or unable to do so.¹¹⁴ This could be interpreted as a back-door entry for the possibility of amnesties: a state may carry out an investigation, with no intention of prosecuting, by simply seeking to ascertain the facts and then grant an amnesty or pardon (Maogoto, 2004: 210). However, the ICC abrogates to itself the right to decide whether such national proceedings are genuine or mere trickery. In the case of Sudan, the government has attempted to step out of the reach of the court by establishing a Darfur Special Court, but this move has been generally dismissed by most observers as a sham. The inclusion of the complementarity principle was intended to provide a plausible compromise between national sovereignty and global justice, for it was understood that most states would not agree to sign on to the Rome Statute unless they were assured that the court would not have primacy over national courts. Thus, states retain the right to investigate and prosecute any violation of the core crimes of the ICC Statute committed within their territorial borders, but the ICC can trump their sovereignty by determining that the state has shown its unwillingness or inability to prosecute in a timely manner. Specifically, article 17(2) stipulates that the ICC can intervene when national courts shield the

¹¹⁴ The Preamble does describe the court as “a complement” to existing national courts and processes. Interestingly, the ICTR and ICTY do have priority vis-à-vis national courts, which makes the ICC experiment seem cautious and prudent in comparison.

defendant from investigation and prosecution, when there is an undue delay in initiating an investigation and prosecution, and where there exists a clear bias in favor of or against the defendant (Roach, 2006: 42).

Any optimistic analysis of the possibilities of the ICC, particularly in comparison with its predecessors, must focus on two aspects of the tribunal: its permanence and the principle of complementarity. The ICC has a significant potential to remedy the limitations of *ad hoc* and temporary courts. First, any possible deterrent effects are enhanced if the tribunal is permanent. Second, the rule of law precludes selective justice and the permanent character of the ICC enhances the legitimacy of any prosecution. It alleviates the criticisms of partiality or prejudice that arise with arbitrary decisions, and all the suspicions and accusations of political bias around why an *ad hoc* tribunal was set up in one situation and not in another. The ICC, established by a treaty instead of by a Security Council resolution, may not be so exposed to criticism of “victor’s justice” levied by those who see the Western-dominated Security Council as a NATO tool. Third, it can be a solution to the syndrome dubbed as “tribunal fatigue.” The process of setting an international *ad hoc* tribunal –electing judges, selecting a prosecutor, hiring staff, negotiating headquarters agreements and judicial assistance pacts, erecting courtrooms, offices and prisons, and appropriating funds- turns out to be too time consuming and exhausting for the members of the Security Council to undertake on a repeated basis. Some of the permanent members of the Security Council have even said that Rwanda would be the last of Security Council-established *ad hoc* tribunals. And last, but not least, the permanence of the court can enhance its authority, providing it with the possibility of

building respected precedents over time, and serving as a model of justice that can influence the behavior of member States.

All of these articles and provisions should be read in light of the general mission of the court, as explained in the Preamble of the Rome Statute, which declares it a moral imperative that “the most serious crimes of concern to the international community as a whole must not go unpunished,” and expresses its determination “to put an end to impunity.” Letting amnesties and political considerations get in the way of justice, or abusively and selectively resorting to the mechanisms contemplated in article 16 and article 53, would go directly against the purpose of the Court, the sentiment of the movement that founded it, and both the letter and spirit of its Preamble. It would deprive the ICC of its greatest advantages, derived from its permanence and its independence. It would cloud its legitimacy by bringing back the question that dogged the *ad hoc* courts established by the United Nations in the 1990s: why a court for Yugoslavia or Rwanda, and not for Haiti or Somalia? A court that would be too responsive to the shifting political winds and the political interests of the great powers would be suspect.

And yet, it is impossible to deny that that political reality affects the distribution of judicial fairness. The court may inconvenience the foreign policy goals of great powers by pushing forward with indictments when diplomats prefer negotiations, but it is unlikely –though not impossible– that the court will target the great powers themselves. Critics can rightfully point out that, at least so far, it appears destined to go after rebels and tyrants in developing countries, even though the United States, Israel, or Russia, may commit war crimes in comparable scale, while their leaders and generals are never called to the dock of international courts. In international politics, as well as in domestic affairs,

the law needs political power backing it up in order to be enforced. Although rules and regulations have some value and functionality independent of enforcement, it is the power to arrest and detain that gives it its full effectiveness. If it is difficult to imagine the member-states committing troops to an invasion of Sudan so as to capture President Bashir and fulfill the Court's wishes, it is doubly improbable that George Bush or Vladimir Putin could someday find themselves in The Hague. This may not be a matter of ideology, but a matter of pragmatism. As the court is unlikely to be able to handle more than a handful of cases at the same time, it will naturally assign priorities to prospective cases, and focus on those situations where the court's involvement can yield tangible and feasible results.

3. Amnesty in the age of accountability:

Amnesty –from the Greek *amnestia*, or oblivion- can be a confusing concept. Amnesty for political prisoners is what my parents demanded almost four decades ago, amidst a sea of raised fists, during the waning days of General Franco's dictatorship in Spain. A similar sentiment inspired the foundation of Amnesty International in the early 60s, and yet this organization is now one of the most outspoken voices *against* amnesty and impunity. Amnesty is also a hotly contested concept in the United States, as it has been somewhat improperly associated lately with the debate over comprehensive immigration reform and how to deal with illegal immigrants.

More than two centuries ago, Alexander Hamilton wrote one of his famous Federalist essays to defend a presidential prerogative to pardon, arguing that otherwise

“justice would wear a countenance too sanguinary and cruel” and that “in seasons of insurrection or rebellion there are often critical moments when a well-timed offer of pardon to the insurgents or rebels may restore the tranquility of the commonwealth.” Hamilton’s opinion has always had proponents through history. In earlier times, post-war amnesties were taken for granted, which formed the basis of the maxim *in amnestia consistit substantia pacis* –in forgiving, lies the substance of peace. At the end of the Peloponnesian War, for example, Isocrates’s advice to the Athenians was “let us govern collectively as though nothing bad had taken place.” Others, who prefer the application of justice regardless of consequences, quote the Latin phrase *fiat justitia ruat caelum* –let justice be done, though heavens fall.¹¹⁵ Robert Jackson, chief prosecutor at Nuremberg, famously said that letting major war criminals live undisturbed to write their memoirs in peace “would mock the dead and make cynics of the living.” (Quoted in Du Plessis, 2008: 3). Currently, some Americans stress the need to assert the primacy of the rule of law, and thus favor investigating the participation of high-ranking members of the exiting administration in torture, illegal detention, illegal surveillance, and other forms of wrongdoing.¹¹⁶ Others prefer to let bygones be bygones and address present and future concerns rather than deal with past grievances.

A similar dilemma pervades the world of transitional justice and conflict resolution. Even though the last two decades witnessed the proliferation of war crimes’

¹¹⁵ The phrase *Fiat Justitia* appears as the motto of many judicial institutions, including the Supreme Court of Georgia and Tennessee, as well as engraved under Chief Justice John Marshall's portrait in the Supreme Court of the United States. The motto *Fiat Iustitia et Pereat Mundus* dates from the 16th century and is attributed to Emperor Ferdinand I. It translates as “let there be justice, though the world would perish.”

¹¹⁶ The demand for investigations, indictments, and even convictions, has risen not only from leftist circles. Recently, conservative jurist Bruce Fein argued in favor of prosecuting Bush, Cheney, Rumsfeld, Rice, Ashcroft, Gonzales, Rove, and others (Fein, Bruce, “The Rule of Law” in *The Washington Times*, January 20, 2009).

courts and cemented the notion that sweeping amnesties were no longer a viable tool to end violence, the application of post-hoc justice has been erratic and various forms of amnesties are still being offered. The 20th century was not only the century of Nuremberg, Eichmann, and the International Criminal Tribunal for Former Yugoslavia. It was also the century of Latin American amnesty laws, the obscenely comfortable exiles of Idi Amin, Hissène Habré, Ferdinand Marcos, Baby Doc Duvalier, Mengistu Haile Meriam, and other Cold War tyrants, and the offers of immunity for Slobodan Milošević to facilitate the Dayton Accords. Despite drafting and signing more than one hundred international treaties and conventions, most war crimes went unpunished. Millions of gallons of Agent Orange and napalm were poured on the forests, rice fields, and people of Indochina, Russian and Chinese tanks rolled down Budapest, Prague, and Tiananmen Square, and the Khmer Rouge slashed Cambodia's population by one fifth, among many other examples.

The 21st century was supposed to be different. The proliferation of international courts over the last decade, the mainstreaming of the human rights movement, and the end of the Cold War seemed to herald a new era of accountability. However, the initial enthusiasm has been curbed, and amnesties are still routinely offered in the menu of options of peace negotiations. For the purposes of this investigation, it is appropriate to survey what role, if any, does amnesty have in the 21st century and how can it shape the task of the worlds' first permanent, independent, war crimes tribunal.

In transitioning societies and in the wake of conflict and upheaval, there have always been those that prefer to look forward and avoid opening old wounds, rocking the boat, and stirring trouble. Today, these voices come from Desmond Tutu and Nelson

Mandela, based on the experience of post-apartheid South Africa; from churches in northern Uganda worried that the ICC indictments will threaten the fragile peace negotiations between the government and the LRA; from European diplomats ready to cooperate with the Sudanese government if it changes its ways; from human rights activists horrified that the involvement of international courts and the presence of peacekeepers have only brought violent reprisals against women and children in IDP camps; from hardened negotiators that have always considered amnesties an indispensable component of their toolkit; and from scholars that understand that, in a post-Cold War world of failed states and porous borders, solidifying state authority and institutions of governance first and foremost is more crucial to peace and stability than overzealous international prosecutors that let law get in the way of politics (Leebaw, 2008; Osiel, 2000). Donald Rumsfeld was sufficiently worried about what he dismissively called ‘lawfare’ –the use of law to achieve operational objectives- that he instructed the Pentagon’s chief lawyer, Jim Haynes, to address the problems posed by the judicialization of international politics and what that meant for the United States’ strategic goals.

The arguments in favor of amnesty in transitional states usually contend that peace could never be achieved without some form of forgiveness. Rebels would be unlikely to come out of the bush and surrender their weapons and dictators would cling to power for as long a possible. In recent years, academics like Leslie Vinjamuri, Louise Mallinder, Andrew Reiter, Tricia Olsen, and Leigh Payne, have demonstrated empirically that, despite the ubiquity of war crimes courts and our no-peace-without-justice pledges, amnesties have grown exponentially over the last decades, and the creation of the ad hoc

tribunals and the ICC has not slowed this trend down. Despite increased pressure from activists in favor of criminal accountability, more than two-thirds of wars since 1989 had formal amnesties, whereas only one-sixth had formal amnesties during the Cold War. A survey of 200 constitutional reforms since 1975 by Princeton professor Jennifer Widner found that amnesty was strongly associated with the durability of civil peace (Snyder and Vinjamuri, 2006).

Accountability may be on the rise, but so is amnesty and impunity. This theme was explored at the International Studies Association's 2008 Convention in San Francisco. Reiter, Olsen and Payne argued that accountability in the last three decades has normally taken place in the form of delayed justice, many years after the end of a war or a regime change. For them, the peace versus justice dilemma is a question of sequencing: peace first, justice later. Leslie Vinjamuri contended that, contrary to common beliefs, amnesties continue to be pursued in conflicts where belligerents have been unable to achieve a military victory, most especially in internal wars with limited involvement of external actors. Louise Mallinder has built a database of amnesty laws, containing information on hundreds of amnesty processes in more than half of the countries of the world since the end of the Second World War. According to her research, 66 amnesties were introduced since January 2001 to December 2005. She concludes that, although few discernible legal trends relating to amnesty are emerging, it appears that they have increased in popularity since the 1990s, but blanket, unconditional amnesties for state agents are less frequent. Most amnesties seem to be *de facto*, rather than formalized, and they seem to benefit mostly the supposed enemies of the state, rather than state agents (Mallinder, 2007).

Mallinder would prefer that the international community accept their necessary existence, but worked to limit its most negative forms and complemented them with reparations for the affected communities.¹¹⁷ Other commentators –including Jack Goldsmith and Stephen Krasner (2003), Helena Cobban (2007), Samuel Huntington (1991), and Snyder and Vinjamuri (2003)- point out that the consolidation of peace in many new democracies owes much to the use of unconditional, blanket amnesties. In Argentina, as well as several other Latin American countries, amnesty laws may have led to the de-politicization of the armed forces and democratic consolidation (Zalaquett, 1993). In Uruguay, the amnesty law was upheld by a comfortable margin in a popular referendum in 1989. The use of amnesty in Namibia, South Africa, or Mozambique is seen by most of these authors as an unqualified success.¹¹⁸ In the 21st century, amnesties, whether *de jure* or *de facto*, have continued to take place in many African countries, including Angola, Kenya, Lesotho, Senegal, Algeria, Ivory Coast, Uganda, Sudan, Mali, and Sierra Leone. In Nigeria, Olusegun Obasanjo preferred to simply ignore the 2002 report drafted by a truth commission set up by himself three years earlier, and that recommended the investigation and possible prosecution of 150 individuals for atrocities committed in the last four decades. Ghana's truth commission, established in 2000, had a similar mandate, but it recommended reparations and not prosecutions, for the sake of Ghana's long-term stability. The 1992 Constitution absolved all military personnel from judicial scrutiny, and thus, unlike the South African TRC, Ghana's National

¹¹⁷ According to her criteria, an amnesty should have democratic legitimacy; should represent a genuine desire to promote peace and reconciliation; should be limited in scope; should be conditional; and must be accompanied by reparations.

¹¹⁸ For a discussion of the truth for amnesty exchange, see Kader (2000) and Boraine (2000).

Reconciliation Commission did not have the power to grant amnesty.¹¹⁹ In Colombia, a new *Ley de Paz y Justicia* (Peace and Justice Law) provides for amnesty for the paramilitaries in exchange for laying down arms. In Afghanistan, the United Nations administrator Lakhdar Brahimi, resisted calls from outgoing Human Rights Commissioner Mary Robinson to investigate war crimes by key figures in Hamid Karzai's government on the grounds that such investigations would undercut progress toward peace and stability (Snyder and Vinjamuri, 2003: 8). In Iraq, few will remember favorably the trial and execution of Saddam Hussein. Instead, the main breakthrough of the United States' armed forces came from paying and arming the former Sunni insurgents in Al Anbar province and Baghdad. The South African model has influenced many other countries with truth commissions, such as Indonesia, Timor Leste, and Liberia, to grant amnesty as a result of participating.

Snyder and Vinjamuri (2007) make a strong case for their claim that over-reliance on war crimes courts and accountability pays insufficient attention to political realities. In their view, preventing atrocities will frequently depend on striking politically expedient bargains that create effective political coalitions to contain the power of potential perpetrators of abuses and spoilers. They assert that "law is too important a business to be left to lawyers, and amnesty is too vital an instrument to be banished from the toolkit of peacemakers." More recently, they have spoken against the ICC involvement in northern Uganda. Many blamed the Court for the protracted resistance of the government of Sudan to the presence of UN peacekeepers in Darfur, as well as the prolongation of hostilities in the Kivus, in eastern Congo. There was even some early evidence that fighters in Liberia

¹¹⁹ See "Peace Versus Justice? Truth and Reconciliation Commissions and War Crimes Tribunals in Africa," a report of the Centre for Conflict Resolution. Cape Town, South Africa (May 2007).

were afraid to demobilize due to rumors that their ID benefits cards would be used to allow the SCSL to reach them (Sriram, 2007).

Proponents of amnesties also try to support their case with references to international law and its compatibility with amnesties. Courts in South Africa, Chile, and El Salvador pointed to Article 6, paragraph 5 of Protocol II of the Geneva Conventions to support their affirmations of amnesty laws. This paragraph states that “at the end of the hostilities, the authorities in power shall endeavor to grant the broadest possible amnesty to persons who have participated in the armed conflict, or those deprived of their liberty for reasons relating to the armed conflict, whether they are interned or detained.” (Roht-Arriaza and Gibson, 1998). Similarly, the definition of genocide in the 1948 Genocide Convention excludes the 'extermination of a group on political grounds,' i.e. situations such as the South America 'dirty wars' where large numbers of people were killed for their alleged political beliefs.

Even the former President of the ICC, Philippe Kirsch, has admitted that some amnesties may be compatible with the mandate of the court and the responsibilities of state parties. Amnesties for lower-level perpetrators do not affect the jurisdiction of the court, which targets higher levels of responsibility. Furthermore, article 16 of the Rome Statute allows for the Security Council to defer the court’s activities for the sake of peace, and article 53 avows similar considerations to the prosecutor, which may suspend an investigation “in the interests of justice.” Although there is disagreement over whether ‘justice’ here means ‘peace,’ the Chief Prosecutor himself, Luis Moreno Ocampo, clarified this matter in one of his addresses to the United Nations: “I am required by the Rome Statute to consider whether a prosecution is not in the interests of justice. In

considering this factor I will follow the various national and international efforts to achieve peace and security, as well as the views of witnesses and victims of crimes.” On other occasions, Moreno Ocampo has cited the principle of complementarity and stated that “amnesties are an example of local justice.”

The Statute is silent on the subject of amnesties, and it does not impose upon its member-states any obligation to prosecute –outside of the Preamble, with some vagueness-from which to infer the unlawfulness of amnesties, as it is done, for example, in the Convention Against Torture. Article 17 of the Rome Statute, which deals with admissibility of cases, suggests that cases could be admissible before the ICC even when an amnesty bars prosecution at the national level. Amnesty is not one of the listed situations that cause the inadmissibility of a case. However, it is not out of the realm of possibilities that an individualized amnesty linked to a truth commission process could be considered a *bona fide* decision not to proceed following an investigation, as contemplated by article 17(1)(b): “the Court shall determine that a case is inadmissible where (...) the case has been investigated by a State which has jurisdiction over it and the State has decided not to prosecute the person concerned, unless the decision resulted from the unwillingness or inability of the State genuinely to prosecute.” Furthermore, if a majority of member-states in the Assembly had been persuaded that amnesties could, in exceptional circumstance, constitute a valid option, it could decide to take no disciplinary action with regards to the non-cooperation of a State party (Broomhall, 2003: 100-101).

4. The pitfalls of amnesties:

In “Measure for Measure,” Shakespeare doubts the pacifying effect of clemency. A member of the German Reichstag in the 1920s described amnesties as “tombstones in the graveyard of justice.” (Gropengießer and Meißner, 2005: 270). This investigation shares a similar skepticism, especially given that international criminal justice targets only those most responsible for the commission of atrocities, and functionally coexists with the availability of amnesties for an overwhelming majority of perpetrators at the lower levels. I am not persuaded that amnesties are making a comeback, as it has been suggested. After conflicts and during transitions, amnesties have always been the rule, rather than the exception. However, what we have seen over the last few years, to be precise, is the proliferation of amnesties that exclude those most responsible for the worst crimes, and this development is not at all incompatible with war crimes courts.

There are many more amnesties, but there is also a true, empirically demonstrable, ‘justice cascade.’¹²⁰ As a matter of fact, the proliferation of amnesties has more to do with conflict resolution than with transitional justice preferences. Over the last two decades, more civil wars ended in peace agreements than in the previous two centuries combined. The end of the Cold War saw an increase in both intrastate violent conflict, and in the international attention devoted to such conflict. The involvement of external actors, in turn, resulted in a conflict resolution approach that privileged power-sharing agreements, rather than the political or military victory of one side over the other.¹²¹ Besides, the number of states has increased due to decolonization and the breakup of the Soviet Union, Yugoslavia, and other blocs, and many of them have

¹²⁰ Most especially, in Latin America. See Sikkink and Lutz (2001); Sriram (2003); Sikkink and Booth-Walling (2006).

¹²¹ Bell, Christine, “Peace Agreements: Their Nature and Legal Status, in *The American Journal of International Law*, Vol. 100, No. 2 (April 2006), pp. 373-412; Kaufmann, Chaim, “Possible and Impossible Solutions to Ethnic Civil Wars” in *International Security*, Vol. 20, No. 4 (Spring, 1996), pp. 136-175.

become new democracies, which may partly explain why there are many more amnesties *and* many more trials and truth commissions. Approximately 90 new democracies have adopted one or more transitional justice mechanisms since 1970.

Furthermore, the use of amnesties to obtain peace has a more mixed record than its proponents admit. As Leila Sadat correctly puts it, “warlords and political leaders capable of committing human rights atrocities are not deterred by amnesties obtained, but emboldened. The cases of Sierra Leone, the former Yugoslavia, and Haiti suggest that amnesties imposed from above or negotiated at gunpoint do not lead to the establishment of peace –but at best create a temporary lull in the fighting.” (Sadat, 2005). In Haiti, where in the early nineties and despite many General Assembly resolutions calling for justice and prosecutions, international mediators ended up drafting the amnesty provisions themselves, the situation only deteriorated into generalized chaos and violence. According to Kenneth Roth, executive director of Human Rights Watch, the lack of justice has been a dominant cause of violence in Haiti: “Frustrated by their inability to bring persecutors before a court of law, many Haitians took matters into their own hands.” (Leebaw, 2008).

Even in South Africa, the truth for amnesty model has been intensely criticized. The victims got virtually nothing in terms of reparations. In a recent survey, most white South Africans still believe that apartheid was a good idea, but badly administered. The failure of former President Pieter W. Botha and many former cabinet ministers and military officials to appear before the TRC was disappointing, as was the acquittal of the Minister of Defense Magnus Malan and his generals. Botha in particular remains arrogant, non-contrite, and undisturbed (Rakate, 2001). Of the more than seven thousand

amnesty applications received, 849 were granted and almost 5400 were rejected, and most of those applying for amnesty were relatively low-level perpetrators, as opposed to high government officials.

Most 21st century amnesties affect lower-level perpetrators, and are limited and conditional. The policy of targeted prosecutions at the international level for those who are “most responsible” can complement national amnesties, as it assumes that the low-level offenders will be dealt with at the national level through either prosecutions or an amnesty in conjunction with other mechanisms to hold individuals responsible without prosecuting them, such as lustration or truth commissions. In Colombia, for example, the Peace and Justice Law was revised, after some challenges to its constitutionality, to exclude the leaders of the paramilitary, and some of them are undergoing trials. Latin America in particular has experienced a dramatic shift from amnesties and impunity to trials and accountability in only a few years. El Salvador, Guatemala, Honduras, Nicaragua, and Peru all passed between five or seven amnesty laws each, and yet they have not prevented the current wave of prosecutions. Article 29 of the Venezuelan Constitution of 1999 even contains an express ban on amnesties for crimes against humanity, serious violations of human rights, and war crimes. Article 23 of the Ecuadorian Constitution of 1998 prohibits amnesties for a catalogue of the most serious offenses, including genocide.

When amnesties are used the trend “has been from broader to more tailored, from sweeping to qualified, from laws with no references to international law to those which explicitly try to stay within its strictures” (Roht Arriaza and Gibson, 1998: 884). The increasing judicialization of world politics is not just a passing fad brought about by the

entrepreneurial spirit and stubborn persistence of the human rights ‘industry.’ Rather, it reflects a much broader movement towards courts and the rule of law across nations, regions, and areas of governance, including trade, environmental protection, and intellectual property (Sikkink and Booth-Walling, 2006).

International law contains regulations which expressly prohibit the granting of amnesties in some cases, as in article 18 of the Declaration on the Protection of all Persons from Enforced Disappearance, for example. An international obligation to prosecute can be justified, in whole or in part, on the basis of special international conventions, general human rights covenants, general principles of law, and customary international law. Authoritative interpretations of the International Covenant on Civil and Political Rights; the European Convention for the Protection of Human Rights and Fundamental Freedoms; and the American Convention on Human Rights make clear that these treaties require state parties to “investigate serious violations of physical integrity - in particular, torture, extra-legal executions, and forced disappearances- and to bring to justice those who are responsible.” Although there is no standard for an obligation to prosecute in the Second Additional Protocol relevant to non-international armed conflict, customary international law is blurring this distinction through jurisprudence from international courts. In *Prosecutor v. Furundizja*, the ICTY held that not only was the prohibition on torture *jus cogens*, but that any amnesty would therefore be inconsistent with international law. The Inter-American Commission has held that amnesty laws in Argentina, El Salvador, Peru and Uruguay were incompatible with the American Convention on Human Rights (Gropengießer and Meißner, 2005: 275-8). In interpreting the European Convention, the European Court of Human Rights found in *X and Y v.*

Netherlands that “only the criminal law is an adequate means of protecting the crucial values at stake in this case...” (Roht-Arriaza and Gibson, 1998; Orentlicher, 1991). Not one jurisdiction has, to date, accepted the juridical validity of a foreign amnesty decree for the commission of human rights atrocities.

To sum up, the Rome Statute of the International Criminal Court does not explicitly mention amnesties, although South Africa tried unsuccessfully to introduce at Rome a provision that did. No agreement on this question could be achieved at the Rome Conference. It was suggested in the Preparatory Committee to include in Article 17 as grounds for inadmissibility crimes that were covered under the jurisdiction of an amnesty law of a responsibly acting democratic State, but such provision was discarded (Roht-Arriaza and Gibson, 1998). Article 16 of the Rome Statute allows the Security Council, at least for a limited period of time, to lend international validity to a national amnesty, or to prevent prosecution by the Court even without an amnesty having been granted at the national level. Initially, this provision had not been expected to have great practical impact, as it requires nine affirmative votes, including the five permanent members, but several UN Resolutions -1422 (2002) and 1487 (2003), and 1497 (2003)- have made clear that the Security Council can be used to try to limit the Court's range of action (Gropen 2005: 288-289; Angemaier, 2004). Nonetheless, the Rome Statute’s preamble suggests that deferring a prosecution because of the existence of a national amnesty would be incompatible with the purpose of the court.

In fact, human rights organizations could legitimately argue the opposite case: that the main goal of the court is precisely to achieve justice, not to speculate over whether its actions boost or undermine peace and stability. And while diplomats and

scholars focus on international security, and obsess over the effect that the ICC may or may not have on peace, the real problem is that the ICC is currently failing at obtaining justice. One could validly claim that the indictments are too few, the pressure on member-states to deliver arrests too tenuous, and the actual day-to-day operations of the court too slow. After all, one rarely entertains such pragmatic bargains and calculations when trying to arrest or kill drug lords in Colombia or Ecuador, members of the mafia in Sicily, or international terrorists anywhere. And yet, their operations are not all-too different from the predatory gangs and small bands that kill, rape, loot and pillage the civilians trapped in warzones.

With its creation in Rome and quick ratification process, the ICC defied all expectations. After a few years of existence, a certain sense of disenchantment and disappointment seems to have settled among its erstwhile supporters. Twelve years after the Rome Conference, it is no longer acceptable to excuse the court's low level of activity behind the relative infancy of the institution. Thus, I now turn my attention to the court's first cases in Central and Eastern Africa.

CHAPTER FOUR

THE INTERNATIONAL CRIMINAL COURT IN NORTHERN UGANDA:

PEACE FIRST, JUSTICE LATER?¹²²

1. Introduction:

In December 2003, Uganda became the first state to refer a situation to the ICC. President Yoweri Museveni's referral was made public one month later, and the first arrest warrants were unsealed in October 2005. The five highest-ranking members of the Lord's Resistance Army, a rebel movement that has been waging a two-decade-long war against the central government, became the first individuals explicitly targeted by the ICC.¹²³ The LRA is considered responsible for unspeakable atrocities in northern Uganda, has virtually no social or political support, and its leader, Joseph Kony, is universally despised. Northern Uganda is also the site of one of the world's worst humanitarian crises, and one of the most neglected by the world community until recently. Thus, it may come as a surprise that the involvement of the ICC has drawn so

¹²² During research for this chapter, the author interviewed Betty Bigombe, who has led peace negotiations with the LRA several times, Winnie Byanyima, a former associate of Museveni, now working at UNDP, and Jack Snyder, an international security scholar who had written in favor of amnesties for the LRA leaders. In Kampala and Gulu, I interviewed several individuals associated with the peace talks, including members of parliament and local councilors, some of which had attended the Juba peace talks in Southern Sudan or had traveled to Garamba National Park to meet the LRA. These included Karima Lanyero, Santa Oketta, Norbert Mao, Betty Aol Ocan, Beatrice Ladaga, Rose Othieno, Margaret Akullo Elem and Jebbeh Forster. ICC staffers interviewed asked to remain anonymous.

¹²³ The arrest warrants were issued against Joseph Kony, Vincent Otti, Okot Odhiambo, Dominic Ongwen, and Raska Lukwiya. Dominic Ongwen was killed by the UPDF on 30th September 2005, days before the warrant against him was unsealed (*The New Vision*, October 6th 2005). Vincent Otti was reportedly killed by Kony in November of 2007, and Odhiambo was rumored to have defected and in hiding.

much criticism from different quarters, from international security experts and scholars to civil society, local politicians and religious leaders, diplomats, media, and many LRA victims themselves. The peace versus justice dilemma sits at the center of this debate.

The arrest warrants coexisted with a series of peace negotiations that provided a glimmer of hope to northern Ugandans. For many, it was the first time that an end to the conflict was within reach, and it was feared that the threat of the ICC removed any incentives to lay down arms. The warrants were also seen as incompatible with a standing offer of amnesty in exchange for disarmament and reintegration, and as a foreign imposition that subverts the local preference for restorative justice articulated through traditional rituals of reconciliation and forgiveness. Many northern Ugandans support justice and accountability only *after* peace has been achieved. In this view, peace and justice may be compatible goals, but only if they are implemented in the right sequence: peace first, justice later. Some criticize the timing of the arrest warrants, issued in the midst of negotiations with the LRA. Others acknowledge that the arrest warrants have had a positive effect on the peace process –drawing the rebels to the most promising round of negotiations to date instead of pushing them back to the bush-, but would like them to be considered a bargaining chip to be traded in exchange for a final resolution to the conflict. This option would mean dropping the arrest warrants, or having the United Nations Security Council use article 16 of the Rome Statute to suspend the investigation and facilitate the extradition of Kony and his commanders to a country that is not party to the ICC.

In order to analyze the impact of the ICC on the prospects for peace in northern Uganda, I set out to answer several questions. First, have the security conditions in

northern Uganda worsened after the involvement of the ICC? If so, can the exacerbation of the conflict be attributed in any way to the indictments? Secondly, have these indictments made it impossible for new rounds of peace negotiations to take place? If peace talks have taken place but failed, can the collapse of the negotiations be mainly associated with the ICC? The answer to these questions supports this dissertation's central argument that the pursuit of justice through *ex ante* war crimes courts does not hurt the simultaneous pursuit of peace. The conflict in northern Uganda went through one of its worst peaks of violence from 1998 to 2004, *before* the Court became involved. In recent years, the LRA has not launched any attacks in Uganda –though they have continued to terrorize civilians in the Central African Republic, southern Sudan, and eastern Congo. Northern Ugandans have left the IDP camps and returned to their villages, and life is slowly improving. Furthermore, quickly after the Prosecutor unsealed the arrest warrants against the LRA, Joseph Kony's deputy, Vincent Otti, announced the LRA's willingness to negotiate with the government, and the Juba peace talks took place in several stages from 2006 to 2008. The ICC was a thorny issue from the beginning, but the negotiations collapsed due to many other irreconcilable differences, as well as general lack of trust among the parties. In fact, the delegations of the LRA and the government signed an agreement on justice and accountability that did not contemplate amnesties for the LRA leadership. Although the international community spent upwards of ten million dollars financing the peace talks, it is entirely possible that neither Museveni nor Kony genuinely wanted peace in the first place. For President Museveni, the Juba peace talks were a convenient sideshow to appease domestic and external audiences. For the LRA, the dialogue allowed for some breathing room to reassemble and rebuild lost strength.

2. The origins of the Lord's Resistance Army:

Much of Uganda's violence and turbulence since independence can be understood in the context of the 'north-south divide syndrome.' Under British rule, Uganda was composed of a number of monarchical entities brought together –despite sharp differences in ethnicities, languages, and even stages of development- by an ill-designed and arbitrary drawing of the borders.¹²⁴ This diversity was used by the colonizing power to divide and rule, giving preferential treatment to the kingdom of Buganda in the south and neglecting the northern regions. While people from the south held civil service positions, the Acholi people from the north were recruited into the armed forces. In many ways, the fighting between the LRA and the government germinates from this conflict between the less developed, Luo-speaking Acholi in the north, and the Bantu-speaking Baganda in the south (Mutibwa, 1992).

People from northern Uganda, including the infamously murderous Idi Amin and Milton Obote, had ruled the country during the two decades leading up to the beginning of Museveni's presidency in 1986. The rebellions that have sprung up in the north and west are typically seen as an attempt to regain that lost power.¹²⁵ Museveni's National Resistance Movement has had to deal with at least twenty of these insurgencies, many of them formed from the remnants of the defeated army of Tito Okello.¹²⁶ Although Uganda

¹²⁴ The Sudan-Uganda border was drawn in a way that divided closely related populations. For an illustration, see Allen, 2006: 26-27: "Some Acholi groups were in fact deliberately included in Sudan because the British officer from the Sudan administration who helped demarcate the line thought their chiefs were quite 'progressive' and he wanted to have some in his territory, whereas the Ugandan official just wanted to go on leave, so he did not care one way or the other."

¹²⁵ In the case of Amin, however, much of his support came from southerners, and most of his victims were Acholi from northern Uganda.

¹²⁶ Okello's Ugandan National Liberation Army (UNLA) fled to the north in 1985, roundly defeated by Museveni's National Resistance Army (NRA). In retaliation for large massacres of civilians in the Luwero

under Museveni has seen a relatively higher degree of stability and economic growth, sour relations with neighboring Rwanda, DRC, and Sudan, a neglected and impoverished north, and the resilience of the rebel groups, continue to threaten the country's precarious stability.¹²⁷

The Lord's Resistance Army is the most brutal and best known of these rebel forces operating in northern and western Uganda.¹²⁸ Led by Joseph Kony, its twenty-year-old campaign of murder and abductions has outlasted all expectations, and has for long kept the Acholi population internally displaced, economically strangled, deprived of freedom of movement, and in a state of fear. Kony, a former altar boy and a relative of the leader of the Holy Social Movement, Alice Lakwena, claimed to have spiritual powers and founded the Lord's Salvation Army in 1987 (Prunier, 2004: 366). The name of Kony's military force changed to United Salvation Christian Army and, finally, Lord's Resistance Army in 1994. Initially equipped and armed by the UPDA and later by Khartoum, the LRA soon lost social support in the north as it began targeting Acholi villages to abduct civilians –mostly children-, control the population through indiscriminate terror, and loot their possessions.¹²⁹ Kony moved his base across the

triangle, the 35th Battalion of the army behaved brutally when they reached the district of Gulu, destroying the livestock of Acholi civilians and leaving the north embittered against the new regime. This episode ranks high among the grievances harbored by Ugandans collective memory (Apuuli, 2004: 392-393; Human Rights Watch, 2003: 10).

¹²⁷ A non-exhaustive list of defeated insurgencies would include the Ugandan People's Defense Army (UPDA), the Ugandan People's Army (UPA), the West Nile Bank Front (WBNF), the Allied Democratic Forces (ADF), and the Holy Spirit Movement (HSM). Scholars normally distinguish between HSM I, led by Alice Auma 'Lakwena,' and HSM II, led by her father, Severino Lukoya. Lakwena's HSM, for example, advanced to within 80 kilometers of Kampala before being crushed in 1987 (Apuuli, 2004: 391-392). For detailed background on the HSM, see Behrend (1999). Another conflict, between the government forces and the Karamojong in the northeast, also persists.

¹²⁸ For detailed background on the LRA, see Behrend (1998), Doom and Vlassenroot (1999), Finnstrom (2003).

¹²⁹ This pattern of killing and abducting people from the ethnic group they claim to defend and represent dates back to the early days of the LRA. These acts were sometimes accepted by the Acholi as necessary cleansing of wrongdoers within the community. See Zeidy, 2005: 88.

border to southern Sudan, where the Khartoum government reportedly provided the LRA for years with arms, uniforms, and other supplies in retaliation for Uganda's support of the Sudanese Peoples Liberation Army (SPLA). After the U.S. State Department included the LRA in its list of terrorist organizations in late 2001 and Sudan and Uganda agreed to cooperate, Museveni launched a full-scale military action dubbed 'Operation Iron Fist' against LRA camps in Sudan, but failed to arrest Kony and most of his commanders and followers, and drove them back across the border to northern Uganda, where it spread to previously unaffected areas (Van Acker, 2004: 337-338). From 2002 to 2004, the security situation deteriorated.

For years, the LRA has survived by terrorizing the civilian population of northern Uganda, especially the Acholi, the Langi, and the Teso. According to UNICEF, the LRA has abducted approximately twenty-five thousand children to serve as soldiers, porters, slaves, and 'wives' of commanders. It has been estimated that eighty percent of the LRA's combatants are children.¹³⁰ LRA soldiers are encouraged to murder, rape, and mutilate civilians so as to dissuade northern Ugandans from cooperating with the government. They have been known to force child soldiers to beat up or kill other children and participate in atrocities against their own communities so that they will not be tempted to escape and return (Human Rights Watch, 2003: 3-4; Amnesty International, 1997). Males between the ages of twelve and sixteen are mainly abducted to turn them into combatants, but females are taken as well to be sex slaves and 'wives' for high-ranking officials.

¹³⁰ Currently, estimates on the total number of LRA fighters vary from 500 to 2,000. As late as 2005, figures as high as 5,000 were still reported. The Ugandan army points at this fact as proof that Operation Iron Fist was a military success.

The bizarre characteristics of the LRA make it a misfit among other non-state armed groups. It has been alternatively labeled military insurgency, rebel movement, terrorist organization, and religious cult (Van Acker, 2004:337-338). It is doubtful that its soldiers are motivated by either greed or grievances, because the overwhelming majority of LRA members have been kidnapped and coerced into fighting. Instead of providing political or material incentives, it relies on powerful spiritualism backed up by extreme violence. It is not a liberation or separatist movement because it neither seeks to control territory nor enjoys the support of the local population. It is often used as an example of violent Christian fundamentalism, but Kony's claim that his goal is to create a state ruled by the Ten Commandments has not been restated in a long time. At one point, to ingratiate their Sudanese paymasters, the LRA members adopted Muslim names (Prunier, 2004: 382). In terms of patterns of recruitment and violence, it shares similarities with Mai-Mai groups in the Democratic Republic of Congo, remnants of UNITA in Angola, and Foday Sankoh's RUF, all known for the ghastly nature of their atrocities. Unlike those groups, however, the LRA does not attempt to control resources and engage in large-scale rent extraction. Perhaps closer to banditry, it lives parasitically off the local population, which is subjected to periodical looting and pillaging (Bevan, 2006: 2-5).

Although defections are not infrequent, LRA members fear the consequences of non-complying or escaping, and believe that spirits back up their commanders' authority and guide Kony's decisions. They are trained to walk straight at the enemy and never to take cover, believing that the oil they are anointed with protects them from bullets. At least until 2005, most of them underwent reasonably sophisticated military training in

Sudan. LRA fighters move in very small groups to avoid detection.¹³¹ They do not target fixed government positions, army barracks, or heavily defended IDP camps, but prefer to ambush small patrols to replenish arms and ammunitions, and attack civilians hunting or working on the fields (Bevan, 2006: 11-12).¹³²

Despite three full-scale military operations in 1991, 2002, and 2009, the government has been unable to defeat the LRA militarily. In January of 2009, a joint operation with Southern Sudan and the Democratic Republic of Congo, called Operation Lightning Thunder, led to the worst wave of retaliatory attacks against civilians in Congolese IDP camps. And the United Nations has not been more successful. In February 2006, a number of US-trained Guatemalan peacekeeping troops were killed when they tried to arrest some of the suspects (Apreotesei, 2008: 18). Peace talks have been attempted many times, including in 1994, from 2004 to 2005, and from 2006 to 2008, but have not been fruitful to date. In the last two years, as the LRA has moved to Garamba Park in Congo and the situation in northern Uganda has improved, most villagers have been to return to their homes due to increased security.

3. Political environment in Uganda:

War crimes courts have political consequences and their work is affected by political developments, but this investigation maintains that the oft-heard claim that war crimes justice is political justice, or that international courts have their *own* political motivations, is misplaced. Given that the ICC's intervention in Uganda was prompted by

¹³¹ It is presumed that Kony's entourage is the largest group, consisting of 40 to 50 fighters.

¹³² From time to time, the LRA strikes IDP camps as punishment for collaboration with the government, revenge for the defection of a commander, or to respond to speculations about its weakness (Bevan, 2006: 12).

Museveni's referral, it is important to pay attention to the political context of this decision and the rationale behind it.

In 2006, Museveni was re-elected President of Uganda, after a controversial removal of presidential term limits. Capturing 59 percent of the vote, he avoided a run-off with his main opponent, Kizza Besigye, who obtained 37 percent of the votes. Besigye rejected the results, alluding to massive rigging, electoral malpractice and intimidation, but international observers indicated that the elections had been reasonably free and fair.¹³³ In northern Uganda, where Museveni is highly unpopular, Besigye got more than 80 percent of the votes, a margin offset by other, more populated, pro-Museveni regions, but that perhaps puts to rest speculations regarding electoral fraud. Norbert Mao, the Democratic Party candidate, won overwhelmingly over the incumbent NRM candidate in the subsequent local elections in Gulu district in Acholiland. When this term expires, Museveni will have ruled Uganda for a quarter of a century (McConnell, 2006).¹³⁴

For most of his years in the Presidency of Uganda, Museveni has enjoyed the praise of Western donors and international financial institutions. A 1997 *New York Times* article spoke of President Museveni with these words: "These days, political pundits across the continent are calling Mr Museveni an African Bismarck. Some people now refer to him as Africa's 'other stateman,' second only to the venerated South African President Nelson Mandela" (quoted in Oloka-Onyango, 2004: 34). In the 1990s, Yoweri

¹³³ Besigye himself had spent part of the campaign in jail or in court to respond to charges of rape.

¹³⁴ The 2006 elections also marked the beginning of multi-party politics in Uganda. Since its arrival to power, the NRM had worked as a broad-based movement that agglutinated the existing political forces and allowed for electoral competition, but without political parties. In an iteration of the traditional argument against factions in democracy, Museveni claimed that because Uganda is only in the initial stages of modernization, political parties could only mirror ethnic, religious, and other parochial differences. In his view, this type of competitive politics based in ethnicity rather than territory-wide benefits, was responsible for plunging the country into repression, instability and violence for much of its post-independence history. For more information, see the opposing views of Kannyo (2004) and Mugisha (2004).

Museveni personified an alleged new breed of African statesmen, characterized by youth, managerial pragmatism, an uncritical embrace of supply-side, free-market economics, misgivings about multi-party politics, and affinity for Anglo-Saxon culture and business (Oloka-Onyango, 2004). Lending institutions and Western donors have consistently provided Uganda with aid covering half of its annual budget. Uganda's economic growth at a higher rate than the sub-Saharan African average, its relative success against HIV/AIDS, and a higher degree of peace and stability after Idi Amin, Obote, or the Okellos, have fueled stories about Uganda's miraculous recovery.

Human rights organizations have not been as enthusiastic, and two issues top their list of complaints: the tragic consequences of grouping the Acholi, Langi, and Teso in squalid IDP camps, and Uganda's intervention in neighboring DRC. In the aftermath of Kabila's takeover of the government in the DRC, Ugandan troops crossed the border claiming that their intrusion was necessary to protect Uganda from the Allied Democratic Forces. Various UPDF commanders settled in North Kivu and the eastern provinces and plundered and pillaged wealth from the DRC during the conflict (Vlassenroot and Raeymaekers, 2004: 400-403). After a UN Panel of Experts and human rights organizations blamed UPDF officers for their illegal commercial operations in the DRC, the Ugandan government established a Judicial Commission of Inquiry to investigate these allegations. Following its recommendations, Museveni dismissed General Kazini as the overall Commander of Operation Safe Haven –the official name of Ugandan intervention in the DRC. These investigations affected other commanders and officials, including Museveni's brother, Salim Saleh, accused of the highest form of corruption and

self-interest.¹³⁵ In December 2005, a ruling of the International Court of Justice ordered Uganda to pay billions of dollars in compensations to the Congo for its military's plundering and abuses in the previous years.

The claim that Kampala neglects the north contains more than a grain of truth. Until very recently, the government has put virtually no resources into dealing with the humanitarian crisis, leaving it entirely up to non-governmental organizations (Tripp, 2004: 20-22). The Ugandan state is virtually absent, and the entire region has been served and *de facto* governed by the international humanitarian community for years. Some attribute this neglect to deep-seated resentments, ethnic hatreds, and past rivalries; others point out that the Acholi region itself does not hold known strategic reserves of any key resources. In any case, the decision to enclose the northern populations in IDP camps to protect them from the LRA has been highly problematic. Amnesty International, Human Rights Watch, Uganda Law Society, Uganda Human Rights Activists and the churches have pointed out the government's failure to observe human rights and the rule of law while trying to suppress the rebellion in the north (Human Rights Watch, 1997, 2004).¹³⁶ Malaria and AIDS were reportedly causing 1,000 excess deaths per week in the camps, whose conditions were unsanitary and not necessarily safer. The phenomenon of 'night commuters' attracted some attention worldwide. Every night, to avoid abduction, parades of thousands of children commuted to the bigger towns or the center of the camps. In

¹³⁵ It should be noted that, while Kazini and other commanders benefited from lucrative operations involving gold, diamonds, and other resources, Uganda's profits derived from foreign interventions decreased during those years (Vlasenroot and Raeymaekers, 2004: 409).

¹³⁶ In an interview with an ICC officer, the author was told that some of these crimes were within the material jurisdiction of the court, but outside of its temporal jurisdiction. Besides, if the UPDF or the government were charged with forcible displacement of civilians, it could be argued that this policy was intended to protect the Acholi, Langi, and Teso populations from LRA massacres, even if the remedy turned out worse than the disease. Other crimes, such as sexual violence and other abuses from UPDF soldiers in and around the IDP camps, appear to be random, and not the manifestation of a systematic and deliberate policy that can be attributed to a commander or a decision-maker.

2006, a former UN Under-Secretary-General and special representative for children and armed conflict published a harshly critical article in *Foreign Policy* about the Ugandan government and the tragic reality of the camps (Otunnu, 2006).¹³⁷

The international community began to take notice, and donors such as Sweden or the United Kingdom relocated some budget support funds to the north as humanitarian aid. Museveni himself has recently launched an ambitious rehabilitation program for Acholiland.¹³⁸ However, northern Ugandans are understandably suspicious of Museveni's motivations, and so are scholars puzzled by a referral that could end up implicating government's officers at the ICC. Some argue that Museveni is merely delegating to the international community the solution to Uganda's internal problem, frustrated by an elusive Kony and failed military actions.

In light of the complementarity principle, it is unclear how the ICC must deal with this type of self-referrals. They could be invoked by countries with difficulties as a tool to escape the duty to prosecute at a national level, and thus risk overburdening the caseload of the Court.¹³⁹ In the words of Arsanjani and Reisman, "while some may welcome the Ugandan initiative as a sign of confidence and trust in the ICC, that enthusiasm should be tempered for three reasons. First, the move could encourage governments to externalize

¹³⁷ The article, entitled *The Secret Genocide*, accused the government of starving the Acholi to death in concentration camps, and deliberately infecting them with HIV/AIDS to wipe out the entire population. Although most of its claims may be far-fetched or unsupported, there is clearly a link between heavy military deployment, sexual abuse, and HIV/AIDS. In 2009, Otunnu announced his aspirations for the presidency of Uganda, after working at the United Nations for several years. For another article critical of the UPDF, see Henderson (2004).

¹³⁸ Interview with Betty Bigombe, November 6th, 2007.

¹³⁹ A State that chooses to defer to the ICC by confirming that it is not going to investigate, like Uganda, should be treated as equivalent to a State that is 'unwilling.' For a thorough discussion of this issue, see Zeidy, 2005: 99-105. According to Payam Akhavan, "it is conceivable that a state may be unwilling to prosecute before national courts but nevertheless willing to do so before the ICC." (Akhavan, 2005: 414). Richard-Pierre Prosper, the United States Ambassador-at-large to the ICC, states the opposite: "There was and is no evidence that Uganda was or is incapable of prosecuting its war criminals. The country has a functioning state and judiciary and could try the war crime suspects" (Quoted in *The Monitor*, March 1st 2005).

to the Court the domestic political problems they are unable or unwilling –because they do not wish to invest the necessary resources- to manage or resolve. Second, it permits the referring government to co-opt the ICC in a confrontational criminal context for what –despite all the attendant violence- may essentially be political struggles, for which negotiation and settlement might be the only practicable mode of restoring minimum order. Third, such a referral does not seem to meet the requirement of admissibility under Article 17 of the Statute” (Arsanjani and Reisman, 2005: 392).

Another view is possible. Museveni’s referral was not a surprise, but had been sought by the Court for some time before its announcement. For Uganda, the referral was an attempt to head-off criticism from its donors and galvanize more support and resources from an international community that, in the case of LRA atrocities, had been largely absent until 2003. By voluntarily surrendering prosecutorial authority to an international jurisdiction, the government of Uganda was, knowingly or not, exposing itself to scrutiny, because referrals encompass a situation rather than particular defendants. Museveni repeatedly stated that he was ready to be investigated for war crimes, and that the government would cooperate to execute any arrest warrant or indictment resulting from the investigation (Akhavan, 2005: 411).

The role of Western donors, who provide half of the government’s budget every year, cannot be underestimated. The escalation of military operations to quash rebellions in the last years had put Uganda at odds with its donors. It had already forced Uganda to renege on the demobilization program it had started with World Bank support in 1994, with a target of cutting down military expenditures and the size of the army (Prunier, 2004: 374). Partly because of its stellar performance on macroeconomic indicators, it was

the first nation to benefit from the Heavily Indebted Poor Countries Relief Plan fashioned by the International Monetary Fund (Tripp, 2004: 3). However, the escalation of violence and the military buildup cost Uganda some of the programs it benefited from, including the HIPC initiative. From 2002 to 2004, more than 20 percent of the national revenue went into the defense budget, causing mounting pressure from the donors (Tripp, 2004: 21).

In several African countries, the perennial corruption and lack of discipline of the army has been one of the main obstacles to construct and consolidate a modern state that legitimizes and promotes collective aspirations. It also inflates the cost of war and constitutes a critical factor in its prolongation (Prunier, 2004: 379). Museveni has complained about this on numerous occasions, and has attempted to deal with this problem –with various degrees of success- establishing a Code of Conduct, a High Command Tribunal, and many disciplinary committees and judicial commissions. In Uganda, the state barely delivers services or extracts revenues from taxation, and thus must compete with a patchwork of private actors from civil society, the market, and international agencies. Traditional theories of sovereignty or compliance with international law have uneasy translation in a context where half of the revenues come from abroad, and global governance is deeply embedded in domestic processes.

The view that Museveni has co-opted the ICC for his own narrow political agenda underestimates the independence of the Court. It also ignores the fact that it limits the government's capacity to maneuver, and that if Museveni were now ready to offer amnesty to Kony –as he has recently mentioned-, he would not be able to do so without infringing his duty to cooperate with the Court. In fact, it would seem as if international

donors pressured Museveni to address the plight of northern Ugandas without resorting simply to an already failed military option. A permanent international court is precisely designed to provide a depoliticized venue for the provision of justice and to add legitimacy to the process. Opposition to blanket amnesties for those most responsible for the gravest crimes is not a political decision taken by an international Court, but the legal application of a norm.

As for the timing of the referral, Museveni was responding to internal and external political pressures, as well as the aggravation of the conflict. At the end of 2003, UN Under-Secretary-General for Humanitarian Affairs, Jan Egeland, called Uganda the worst humanitarian situation in the world, and the most neglected by the international community. In November 2003, thirty-four MPs walked out of the parliament as a protest for the government's inaction concerning the LRA (Tripp, 2004: 23).¹⁴⁰ Only one month later, Museveni submitted the referral to the ICC, although it was not made public by the Office of the Prosecution until January 2004. In the same way, Museveni's willingness to extend Kony and his commanders an olive branch in recent years may have more to do with politics than with conflict resolution. The reversal of his position followed Museveni's abysmal electoral performance in the Greater North.

4. Between Amnesty or Prosecutions:

When Luis Moreno Ocampo announced the indictment of the so-called LRA-Five, many local NGOs and Acholi community leaders protested loudly. This move was widely perceived as being contrary to the peace talks taking place between the

¹⁴⁰ A more cynical view holds that the strategic importance of northern Uganda is likely to change in the near future, as the oil wealth of southern Sudan is expected to be unlocked, pending the evolution of a peace settlement between Khartoum and the SPLA (Van Acker, 2004: 336).

government and the rebels. Their complaints found a receptive audience among US diplomats, eager to demonstrate that the Court is severely flawed, and thereby justify the Bush administration's vehement opposition. Critics of the Court mentioned that the peace talks were making some progress prior to the involvement of the ICC, and that a significant number of defectors had surrendered to local and national authorities encouraged by a blanket amnesty and the implementation of a non-retributive traditional ritual for justice and reconciliation called *mato oput*. For many, the wiser approach was to seek peace first, and justice later.¹⁴¹ American diplomats piggy-backed on this sentiment to criticize the ICC and promote their own alternative solution: an ad-hoc tribunal created by the African Union and the United Nations for human rights abuses in northern Uganda, eastern DRC, and western Sudan. Surveys showed that most of the victims wanted to forgive. The narrative turned again to highlighting the limits of idealism, the pitfalls of legal evangelism, and the danger of prosecutorial zeal in situations in need of political compromise and unsavory deals. Former enthusiasts turned into skeptics, especially within the human rights movement. Helena Cobban, writing for the *Christian Science Monitor*, summed it up with the headline "Uganda: when international justice and internal peace are at odds."¹⁴²

¹⁴¹ For his own political reasons, Museveni himself has lobbied for 'peace first, justice later,' but not in the context of his war with the LRA. As mentioned above, Uganda did not withdraw its troops from eastern DRC until 2003, and their proxy militias are deemed to have committed atrocities that would fall under the material and temporal jurisdiction of the ICC. A 2004 letter from Museveni to Kofi Annan, on file with the author, includes a very telling paragraph: "Your Excellency, whereas Uganda has been at the fore front of working for an end to impunity, with respect to war crimes and genocide in this region, our experience in the Burundi peace process has convinced us of the need for *provisional immunity in order to achieve peace first*. It may be important to advise the DRC government to *suspend the activities of the international criminal court until the peace process in Ituri and the DRC in general is irreversible* (emphasis added).

¹⁴² Cobban, Helena, "Uganda: when international justice and internal peace are at odds" in *Christian Science Monitor* (August 24th, 2006), available at <http://www.csmonitor.com/2006/0824/p09s01-coop.html>.

Of course, these opinions are part of a perennial and unresolved debate, and those that witness the daily suffering of the victims in Acholiland may have very different views for the noblest of reasons. But the debate about pardons for the sake of peace normally revolves around leaders of armed organizations that have the support of at least a segment of the local population. The LRA does not represent the Acholi, nor is supported by them. It does not have a clear or realizable political agenda. It does not recruit impoverished Acholi that resent the government, but abducts them. There is something very perverse in elevating the political status of players like Joseph Kony in peace negotiations sugarcoated with pardoning deals.¹⁴³

The most prominent opponents of the ICC in Uganda are Acholi politicians and religious leaders, members of the Amnesty Commission, and local NGOs.¹⁴⁴ Particularly in Gulu, where most international agencies and journalists are based, organizations like the Acholi Religious Leaders Peace Initiative (ARLPI), the Council of Elders Peace Committee, and the Council of Chiefs have been disseminating this view.¹⁴⁵ Rwot David Acana II, one of the cultural leader of northern Uganda's Acholi ethnic group, has been particularly vocal in his opposition to ICC investigations and trials. The Acholi argued that the announcement of the ICC had made the rebels more reluctant to meet for peace negotiations. Acana does not oppose prosecution of those who have committed crimes against humanity, but disagrees with the timing of the investigations. The Vice Chairman

¹⁴³ See "Kony does not deserve amnesty" in *The New Vision* (April 17, 2006); Osike, Felix, "Kony Must Face Trial – ICC" in *The New Vision*, July 12th 2007. According to Betty Bigombe, who has met Kony several times, the LRA leader displays clear signs of Multiple Personality Disorder and psychopathic behavior.

¹⁴⁴ It should be noted that, despite the active role of the Acholi Parliamentarians' Group in raising many northern issues, they have also suffered from divided leadership. For example, two separate Acholi delegations went to visit the ICC in The Hague with incoherent messages.

¹⁴⁵ Funded by international aid agencies, the ARLPI was established in 1998 to coordinate peacebuilding initiatives of the Catholic and Protestant churches (Allen, 2006: 132).

of the ARLPI, Bishop McLeod Ochola put it more categorically when he contended that the ICC will “destroy all efforts for peace. People want this war to stop. If we follow the ICC in branding the LRA criminals, it won’t stop” (Apuuli, 2004: 406). Walter Ochola, council chairman in the Gulu district, also weighed in: “The ICC’s intervention is counter-productive to the already successful peace processes on the ground. The priority should be peace first and justice later. Even if the chief prosecutor went ahead and issued the warrant, who will arrest Kony anyway? The government and the army have repeatedly failed.” Their concerns quickly found their echo in the media, which took a greater interest in the story of a possible clash between the ICC and those that it was supposed to benefit, than it had in the actual massacres when they took place.¹⁴⁶

A number of Ugandan and transnational NGOs share their reservations, such as the Uganda Program Development Officer for Conciliation, Christian Aid’s Uganda Program, and Ugandan Kakoke Madit peace initiative.¹⁴⁷ The Refugee Law Project has produced several studies and surveys that support this view, and so do several Ugandan academics.¹⁴⁸ Finally, mediator Betty Bigombe, who led the peace talks in 2004 and has met Kony on five separate occasions, asked repeatedly for timing and sequencing the activities of the Court and the peace negotiations, with an emphasis on peace first.¹⁴⁹

¹⁴⁶ See Lacey, Marc, “Victims of Uganda Atrocities Choose a Path of Forgiveness” in *The New York Times* (April 18, 2005), p. A1; “US Envoy Criticizes ICC on LRA Prosecution” in *The Monitor* (February 28, 2005), available at <http://allafrica.com/stories/printable/200502281210.html>; Reuters, “Uganda: ICC jeopardizing local peace efforts – Northern leaders” (March 25, 2005); Volqvartz, Josefine, “ICC Under Fire Over Uganda Probe” (Feb. 23, 2005), available at <http://edition.cnn.com/2005/WORLD/africa/02/23/uganda.volqvartz/>.

¹⁴⁷ For an interesting study on human rights organizations in Uganda, see Dicklitch and Lwanga (2003).

¹⁴⁸ For example, Samuel Tindifa, of the Human Rights and Peace Center of the Faculty of Law at Makerere University, who opines that “the ICC should join the diplomatic bandwagon to put pressure on both parties to come to a negotiated settlement” (quoted in Apuuli, 2004: 407).

¹⁴⁹ Bigombe underscores that the overwhelming majority in Uganda are in favor of accountability and trials, but want peace first. In that sense, when NGOs or Ugandan politicians make broad claims about a local preference for forgiveness, they are manipulating the opinion of the victims to push their own agenda (Interview with the author, November 6th 2007).

Even though global human rights organizations, such as Amnesty International and Human Rights Watch, remained supportive of prosecutions, such a widespread sentiment in northern Uganda should not be taken lightly. For some, it is the only thing that should matter: “The decision, on the one hand, to seek justice through punishment or, on the other, to forgo punishment in favor of justice through reconciliation, is a decision that must be made by the concrete community that is the victim of the crimes and that will have to live with the consequences of this decision (Branch, 2004: 5, quoted in Allen, 2006: 24).

Members of the Amnesty Commission maintain that the referral to the ICC sits in contradiction to the Amnesty Act, which was passed into Ugandan law and enacted in January 2000.¹⁵⁰ The law, which was adopted in Parliament despite the opposition of President Museveni himself, provides amnesty for all rebels that surrender and lay down arms, and it has been periodically renewed every six months. Over the last years, Museveni has maintained that the Amnesty Act could not apply to LRA commanders, and the Anti-Terrorism Act of 2000 implicitly set limits on its application. However, his position has been very inconsistent, and has shifted with the ebb and flow of the peace process. In the summer of 2006, he guaranteed safety to Kony if he would renounce rebellion, a promise that may have jumpstarted the last round of negotiations at Juba (Apreotesei, 2008: 19)¹⁵¹. By most accounts, however, Museveni’s main wish is to kill Kony, and the International Criminal Court or the peace negotiations are only ways to

¹⁵⁰ Amnesty Act, 2000, at

http://www.cr.org/accord/uganda/accord11/downloads/2000_Jan_The_Amnesty_Act.doc.

¹⁵¹ See Mukasa, Henry, “Museveni gives Joseph Kony final peace offer” in *The New Vision*, May 16 2006; also, “Uganda: Government to seek review of ICC indictments against LRA leaders,” IRIN, June 21st 2007.

show to northern Uganda's civil society and political class that he has exhausted all possible options before moving against him militarily.¹⁵²

At first, rebels from the other existing armed groups benefited from the amnesty, but thousands of LRA defectors have also applied for and benefited from it. The Amnesty Act was amended by the Amnesty Amendment Bill on April 18th 2006 to exclude ICC-indicted LRA leaders. But the bill requires the internal affairs minister to provide a list of excluded individuals for parliamentary approval, and this has not yet happened. As a result, Kony and the other commanders are still technically eligible for amnesty (International Crisis Group, 2007: 7).

Normally, traditional rituals of repentance and reconciliation accompany the delivery of an amnesty package.¹⁵³ These local mechanisms are compatible with the mission of the ICC, which only targets the top leadership. The Chief Prosecutor has recognized the importance of these initiatives. After meeting with a group of Acholi leaders in The Hague, the Office of the Prosecution issued a statement saying that the court and the community leaders had agreed to integrate the simultaneous approaches

¹⁵² Interview with Winnie Byanmiya on February 7th, 2007. On file with the author.

¹⁵³ The most commonly used consist of drinking a bitter herb (*mato oput*), stepping on a rotten egg (*nyouo tong gweno*), and bending spears (*gomo tong*). The meanings of these rituals are not interchangeable, though they are often confused, not least by Ugandans themselves. Many object to them, especially women and the youth. There are pertinent questions to be asked about the effectiveness of reinventing traditional leadership structures of male elders in this context. It re-creates the system of clan leaders (*rwodi*) in a context of war, displacement, and profound cultural change, with a generation of youngsters brought up in conditions far removed from those that enabled the functioning of such leadership structures. It risks overlooking the generational aspects inherent in this conflict, where elders have been seen to be ineffective and to abandon their responsibilities at the very start of the conflict (Van Acker, 2004: 355). Besides, traditional justice mechanisms often lack due process protections and can be insensitive to victims of sexual violence. These rituals can entail complicated arrangements and require weeks or months in preparation. For more information, see Finnstrom (2003), Ojera Latigo (2008).

being pursued: peace talks, the International Criminal Court investigation, and traditional justice and reconciliation justice.¹⁵⁴

The International Criminal Court does not have, nor intends to have, the monopoly in the application of justice in those situations that are referred to its offices, and it is designed precisely to coexist with a whole range of mechanisms responding to such crimes, including national courts, truth and reconciliation commissions, historical commissions, and other means of transitional justice.¹⁵⁵ The ICC team in Uganda is fully equipped to work with local and civil society to determine the most appropriate mix of justice and reconciliation mechanisms and to guarantee the highest standard of protection for victims. To achieve these goals, the Prosecutor has created a Jurisdiction, Complementary, and Cooperation Division within his office in order to ensure close communication and collaboration with member countries, local civil society, and international NGOs. Similarly, it has made the protection of the victims a top priority, creating a Victims Trust Fund, devoting extensive resources to experts on trauma experienced by child victims and victims of sexual violence, enabling victims to have their own legal representatives, and allowing them to track the proceedings and share their views when appropriate (Citizens for Global Solutions, 2004: 11-12).

For opponents of the ICC, the peace negotiations at Juba in southern Sudan opened many doors and stand a real chance of bringing an end to the conflict, allowing the Acholi to return to normal lives, and leaving behind a two-decade-long nightmare.

¹⁵⁴ International Criminal Court Press Release, “Joint Statement by ICC Chief Prosecutor and the Visiting Delegation of Lango, Acholi, Iteso, and Madi Community Leaders from Northern Uganda” (April 16, 2005), available at <http://www.icc-cpi.int/press/pressreleases/102.html>.

¹⁵⁵ Over the years, Uganda has paid much lip service to truth commissions, but it has yielded poor results. The first ever truth commission was convoked in Uganda under Idi Amin in 1974, although the first one to fulfill its mandate and complete its work was established in Bolivia in 1982. Under Museveni, truth commissions have proliferated, proclaimed loudly but under-funded, and little to show for other than redundancy. For more background on this matter, see Quinn (2005).

Amnesty for deranged criminals may be unpalatable, but it is a price worth paying. It is, furthermore, the wish of the victims and the affected populations. There are, however, three underlying assumptions that need revision: that the Acholi want amnesty, that peace hinges on amnesty for Kony, and that the ICC investigation is an obstacle for the peace talks and risks exacerbating violence.

The answer to the first question cannot be known. Some surveys show that a majority of Acholi is ready to forgive, and others show precisely the opposite.¹⁵⁶ Many ask opinion-leaders, but the International Center for Transitional Justice and Berkeley's Human Rights Center produced the most ambitious population-based survey to date in northern Uganda. It concluded that, contrary to conventional thinking, peace and justice were not seen as mutually exclusive, and three-quarters of the sample surveyed prioritized accountability in several forms. Sixty-six percent wanted some kind of punishment –from trial and imprisonment to killing- and twenty-two percent-preferred reconciliation and reintegration. The issue is compounded by the difficulty of aggregating varied, and even contradictory responses, and the nuances of cultural translation. For example, even though they do not mean the same, it is easy to associate the amnesty offer with a more general notion of forgiveness, for the same word (*timo-kica*) is used in Luo language to denote both (Allen, 2006: 76). Lack of clarity about the scope of ICC indictments has created uncertainty. There are indications that in northern Uganda many think that the court will punish children who have been abducted (Akhavan, 2005: 418). Most of the polled are Acholi, but one would suspect that the Langi, Teso, and other groups victimized by the LRA in other districts, and even southern Sudan or eastern

¹⁵⁶ Contrast, for example, the results of surveys made by the Refugee Law Project, on the one hand, and the International Center for Transitional Justice, on the other. However, a preference for food and peace as immediate concerns is quite uniform among respondents (Souaré, 2008: 110).

DRC, would have a legitimate right to state a preference. Should the rest of Ugandans be asked how they feel about pardoning Kony? Measuring the victims' wishes is highly contentious, because it is impossible to address as a group what remains an individual experience. Victims may prefer to forgive and move on, but they can also, quite plausibly, prefer execution without trial, and other options that do not reside within the frames of war crimes' courts.¹⁵⁷ International justice is *mainly*, but not *only* about the victims of atrocities. It is also about peace and security in the world, and potential victims beyond northern Uganda.

Are peace negotiations with blanket amnesties a better alternative? This is the first time that an international court gets involved in northern Uganda. Peace negotiations, however, have proved unfruitful for two decades, despite many attempts. Every peace initiative has failed, including the US-supported Northern Uganda Peace Initiative (NUPI). In 1994, the collapse of peace talks marked the beginning of a more vicious campaign of violence against non-combatants, with increased frequency and ferocity.¹⁵⁸ Two years later, another attempt from Acholi elders resulted in the death of two of the envoys (Allen, 2006: 50). When Uganda's Parliament issued the Amnesty Act, Kony condemned it and threatened LRA members with violent reprisals if they tried to accept it.¹⁵⁹

¹⁵⁷ The most common complaint from victims and locals with regards to international courts is actually that sentences are too lenient, or prison conditions too comfortable. A majority of Rwandans and Sierra Leoneans wanted, respectively, death penalty for the convicted at the ICTR in Arusha, and punishment for RUF child soldiers.

¹⁵⁸ Museveni interrupted the peace talks with an unrealistic ultimatum, under the pretext that the LRA was merely buying time and receiving aid and weapons from Sudan. This decision was taken by many in the north as proof that the continuation of the war had clear political advantages for Museveni vis-à-vis the rest of the regions.

¹⁵⁹ This amnesty offer, which was endorsed by several states and NGOs, such as the Carter Center's Conflict Resolution Department, is significant in that it was issued *ex ante*, in the midst of the conflict

One of the reasons for the long duration of the conflict is the Sudanese factor. In many ways, Sudan and Uganda have been carrying out for many years an undeclared war. Khartoum has repeatedly accused Kampala of providing military support to the rebels of the Sudanese People's Liberation Army (SPLA). In exchange, the Sudanese government has supplied the LRA with landmines, rocket-propelled grenades, machine guns, and bases to train.¹⁶⁰ As a result, a rebel group armed primarily with machetes and rifles became a well-supplied military enterprise in possession of more sophisticated weaponry than the UPDF. After the U.S. State Department included the LRA in its list of terrorist organizations in late 2001 and Sudan and Uganda agreed to cooperate, Museveni launched a cross-border, full-scale military action dubbed 'Operation Iron Fist' against LRA camps in Sudan, but its main result was another wave of indiscriminate violence against civilians with the main goal of abducting hundreds of children and replacing those killed in the military operation. The numbers of internally displaced persons rose to reach its peak, encompassing almost 90 percent of the population in the region. However, the number of former LRA soldiers defecting and accepting amnesty packages increased.¹⁶¹

Before the unsealing of the arrest warrants, the most serious effort at peace negotiations was led by Betty Bigombe, an Acholi from Gulu who managed to engage

rather than in its aftermath. Historically, most amnesties are decreed after a regime change, or a transition of some kind.

¹⁶⁰ Although relations between Sudan and Uganda have eased in recent years, and both governments have pledged to stop aiding the LRA and the SPLA respectively, their undeclared war has also been fought through proxies on the territory of the neighboring Democratic Republic of Congo, where a Sudanese-sponsored coalition of anti-Museveni movements, merged in the Allied Democratic Force (ADF), has been active along Uganda's western border. Although some of these groups have surrendered, their remnants still constitute a security threat for both Kampala and Kinshasa (Prunier, 2004: 359).

¹⁶¹ By mid-2004, over 5,000 former LRA fighters had surrendered and applied for amnesty. Mega Radio, an FM station broadcast from Gulu, began to feature returnees encouraging others to defect. This brought more people from the bush, but also savage retaliations from the LRA (Allen, 2006: 75).

the LRA leadership in a protracted dialogue through 2004.¹⁶² She gained the trust of one of Kony's commanders, Sam Kolo, who would eventually defect and benefit from the amnesty. For the rest of the LRA leadership an amnesty implied admission of guilt, which they abhorred (Allen, 2006: 81-82). It should be noted that the ICC had made public Museveni's referral only two months before the LRA sat to negotiate. Another military operation, known as Operation Iron Fist II, seemed to have been more effective than the first one, leaving the LRA in a very weak position.¹⁶³ And Sudan, in the middle of peace negotiations with the SPLA and widely condemned for ethnic cleansing in Darfur, was not able or willing to keep replenishing Kony's stock of weapons. Pressure on Khartoum yielded a March 2004 Protocol allowing the UPDF to attack LRA camps in southern Sudan.¹⁶⁴ The peace negotiations failed again, but in many ways set the stage for a longer round of negotiations in Juba. In fact, it is more accurate to speak of an intermittent succession of negotiations, truces, and ceasefires, from 2004 to 2008, precisely the first four years after the ICC entered into the picture.

There is no evidence that indicates that the rate of defections has slowed down since the intervention of the ICC. Most importantly, prior to 2004, senior LRA commanders had never accepted offers of amnesty.¹⁶⁵ Besides Sam Kolo, chief

¹⁶² Due to her gender and age, Bigombe had already made headlines in 1988 with her appointment as Minister of State for Pacification of Northern Uganda. Bigombe had participated in previous peace talks, meeting Kony several times.

¹⁶³ Army commander Lt. Gen. Aronda Nyakairima was quoted in *The New Vision* on March 2005 saying that "from about 3,000 fighters during the Operation Iron Fist which I commanded in southern Sudan in 2002, the LRA rebels are now about 300."

¹⁶⁴ Even though a 1999 Sudan-Uganda non-intervention agreement and the Sudan-SPLA peace process had eliminated Sudan's original justification for supporting Kony, the LRA continued to receive support from Khartoum at least until 2004, according to the International Crisis Group. The impact this had on the conflict was stark. Akhavan, for example, compares the bleak assessment of the UN in November 2003, only one month before the referral to the ICC, with a much more hopeful UN report in November of 2004 (Akhavan, 2005: 416-417).

¹⁶⁵ In an interview with Tim Allen, Father Carlos Rodriguez, one of the most vocal opponents of the ICC, seemed to have changed his mind: "Things have changed. Something has happened since April that we did

spokesman and peace negotiator in 2004, defections from high-ranking members have included Operations Commander Onen Kamdalú and Brigadier Kenneth Banya (Akhavan, 2005: 417). Kony himself had remained virtually invisible for many years, but revealed himself to the world in videotape from southern Sudan in May 2006. Several phone lines were set up, and Museveni and Kony have spoken several times in recent years.

The LRA's purpose and existence is inextricably tied to Kony's fate. Luis Moreno Ocampo frequently says that Kony's arrest will bring both peace and justice to Uganda. According to Akhavan, the international community should focus on the arrest and prosecution of the perpetrators, "who would never enjoy impunity if their victims happened to be Americans or Europeans (...), instead of holding Uganda hostage to never-ending and potentially futile negotiations" (Akhavan, 2005: 420). It is difficult to imagine Kony agreeing to a settlement that included an amnesty. A pardon may not be enough for someone who has led a rebel force for twenty years. Amnesties are not always dealmakers. Vincent Otti, Kony's second in command, openly said that he expected to obtain a position in the government if the talks succeeded, and that he would not settle for less.¹⁶⁶ For many, the Juba peace talks were only a tactical retreat on the part of the LRA, forced to buy time, take advantage from food supplied by the United Nations, and recover from a position of weakness. Otti seemed convinced that the talks would drag out for years.¹⁶⁷ After being the main contact with the LRA for months during the peace talks in

not expect. Between April and September (2004) five hundred or so combatants have come out of the bush with their guns, including senior officers. So the ICC might not be so discouraging as we thought" (Allen, 2006: 116).

¹⁶⁶ The head of the LRA negotiations team, David Matsanga, was very clear that they would not sign anything unless the ICC indictments were dropped (Souaré, 2008: 107).

¹⁶⁷ This was not only convenient for the LRA, but for the delegations of both parties, who received a generous daily allowance and paid accommodation.

Juba, he was reportedly killed by Kony over disagreements regarding the negotiations. According to recent defectors, Kony claimed that one of the spirits that possesses him had told him that the talks would fail, and that they would be attacked soon.¹⁶⁸

Admittedly, the peace talks defied expectations and advanced further than any other previous rounds, but Joseph Kony himself did not turn up to the negotiating table.¹⁶⁹ Instead, the LRA was being represented by a delegation of diaspora Acholi detached from the conflict, and the main spokesperson on the rebels' behalf was Vincent Otti until Kony allegedly killed him. The LRA was getting food, money, and time to regroup and rebuild while it was engaged in the talks, and had therefore a stake in dragging matters out.¹⁷⁰

On February 18th 2008 the Ugandan government and the LRA reached an agreement on accountability and reconciliation that would provide for prosecution in Uganda of senior LRA leaders, and traditional justice mechanisms for lower level perpetrators. Those most responsible for the worst offenses would be prosecuted in a special division of the Ugandan High Court. It also calls for a “comprehensive, independent, and impartial analysis of the story and manifestations of the conflict, especially the human rights violations and crimes committed during the course of the

¹⁶⁸ Kony is known to have made predictions like this in the past, such as anticipating the outbreak of the Ebola virus in the Great Lakes region. Betty Bigombe gave confirmation of Vincent Otti's assassination to me during our interview on November 6th 2007. She said that, to date, the LRA has done absolutely nothing that demonstrates they are interested in a solution to the conflict. Being one of the few people who have met Kony several times, she maintains that he shows signs of Multiple Personality Disorder and oscillates dramatically in both word and deed from one day to another (Interview with the author, November 6th 2007).

¹⁶⁹ The negotiating parties signed an agreement on comprehensive solutions to the conflict on May 2nd 2006, and an agreement on reconciliation and accountability on June 29th. Both agreements, however, are very vague and are devoid of specifics (ICG, 2007).

¹⁷⁰ The International Crisis Group, which followed the process closely, was not very hopeful: “Despite the gains it has made, the Juba peace talks have some of the wrong issues on the table, the wrong LRA negotiators and insufficient leverage to overcome the parties' mutual mistrust and wavering commitment” (International Crisis Group, 2007: 2).

conflict,” and states that “truth-seeking and truth-telling processes and mechanisms shall be promoted.” The annex to the accountability agreement establishes a body that will hold hearings and make recommendations on reparations and governmental reforms (International Crisis Group, 2007). However, it is not known whether these agreements will be of any use in the future, as the peace process was broken by both parties at the end of 2008 and the beginning of 2009. When I visited Uganda, it seemed like the first ever LRA commander would be tried in the War Crimes Chamber set up at the High Court, demonstrating that Uganda is both willing and able to try the suspects at home. Thomas Kwoyelo was wounded during Operation Lightning Thunder, and unlike other LRA commanders, like Sam Kolo, Kenneth Banya, and Opiyo Makasi, as well as 10,000 other LRA soldiers throughout the decade, he will not be granted amnesty.

The issue of national amnesties was not seriously discussed during the Preparatory Committee and was avoided at the Rome Conference. However, as discussed above, it can be inferred from the mission of the Court that the ICC cannot operate alongside a sweeping amnesty that includes serious crimes and high-ranking officials. The main goal of international criminal law is to fight impunity, and an obligation to prosecute the gravest crimes takes priority over amnesties as an available tool for reconciliation via pacification. This is easier said than done, because the ICC depends on the cooperation of governments to execute the warrants. Amnesties have been liberally used in Uganda in the last decades, and they only gave way to new insurgencies. The military junta led by General Tito Okello, for example, amnestied all the other groups that had been fighting against Obote. When Museveni came to power, he also used amnesty to bring his political opponents into the fold. Prior to the involvement of the

ICC, the Amnesty Act did not attract a single commander from the bush, or helped reach a settlement with the leadership. The defectors, thousands of them, were mainly regular fighters, and their defection was answered by the LRA with a violent campaign of retaliation and abduction between 2002 and 2004. Blaming the ICC for a possible exacerbation of violence would be tantamount to blaming the amnesty policy, because more returns only provoked more subsequent massacres and kidnappings.

The Office of the Prosecution can only suspend an investigation when there is reason to believe that the investigation is not furthering the interests of justice, and any decision by the Prosecutor in that direction would have to be approved by a Pre-Trial Chamber. The alternative that has been discussed is the adoption in the Security Council of a Chapter VII resolution asking the prosecution to defer the proceedings for a year.¹⁷¹ Luis Moreno Ocampo has reportedly stated that “I will stop but I will not close. Timing is possible, but immunity is not possible” (Allen, 2006: 93). Bigombe and others complain that the ICC should be more sensitive in its timing, but Moreno Ocampo delayed the indictments for a year to give an opportunity to the 2004 peace talks. This has its risks. Justice delayed may be justice denied. And although investigating in the midst of a conflict makes it more difficult and dangerous for the investigations team, waiting until the conflict has elapsed could entail the loss of crucial forensic evidence.

¹⁷¹ Although this idea is floated around, no one I spoke with deemed it likely to happen. A likelier scenario would be that, with the establishment of the Special War Crimes Chamber at the High Court in Kampala, President Museveni argued that Uganda was now willing and able to try the suspects domestically, as stipulated in the agreement on accountability signed by the government and the LRA. Some suggest that part of the deal would be that, upon completion of Kony’s trial in Uganda, Museveni would issue a presidential pardon in the interests of reconciliation. See Apuuli (2008).

Although unlikely, Uganda could refuse to comply with the ICC and give the LRA commanders safe haven in a country non-signatory of the Rome Statute.¹⁷² In its most recent report, the International Crisis Group included this recommendation: “Reconciling peace and justice may yet require tough compromises, including possible safe haven outside Uganda for LRA leaders indicted by the ICC, but –if the credibility and deterrent effectiveness of the ICC is not to be undermined- only as an absolute last resort and with international endorsement on the basis that this is genuinely the only way of ending the suffering of the people of the region once and for all” (International Crisis Group, 2007: 1). Two countries were approached, and one purportedly said yes. It is difficult to envisage the damage that such an outcome would cause to the fight against impunity. Rewarding Joseph Kony with pardon, asylum, and secure livelihood in a safe haven can only send a disastrous message, and threaten the very foundations of an edifice that took much time and effort to build.

Among US academics, perhaps the most vocal supporters of an amnesty for the LRA leaders are Jack Snyder and Leslie Vinjamuri. In a short piece titled “Making Amnesty Smart” argued that the ICC indictments were “the one thing that stands in the way of peace in Uganda.”¹⁷³ At the beginning of 2009, the government of Uganda and the International Criminal Court faced a real-time dilemma with regards to Okot Odhiambo, who announced that he had defected but would not surrender himself to Ugandan authorities until the indictment pending against him had been lifted (IWPR, 2009). He

¹⁷² Museveni has paid some lip service to the idea that he would consider this possibility, but more frequently he makes statements to the contrary. His favorite option continues to be a military one. Recently, he requested permission to cross the border between DRC and Uganda so that the UPDF could attack the LRA in its hideouts in Garamba Park. The only effort to date ended in tragedy. On January 23rd 2006, 70 Guatemalan special forces from MONUC were ambushed by 200 LRA fighters. Eight of them died. The botched operation was launched on the basis of faulty intelligence, with Vincent Otti as a target, and without fully informing MONUC and thus lacking air support (International Crisis Group, 2007: 13).

¹⁷³ Interview with Jack Snyder on November 26th 2007. On file with the author.

was reportedly hiding with a few dozen fighters and some abductees, and had contacted the International Organization of Migration to secure safe passage. Odhiambo is believed to be Kony's number two since the assassination of Vincent Otti as a result of disagreements over the peace process, and is recognized by many survivors as the leader of many massacres on the IDP camps, including one in 2004 in which more than three hundred people were burnt, shot, or hacked to death.¹⁷⁴

Nonetheless, forgiving Kony or Odhiambo would be unforgivable. Proponents of amnesties speak about the need to strike political bargains and build robust institutions that can enforce the rule of law; they trumpet pragmatism and propose paying attention to political prudence and *realpolitik*. However, Kony and Odhiambo are security threats, but are politically weak. Cut off from the support of Khartoum, they are isolated and militarily debilitated. They do not lead political movements, but predatory gangs. They are not supported by a segment of the civilian population of the states that host them, but are feared by them. In this sense, chipping away at the impunity paradigm in favor of perpetrators that do not have political appeal or following is the opposite of paying attention to political realities.

One of the positive things about the intervention of the ICC is that it has refocused attention to one of the most neglected humanitarian disasters in the world. The political will and the resources of the international community could be required to arrest Kony and his closest commanders. However, they are also needed to pressure Museveni to pursue and consolidate democratic reforms, especially in the military and the judiciary,

¹⁷⁴ His defection may be the only positive outcome of Operation Lightning Thunder, the joint air and ground campaign with Congo and South Sudan that failed to capture Kony and instead provoked the worst wave of LRA retaliations in several years. Since the attack, the LRA has gone on a bloody rampage in the Democratic Republic of Congo, killing an estimated 700 to 800 people.

and address the plight of the Acholi. The roots of poverty, anger, and disenchantment in the northern provinces must be addressed, but this responsibility lies less with the ICC than with Kampala and the international community. It has less to do with deciding whether or not and when to issue arrest warrants, or whether to execute or forgo punishment, but with implementing measures to bring back a certain degree of normalcy and dignity to northern Ugandans (Van Acker, 2004: 354). The government of Kampala has devoted very few resources to address the humanitarian catastrophe in the north. International donors, who provide Uganda with half of its annual revenues, have rewarded steady economic growth and the implementation of neoliberal economic measures at the cost of ignoring the uneven distribution of wealth and development and the tragic proportions of northern Uganda's suffering. Hence, there are many ways in which politics can and will play an important role. However, the ICC should not be one of them.

CHAPTER 5

IN THE HEART OF DARKNESS: THE INTERNATIONAL CRIMINAL COURT IN THE DEMOCRATIC REPUBLIC OF CONGO¹⁷⁵

1. Introduction:

Since 2004, the ICC has been investigating atrocities committed in the eastern part of the DRC, where violence continue despite a peace treaty and a power-sharing agreement that should have put an end to the country's civil war in 2002, as well as separate peace agreement with various rebel groups. Although the Office of the Prosecution has initially concentrated its investigations on the province of Ituri, abominable violations of human rights have also taken place, recurrently at times and sporadically at others, in the Kivus and northern Katanga.

Needless to say, the ICC is testing its own operational and functional capabilities in the most chaotic scenario. The level of complexity of the situation in the DRC confounds observers and defies easy explanations. The Court has to wrestle with a countryside utterly devastated by the war and lacking the most basic infrastructures; a central government that struggles to control large portions of its territory and to manage a

¹⁷⁵ Among the interviews conducted to obtain background information for this chapter, the author is especially thankful to Severine Autesserre, one of the world's best researchers on eastern Congo, Richard Nsanzabaganwa at the Coalition for the International Criminal Court, and Chris Hall at Amnesty International. ICC staffers interviewed asked to remain anonymous.

very fragile new democracy; a dizzying number of rebel movements, local militias, and ethnic rivalries; and the complicity of multinational corporations in unscrupulous competition over the Congo's vast resources. Altogether, the ingredients of this incalculable human catastrophe have turned eastern DRC into the most dangerous place on Earth.

The political landscape emerging from the first democratic elections in this country since independence remains unclear and unstable, and fighting has not receded in the eastern provinces. At the time of this writing, the ICC has the custody of three militia leaders from Ituri: Thomas Lubanga Dylo, Germain Katanga, and Mathieu Ngudjolo Tchui, presumed commanders of the *Union Congolais Patriotique* (UPC), the *Force de Résistance Patriotique en Ituri* (FRPI), and the *Front des Nationalistes Intégrationnistes* (FNI), respectively. After an entire year occupied with confirmation hearings, the trial of Lubanga finally began on January 26th 2009 (Bekou, 2008). This is the ICC's first actual trial since the passage of the Rome Statute in 1998 and its entry into force in 2002. The trial of Germain Katanga and Mathieu Ngudjolo Tchui, arrested in October of 2007 and February of 2008, respectively, began in November 2009. General Laurent Nkunda, partly responsible for a great deal of the fighting in the Kivus throughout 2008, was arrested by Rwandan forces, but has not been indicted by the ICC. His associate, Bosco Ntaganda, has been indicted, but is believed to have been reintegrated into the Congolese army. Another Congolese, former Vice President and presidential candidate Jean-Pierre Bemba, was arrested in the summer of 2008 in Belgium and was transferred to The Hague, where his trial is expected to begin in July 2010. He is, however, accused of

crimes committed in the Central African Republic, although he could arguably respond for massacres perpetrated in late 2002 in the DRC by rebel forces under his command.¹⁷⁶

The situation in the DRC has proved moderately fruitful for the Office of the Prosecution. Uganda and Sudan, for example, have not produced the arrest of suspects. However, many questions continue to arise. Human rights organizations complain that the prosecutor is moving at a very slow pace and with too much caution, targeting small fry instead of their more powerful backers in the governments of the region. In particular, many were outraged that, after years of investigation in the Congo, the first three indictments were issued against soft targets and relatively unknown individuals. The case of Lubanga was of special concern, as the only count on his indictment was that of enlisting soldiers that were 15 years old or younger. Needless to say, Lubanga was hardly the only one recruiting children, and the movement that he founded and led, the UPC, is now registered as a political party.

On the other hand, during 2006, the political contest seemed to relegate transitional justice issues to the backseat. Some worried that the court's activities were jeopardizing a very fragile transition, especially one in which the European Union and other members of the international community had invested such a significant amount of time and resources. Contrary to those that complain of excessive prudence, it is argued that the Office of the Prosecution should avoid 'rocking the boat,' so that the pursuit of justice does not endanger the pacification and reconstruction of the region. So far at least,

¹⁷⁶ Bemba's charges were confirmed in early 2009. He is not only a former Vice President and presidential candidate, but also the former leader of one of the rebel factions that controlled a large portion of the country during the civil war and its aftermath. In the elections of 2006, he was the second largest vote-getter, and thus has many loyal supporters in the Congo. He will probably be tried for several counts of war crimes and crimes against humanity committed in CAR in 2002, but he may yet be charged with crimes committed on Congolese soil. For updates, see www.icc-cpi.int.

the developments unfolding in the DRC prove that, in the context of the Congo, the fight against impunity can also be politically expedient and contribute to peace. Once again, as the former Secretary-General of the UN aptly put it, “justice, peace, and democracy are not mutually exclusive objectives, but rather mutually enforcing imperatives.”¹⁷⁷

None of this is, of course, irreversible. In December 2007, President Kabila mobilized twenty thousand Congolese troops to take on the rebel troops of the renegade General Laurent Nkunda, a Tutsi who claims to protect the interests of the Rwandophone minority in Northern Kivu, and that received the support of the government of Paul Kagame in neighboring Rwanda. Nkunda is currently one of the rumored targets of the Office of the Prosecution of the ICC for his role in the commission of mass atrocities in 2004 around Bukavu. Different armed groups, the government, and the international community signed a peace agreement in Goma, North Kivu’s capital, in January 2008, one of a long list of similar fragile, short-lived settlements, but Nkunda continued fighting. In January of 2009, Rwandan forces apprehended Nkunda in one of the most surprising turning points of the conflict, and another ceasefire was signed in March 2009.¹⁷⁸ This bodes well to achieve a modicum of peace in Eastern Congo, but it did not come without a price. Estimates indicate that at least 100 villagers were killed in the crossfire or by fleeing rebels looking to retaliate and avenge their losses.¹⁷⁹ Since then, a peace agreement has been signed with Nkunda’s forces, and the Congolose and Rwandan

¹⁷⁷ See United Nations, Report of the Secretary-General on the Rule of Law and Transitional Justice (August 23rd 2004).

¹⁷⁸ This peace agreement demonstrated that, when politically expedient, President Kabila is ready and willing to sacrifice justice for the sake of peace, as it has resulted in the reintegration into the Congolese army of Bosco Ntaganda, an ICC runaway. This has put MONUC and international mediators in a very difficult position, given the pressure on MONUC to arrest Ntaganda, on the one hand, and the beneficiary effects of the ceasefire (Carayannis, 2009: 13).

¹⁷⁹ Gettleman, Jeffrey, “In Congo, With Rebels Now At Bay, Calm Erupts” in *The New York Times*, March 4th 2009 (page A6).

governments, with the support of the United Nations peacekeeping operation, have renewed efforts to wipe out the other major rebel group of the area, the *Forces Démocratique de Libération de Rwanda* (FDLR). This is taking an even higher toll on civilians. According to Human Rights Watch (2009), for each FDLR member that is disarmed, one civilian is killed, seven women are raped, six houses are burned down, and 900 people are displaced.

And yet, as in the other situations under study, the involvement of the ICC has not led to an exacerbation of the conflict. The province of Ituri, from which all three suspects currently in The Hague come from, has been enjoying relative stability for some time. And the possibility of being sent to The Hague has not inhibited peace negotiations either, some of which took place in 2008 and 2009 with various rebel groups. It has been, however, more than ten years since the Lusaka agreement, the first one of a series of peace treaties, as well as ten years since the establishment of one of the largest UN peacekeeping operations in the world, and life has not improved for many Congolese in the East.

2. Background to the conflict:

The Democratic Republic of Congo has been tragically marked by more than a decade of uninterrupted violence.¹⁸⁰ After the effects of the Rwandan genocide spilled

¹⁸⁰ Since 1960, there have been 11 outright wars in the Congo. Added to 5 wars in Burundi, 2 wars in Rwanda, Uganda's own share of civil strife, and constant low-intensity warfare, this arguably makes the Great Lakes Region of Africa the most dangerous corner of the planet. For a broader historical perspective of post-independence DRC, including the assassination of Patrice Lumumba, the thirty-two year dictatorial and predatory regime of Mobutu Sese Seko, and the beginning of the current wave of violence, see Gondola (2002), Dunn (2003), Willame (1999), Braeckman (2002, 2003), Edgerton (2002), Clark (2002), Nzungu-Ntalaja (2002), and Martens (2002). Particularly interesting is the contrast between Willame's scathing critique of the first Kabila, and Martens' much more sympathetic analysis of the same subject. Gondola's volume is an especially helpful research instrument and introduction to Congo's history. It

over the border, bringing many Rwandan Hutus to mass camps in what was then Zaire, two wars subsequently engulfed the country. The first began in 1996 and ended in the overthrow of Mobutu Sese Seko in 1997. Laurent Kabila and his Tutsi-led rebel alliance, backed by the governments of Rwanda and Uganda, decided to remove Mobutu in response to his support of the Hutu and his persecution of hundreds of thousands of Tutsi that had lived in northeastern Congo for several generations. After successfully taking control over Kisangani, Lubumbashi, and finally Kinshasa, Kabila sent away the Rwandan and Ugandan officers that had put him in power, and tried to distance himself from his main backers. As a response, Uganda, Rwanda, and Burundi seized much of eastern Congo. Laurent Kabila asked Angola, Zimbabwe, and Zambia to intervene on his behalf in return for oil and mining concessions, and ‘Africa’s first world war’ broke out in 1998 (Edgerton, 2002: 224-229).

Though neglected by virtually all of the world powers and international media, an estimated 3.3 million civilians lost their lives in this war.¹⁸¹ This 5-year-long conflict involved seven African countries, more than a dozen rebel groups, and dozens of companies seeking to exploit the country’s natural resources (Nowrojee, 2004: 8).¹⁸²

includes many useful features, such as a chapter-by-chapter annotated bibliography, biographical notes on Congo’s most notable leaders, a timeline of historical events, and current and former topographic names.

¹⁸¹ In a report published on April 8, 2003, the International Rescue Committee found that the conflict in the DRC had caused the deaths of at least 3.3 million between August 1998 and November 2002. This estimate excludes the victims of the 1996-1997 conflict. Most of the deaths were attributed to malnutrition and easily curable diseases, and most often linked to the displacement of populations and the collapse of the country’s economy and health-care system (ICTJ, 2004: vii). However, many large-scale massacres of civilians, from the massacre of Makobola in 1998 to the massacre of Mambasa in 2002, were duly documented by human rights organizations and ignored by major international media outlets. This neglect is hard to justify, considering that the Congo was “the stage of the most deadly conflict since World War Two and host to the largest and most expensive peacekeeping mission in the world” (Autesserre, 2008: 3).

¹⁸² Much of this conflict was driven by the rapid increase in the value of columbo-tantalite (coltan), which, once it was refined as tantalum, became a key component in everything from cell phones to computer chips. The Kivus, Ituri, and Maniema are rich in rare minerals essential to advanced-technology industries from the developed world: cadmium, cassiterite, cobalt, coltan, niobium, tin, uranium, and wolfram. In addition, huge oil deposits have been identified in Lake Albert, a few miles from Bunia (Ituri). A United

Throughout the five-year long conflict, the DRC was effectively split into three areas controlled by three main groups. Kabila's central government controlled the capital and most of central, southern, and western Congo; Jean-Pierre Bemba's MLC (Congolese Liberation Movement), backed by Uganda, controlled northern areas in the Equateur province; and the RCD (Congolese Rally for Democracy), supported by Rwanda, controlled the province of Maniema, most of the Kivus, and parts of Orientale, Kasai Oriental and Katanga provinces (Borello, 2004: vii).

On January 2001, Laurent Kabila was killed, and his son Joseph became the youngest president in the world. The young Kabila promised democratic elections, liberalized the economy, and permitted the deployment of UN troops to observe the implementation of the 1999 Lusaka peace agreement, which his father had rejected. In a short time, Kabila authorized the establishment of opposition political parties, liberalized fuel prices and the exchange rate, and tackled corruption in state-run companies. As a response, the European Union began to invest money and resources in the peace process, and the World Bank provided it with the largest grant ever given to any country until then (Edgerton, 2002: 233-237).

After peace talks hosted in 2002 by Thabo Mbeki, President of South Africa, both Uganda and Rwanda began to withdraw their troops.¹⁸³ However, an agreement with the two main rebel factions opposed to Kabila -the Rwanda-based RCD, and the Uganda-led MLC- was not reached until April 2003. An 'All Inclusive Agreement on the Transitional

Nations Panel of Experts documented with much detail and specificity the amounts illegally exploited and traded, as well as the role played by foreign governments and corporations. See United Nations Panel of Experts (2002).

¹⁸³ Two UNSC resolutions –1304 passed in 2000 and 1341 passed in 2001- had already condemned the invasion of the Congo and recommended that all countries involved withdraw their troops (Iyenda, 2005: 10).

Government' signed by the warring factions meant that they would all be integrated in a power-sharing arrangement as an interim solution in preparation for democratic elections. A government of national unity –composed of representatives of the former government, armed political groups, opposition political parties, and Congolese civil society- was sworn in, with Kabila presiding over a cabinet that included the main rebel leaders as vice-presidents and ministers (Human Rights Watch, 2004: 2). During the transition, which finished with the celebration of elections in 2006, the former factions remained, for all practical purposes, in control of the regions that they had administered during the war.

While the situation in Kinshasa seemed to stabilize, fighting in eastern DRC intensified in late 2002 and early 2003.¹⁸⁴ Emerging from a dispute between the two main ethnic groups of Ituri, different local, national and regional conflicts broke out. Although many times depicted as uncontrolled inter-ethnic warfare dangerously reminiscent of Rwanda's genocide, the interference of foreign powers and competition over economic resources were arguably the two most determinant aggravators.¹⁸⁵ The pastoralist Hema, who had been favored by the Belgian colonizers, and the agriculturalist Lendu had had some squabbles in the past, but peaceful coexistence and intermarriage were common.¹⁸⁶

¹⁸⁴ Human Rights Watch estimates that at least 5,000 civilians died directly from violence in Ituri in the year between the ICC's Statute entry into force and the Prosecutor's announcement to investigate in the Congo. These victims are in addition to the 50,000 civilians that the United Nations estimates died there since 1999.

¹⁸⁵ Rwanda and its RCD allies, working through Kigali's Congo Bureau and under the cover of fighting Hutu *génocidaires*, focused on the extraction of cassiterite and coltan from Ituri and Kivu. Meanwhile, the Ugandan military took over the rich Kilo-Moto gold mine in Ituri. Multinational corporations, such as American Mineral Fields, Ashanti Goldfields, Barrick Gold Corporation, Consolidated Eurocan Ventures, and Heritage Oil, continued their exploitation of the Congo's resources (Martin, 2005: 133).

¹⁸⁶ Both communities are also subdivided in different factions: the southern Hema are also known as the Banyoro; the northern Hema (the Gegere) have integrated with the Lendu and speak the Lendu language (Kilendu), while the southern Lendu are known as the Ngiti. The strong partnership between Hema elites and Belgian colonists guaranteed the Hema's predominance in the educational, political, and economic

In 1999, a group of Hema attempted to bribe local authorities into falsifying land ownership documents to evict Lendu inhabitants from the land. The Lendu retaliated and Uganda, seeking to defend their business partners in this mineral-rich province, intervened by creating and arming the Hema-based UPC (Union of Congolese Patriots), led by Thomas Lubanga, who would eventually become the ICC's first case. Lubanga's UPC was the first ethnically-based political party, but its formation quickly sparked the creation of several other mono-ethnic militias seeking to counter its growth and seizure of power in Bunia. Anti-Kabila national rebel groups such as the MLC and the RCD supported local militia in their conflicts as a way to increase their own base of power in eastern DRC and the transitional government. At its height, the Ituri conflict involved at least three rebel groups (MLC, RCD-Goma and RCD-ML), and five militias (UPC, PUSIC, FNI, FAPC, FRPI). They all engaged in deliberate massacres of civilians, targeting entire villages suspected of supporting rival factions.

These national groups and local ethnic groups in Ituri were, at least in some cases, supported by the Ugandan, Rwandan and DRC governments (Human Rights Watch, 2003: 2). Unlike Uganda, which manipulated several political links simultaneously and shifted alliances continuously, the Kinshasa government steadily exerted some control over Ituri through the RCD-ML, and attempted to protect the interests and the lives of the Lendu and the Ngiti. In compliance with the above-mentioned Pretoria agreement and several UN resolutions calling for the withdrawal of foreign troops from the Congo, Ugandan troops proceeded to leave the country, forcing the UN peacekeeping mission (MONUC) to increase its presence in the region in order to fill the vacuum. At the peak

sphere, and easier access to the inner circles of the post-colonial Mobutu-regime (Vlasenroot and Raeymaekers, 2004: 388-390).

of the crisis, the Security Council authorized an Interim Emergency Multinational Force, led by France and dubbed Operation Artemis, with a Chapter VII mandate to pacify and secure Bunia and its surroundings. For the most part, however, Ituri remained out of reach and control either of Kinshasa or the United Nations, unable to protect thousands of endangered civilians whose plight was largely ignored by the global media but duly reported by Amnesty International and Human Rights Watch.

In reality, the withdrawal of the foreign troops was largely symbolic, as the various military commanders left behind well-organized proxy networks –called ‘Elite Networks’ by the UN- to act on their behalf and exploit the natural resources of the DRC. The killing, looting and pillaging continued, causing the displacement of more than half a million of people, and thousands of deaths from direct violence. Appalling episodes reported by human rights organizations include such atrocious accounts as the massacre of more than a thousand women and children in Nyakunde by Ngiti combatants and soldiers of the APC (*Armée Populaire Congolaise*, or People’s Congolese Army). Since 2005, the level of violence dropped in Ituri, perhaps as a consequence of the expansion of MONUC and the possibility, widely propagated throughout the region, that the ICC would conduct preliminary investigations.

In the Kivus, most accounts attribute the continuation of violence to tensions between Kinyarwanda-speaking Congolese (Rwandophones), and the rest of the ethnic groups, which see themselves as indigenous or native and view Rwandophones as outsiders or foreigners that are to blame for the war and all the problems of the transition.¹⁸⁷ This master cleavage seems to run along the same dividing line of the

¹⁸⁷ Hatred against Rwandophones constituted the most pervasive source of violence. In Kinshasa, newspapers disparaged the Rwandophone community daily, and presented the RCD-Goma as “the Trojan

national rift between Kabila and the Rwanda-backed RCD-Goma. As it is well remembered in the region, Rwanda invaded eastern Congo twice in the last decade, and has participated in many other cross-border incursions. However, as explained in the groundbreaking research of Séverine Autesserre, local and provincial reasons may have been more important.¹⁸⁸

In the Kivus, as much as in the rest of eastern DRC, land tenure is the strongest factor in determining economic survival, and disputes over land have contributed to the persistence of ethnic-based militias and cyclical violence. Rwandophones owed about 80 percent of the land as a result of transactions made under president Mobutu, but the Nande and other “indigenous” groups claimed that the land was theirs and that Mobutu should not have been allowed to sell it because it belonged to traditional authorities. Mai Mai militias in North Kivu fight against the Rwandophone not because of their loyalty to Kabila or their hatred of Rwanda, but mostly because it is the best way for them to settle in their favor the ongoing conflict over land, local administrative positions, and local traditional power. Similarly, Tutsi hardliners refuse any kind of settlement because they are afraid of revenge killings on their families and ethnic group and because they are afraid to lose the local economic and political power acquired during the war (Autesserre, 2007). In South Kivu, RCD-Goma had lost the control of the province following the fighting over Bukavu in May of 2004, but the Mai Mai continued to fight against

horse of the abhorred Rwandans. Rwandophone-bashing was an easy way to show one’s patriotism and to appeal to the majority of the Congolese population” (Autesserre, 2006: 11). Many of the Hutu in eastern Congo came from Rwanda fleeing retaliation after the genocide, but most Kinyarwanda speakers – Banyarwanda in North Kivu and Banyamulenge in South Kivu- are Tutsi who have lived there for many generations. However, during the war, their identity was manipulated along Hutu versus Tutsi, Rwanda versus Congo, and Bantu versus Nilotic lines, despite centuries of peaceful coexistence and intermarriage. The strength of the Mai Mai come from their claims of autochtony and authentic Congolese roots, but they will opportunistically enter into short alliances with the Hutu FDLR in order to fight the more numerous Tutsi over land (Thakur, 2008: 56; see also Jackson, 2006).

¹⁸⁸ Interview with Séverine Autesserre on December 13th, 2007. On file with the author.

Rwandophones, against the national army, and among each other. Meanwhile, Rwanda provided Nkunda and Mutebusi, renegade leaders of the RCD-Goma who had refused to integrate their units in the national army, with heavy arms and ammunition, uniforms, money, and a rear base in Rwanda to regroup and retreat when necessary. Rwandan officials also helped the North Kivu governor, Eugene Seruphuli –a Rwandophone affiliated with the RCD-Goma- arm Rwandophone civilians in Masisi and constitute additional local defense militias (Amnesty International, 2005; Autesserre, 2006: 8). The role of Rwandan officials was documented by MONUC and the United Nations Security Council, including hit-and-run operations across the border and the maintenance of semi-fixed positions in North Kivu in 2004.¹⁸⁹ Rwanda justified its actions on the threat posed by the presence of the FDLR (Democratic Forces for the Liberation of Rwanda), and the need to protect Congolese Rwandophones from ethnic hatred, but many suspected that the appeal of Kivu's mineral resources was far more important.¹⁹⁰

By 2007, the failure to integrate the forces of renegade General Laurent Nkunda led to the resumption of fighting in the Kivus, a conflict that escalated throughout 2008 and displaced hundreds of thousands of people (International Crisis Group, 2007). Even though global media has routinely ignored the Congo, leading Nicholas Kristof to write that “no slaughter has gotten fewer column inches –or fewer television minutes- per million deaths,” this time the all too familiar images of women with babies on their backs walking along unpaved roads and families crammed into cars did make it to the cover of

¹⁸⁹ Evidence of an invasion was sufficient for the United Kingdom and Sweden to suspend substantial quantities of aid to Rwanda (Autesserre, 2006: 6).

¹⁹⁰ The FDLR appears to consist not only of former génocidaires, but also of their family members, Hutu refugees, and political opponents forced to flee by Kagame's take-over post-genocide. Many had arrived in the DRC when they were young, grew up as refugees, and used violence because they had no other means of subsistence. Most observers agree that they do not pose a real danger to Rwanda, and that its last major infiltration of Rwanda's territory took place in 2001 (Autesserre, 2006: 7).

major newspapers in the Western world (Kristof, 2007; Gettleman, 2008).¹⁹¹ The armed militias fighting the government emerged mostly after 2003, and have been resisting the demobilization and reintegration efforts orchestrated by the international community. They include the Hutu *Forces Démocratiques de Libération du Rwanda* (Democratic Forces for the Liberation of Rwanda, or FDLR), more informal and less organized groups such as the Mai Mai, renegade brigades within the Congolese national army –such as the 81st and 83rd brigade of the *Forces Armées de la République du Congo*, or FARDC- and Nkunda's forces (Thakur, 2008: 53). In a surprising turnaround, and after MONUC had refused to confront the rebels directly, a joint-operation led by Rwanda and Congo, whose rivalry has driven much of the conflict in the previous years, resulted in Nkunda's capture.¹⁹²

In Katanga province, which is both the heartland of national politics and the nation's most mineral-rich province, tensions escalated in 2005 and 2006 (International Crisis Group, 2006). In May 2005, officials alleged a secession plot in Lubumbashi and arrested south Katangan politicians and military officers. Furthermore, during the war, Laurent Kabila –Joseph Kabila's father and former president of the Congo- created and armed local Mai Mai militias in the region to stem the advance of Rwandan-backed rebels. As in the Kivus, Mai-Mai militias have resisted integration into the national army and have been fighting each other and the Congolese army over poaching and taxation

¹⁹¹ Kristof even interviewed Nkunda, at a time when an international arrest warrant was pending against him. He reported that Nkunda predictably sees himself as a liberator and not a warlord, and that Pentecostalism seems to be central to his identity and the identity of his forces. At the interview, he wore a button that read "Rebels For Christ," prayed and said grace, mentioned that most of his troops had converted to Pentecostalism and showed Kristof many pictures of the baptism of his soldiers.

¹⁹² One of the experts on the Congolese conflict, Koen Vlassenroot, confessed himself bewildered by the new development, and unsure whether it signified a permanent strategic shift or a more short-sighted political maneuver. Rwanda, many times smaller than Congo, is far more powerful, and Kabila has risked the animosity of some of his allies in the government and his supporters throughout the country by going out of his way to cooperate with Kagame despite the recent history of both countries (Gettleman, 2009).

rights, as well as looting, pillaging, and targeting local traditional chiefs and those who had registered to vote. In 2005, aware that the Congolese government had appointed former warlords from other parts of the Congo as generals of the national army, Mai Mai warlord Gédéon (Kyungu Mutanga) and other leaders demanded senior military posts in exchange for their surrender. Some Mai Mai leaders of lesser importance have been named colonels and majors in the army upon their capitulation. However, after much fighting, Gédéon turned himself over to MONUC on May 2006, accompanied by a group of over 150 combatants, most of whom were child soldiers. He was tried and convicted in the Congo. At the time of this writing, Luis Moreno Ocampo had declared that a first phase of investigations, resulting in the arrest and transfer of three Ituri warlords, had concluded, and that a second phase, which will concentrate the court's resources on the Kivus, is now underway.

3. The ICC in the Congo: from the first situation to the first trial.

In late 2003, the Chief Prosecutor of the ICC, Luis Moreno Ocampo, announced that the Court would shortly commence preliminary investigations in the Ituri district of eastern Congo. His pronouncement was duly followed by President Joseph Kabila's promise of cooperation and, subsequently, the official state referral to the court of crimes within jurisdiction of the court allegedly committed anywhere in the territory of the DRC since the entry into force of the Rome Statute, on 1 July 2002.¹⁹³ For all practical purposes, this has included atrocities committed in the eastern provinces of Ituri, North and South Kivu, and Katanga. Combatants of all armed groups have committed deliberate

¹⁹³ On April 19th 2004, the ICC Prosecutor received a formal referral of the situation in the Congo from Kabila. See Press Release: "Prosecutor receives referral of the situation in the Democratic Republic of Congo," April 19th 2004, available at <http://www.icc-cpi.int/newspoint/pressreleases/19.html>.

mass killings of civilians, widespread sexual violence, torture, mutilation, acts of cannibalism, forced displacement of people, extrajudicial executions, destruction of property, pillage, and other offenses. Depending on the perpetrator, the victim, and the context, these categories can fall under one or more of the offenses covered by the Rome Statute, and many could inevitably overlap. Initially, the Prosecutor estimated that between 5,000 and 8,000 unlawful killings had been committed in Ituri alone since July 1st 2002 (Apreotesei, 2008:4). So far, three suspects have been transferred to The Hague, and the court has opened two field offices in the DRC: one in Kinshasa and one in Bunia, the capital of Ituri. Congo's referral became the first application ever of the novel principle of complementarity in international criminal justice, and it surprised many that had assumed that state-party referrals would come from third countries, and not from the countries involved themselves.

The DRC ratified the Rome Statute on March 30th 2002, and any crime of genocide, crimes against humanity or large-scale war crimes committed after July 1, 2002 on any part of the DRC or anywhere by Congolese nationals may be subject to ICC prosecution, as long as the justice system of the DRC is unable or unwilling to prosecute such cases itself. According to article 15 of the Rome Statute, one of the triggering mechanisms for an investigation is that of the initiative of the Chief Prosecutor, subject to the scrutiny of a panel of judges at the Pre-Trial Chamber. Initially, Luis Moreno Ocampo announced that he would consider the possibility of proceeding *proprio motu*. Shortly thereafter, however, President Kabila, who had already made public his promises of cooperation, decided to issue a referral on April 19th 2004. The DRC government had always been very vocal in its support of the ICC, and had repeatedly expressed its desire

to have the Court investigate ongoing crimes in the country. Due to the precarious state of the Congo's own justice system, this situation seemed to fulfill the principle of complementarity that is central to the institution's purpose.¹⁹⁴ The initial hesitancy to refer the case probably had to do with the transitional government's delicate and complex power sharing agreement, by which many members of the government could be subject to the court's jurisdiction.

So far, the promises of cooperation by the Kinshasa government have proved genuine. The DRC formally deposited its instrument of ratification to the Agreement on Privileges and Immunities of the ICC (APIC) at the UN on July 3rd 2007.¹⁹⁵ Most significantly, the transitional government drafted legislation to implement the provisions of the Rome Statute and harmonize its own penal codes with the foundational text of the ICC. This legislation contains the prohibition of statute of limitations for genocide, crimes against humanity, and war crimes, the rejection of amnesties and pardons for these crimes, the eliminations of immunities for the perpetrators, and the prohibition of the death penalty. The draft legislation also contains the recognition of the legal personality of the International Criminal Court in the DRC, its privileges and immunities and those of its personnel, counsel experts, witnesses and others whose presence is required at the seat of the Court.¹⁹⁶

¹⁹⁴ Utterly debilitated by the conflict, the Congolese judicial system cannot adequately investigate and prosecute these crimes. The judiciary does not have sufficient resources, corruption is rampant, and judicial independence is lacking. After a longstanding history of political abuse and interference, national courts inspire little confidence among the ethnically diverse and politically fractured population, suspicious of government courts and their motives. Perhaps not coincidentally, the ethnic uprising of 1999 in Ituri began when a local court purportedly mishandled a property dispute between the Hema and the Lendu.

¹⁹⁵ Since the court is an independent treaty-based organization and not a part of the United Nations, the ICC and its staff are not covered by the Convention on the Privileges and Immunities of the United Nations.

¹⁹⁶ In some cases, the definitions of certain crimes are broader than those in the Rome Statute. Amnesty International has closely scrutinized the provisions of this draft legislation and raised some concerns, many of which were satisfied with the ratification of APIC in 2007 (Amnesty International, 2003).

Among the civilian institutions formed by the DRC government to monitor, investigate and remedy human rights abuses is the *Observatoire national des droits de l'homme* (National Observatory of Human Rights). The Truth and Reconciliation Commission, established as a result of provisions in the Inter-Congolese Dialogue, began to work on its race-against-the-clock untenable mission of determining the nature, causes and extent of political crimes and violations of human rights committed in the DRC since its independence in 1960, and provide reparations to the victims. However, only two of the five commissions of the transition –the Independent Electoral Commission and the High Commission for the Media- got funded, and the TRC's mandate expired in 2006 with the installation of the newly elected government (Carayannis, 2009: 12).¹⁹⁷ Apart from these two, the UN's Special Rapporteur for the DRC, human rights officers of MONUC and other UN agencies and human rights organizations have gathered evidence of war crimes and crimes against humanity committed in the DRC since 1996 (Amnesty International, 2003: 9-10).

None of the suspects have been accused of genocide, even though it could be argued that the murderous campaigns of Lendu and Hema militias evoked eerie parallelisms with Rwanda. At the height of the conflict, many Hema said publicly that the Lendu, together with the remnants of the Interahamwe in the Congo, were perpetrating an attempt of genocide against them. Similar accusations were made by the Lendu and the Ngiti against the Hema, but the high threshold of the definition of genocide used in article

¹⁹⁷ While the Inter-Congolese Dialogue agreed on the establishment of a Truth and Reconciliation Commission (TRC) to promote reconciliation and victim compensation, donor priorities during the election process, on top of the unprecedented costs of the election itself, resulted in funding only two of the five commissions of the transition –the Independent Electoral Commission and the High Commission for the Media. The TRC thus never got started and, as a transitional institution, its mandate expired with the installation of the newly elected government in 2006.

6 of the Rome Statute makes it highly unlikely that charges of genocide would ever make it to their charge sheet. The three Congolese in custody have been accused of large-scale war crimes, which for an internal conflict fall under article 3 common to the 1949 Geneva Conventions and the Second Additional Protocol of 1977.¹⁹⁸ Common article 3 expressly binds all parties to an internal conflict, including non-state armed groups such as the mono-ethnic militias involved. Interestingly, both Katanga and Ngudjolo belong to the Lendu ethnic group, and their indictments include a much longer list of counts than that of Thomas Lubanga, an Hema militia leader. The Lendu are Bantu-speaking, like the Congolese Rwandophone, and this asymmetry only reinforces their sense of victimization. Lubanga was not accused of murder, sexual violence and sexual slavery, or indiscriminate attacks against civilians, as were the other defendants.¹⁹⁹ The only count of his indictment is that of recruiting child soldiers, an offense shared by most –if not all– parties to the conflict.²⁰⁰ Lubanga has alleged that the underage soldiers had volunteered, but it has been reported that each Hema family was forced to give either one child or one cow to the Hema militias, resulting in compulsory recruitment for the children of the poorest families (Human Rights Watch, 2003: 46). His trial, which finally commenced in early 2009, was delayed for many months when the trial chamber discovered that the Office of the Prosecution had incorrectly applied article 54(3)(e) of the Rome Statute

¹⁹⁸ The difference between internal and international conflict has lost much of its relevance, and it is increasingly difficult to establish which is which. In the case of Ituri, for example, the involvement of foreign armies, directly or through proxies, has been well documented.

¹⁹⁹ Even though there is good reason to believe that the UPC perpetrates many more actions that could be typified under article 8 (2) (e) of the Rome Statute, including blocking humanitarian assistance.

²⁰⁰ Protocol II of 1977 to the 1949 Geneva Convention prohibits all combatants in an internal armed conflict from recruiting children under 15 or allowing them to take part in hostilities. In November 2001, the DRC ratified the Optional Protocol to the Convention of the Rights of the Child on the Involvement of Children in Armed Conflict, which establishes eighteen as the minimum age for direct participation in hostilities, for compulsory recruitment, and for any recruitment or use in hostilities by irregular armed groups.

through the use of confidential documents, an oversight that almost led to Lubanga's release (Apreotesei, 2009: 6).

The arrest warrants of Ngudjolo and Katanga include nine counts of war crimes and four counts of crimes against humanity. They are both accused of leading the Lendu militias in massacring two hundred civilians in the village of Bogoro on February 24th 2003. According to United Nations investigators, the FNI launched a swift and indiscriminate attack against the Hema civilians in Bogoro. Dozens were shot or hacked to death with machetes, and others burned alive in their home. Survivors were beaten and locked in a room with corpses, and women and girls were raped and kidnapped (McConnell, 2008). At times, both Katanga and Ngudjolo were high-ranking members of the Congolese army, which has been often labeled as the main culprit of widespread human rights violations in the DRC.

Human rights groups have demanded that the military and political leaders of the Great Lakes region that are behind the warlords be indicted as well, and that sexual violence, brutally and systematically deployed as a weapon of war in the Congo, occupy a more prominent role in the counts leveled at the accused. In interviews with ICC officials, I was told that the main difficulties that the court faced were protecting victims and witnesses, obtaining enough safety to conduct investigations and gather forensic evidence, and getting the state parties of the Rome Statute to execute the arrest warrants and mobilize to apprehend the suspects. Not one of them entertained the possibility that the Office of the Prosecution was not being more aggressive out of consideration for the political implications of the court's activity. Retaliations against civilians trapped in the warzone have remained, however, a main concern. Multiple missions to Kinshasha and

Ituri have been conducted for the purpose of consulting with civil society groups and victim representatives, and several consultations with similar intentions have taken place in The Hague as well.

4. The consequences of ICC involvement: seeking peace *and* justice.

After years of neglect, the international community has considerably increased the resources devoted to peace building in the Congo. MONUC remains the largest peacekeeping force in the world, is equipped with tanks and helicopters, and other UN agencies have intensified their efforts on three main fronts: democratic elections, disarmament, demobilization and reintegration (DDR) and security sector reform (SSR).

Despite its name, the DRC had not held a democratic election since 1960. The international community bankrolled the 2006 election to the tune of nearly \$500 million, in a vast operation of almost impossible execution.²⁰¹ The DRC occupies an area roughly the size of Western Europe. There were 53,000 polling stations, thirty-three presidential candidates, more than 9,000 candidates representing over 200 parties for seats in the national parliament, and more than 10,000 candidates for provincial elections (McConnell, 2006). Given that the European countries that were paying for this election are also among the main backers of the peacekeeping force and the International Criminal Court, many suspected that the Prosecutor was acting with too much prudence so as not to jeopardize these other processes. Others were also worried that elections would only spark more violence, as the losers in the ballot box would turn to bullets to keep or recover their positions of power. Violent protests and fighting did erupt among Bemba

²⁰¹ The European Union paid for more than three-quarters of the bill.

loyalists and Kabila loyalists in Kinshasa following the elections.²⁰² And in the east, where Kabila won precisely most of his votes, it is argued that Nkunda simply picked up the mantle left by the RCD of Azarias Ruberwa as the protector of Rwandophones commonly disparaged as foreigners and invaders.²⁰³

Demilitarization and security sector reform is the other side of this peace-building strategy. Historically, DDR programs have been implemented as separate from other transitional justice strategies.²⁰⁴ In the DRC, they are strictly tied to them, as it is understood that those militias that are not either disarmed and demobilized or integrated within the government's forces can only become peace spoilers. The World Bank and thirteen other donors fund a Multi-Country Demobilization and Reintegration Program in the Great Lakes region of Africa that includes not just the Congo, but Angola, Burundi, Central African Republic, Republic of Congo, Namibia, Rwanda, Uganda, and Zimbabwe. In Congo alone, between 100,000 and 200,000 combatants had been disarmed and demobilized by 2007. Each former soldier has to decide whether to return to civilian life or integrate the national army. Those who opt for civilian life are given \$110 to cover transport back home and basic needs, and \$25 per month for a year to cover basic living expenses until they can get back on their feet (Boshoff, 2008; Thakur,

²⁰² When the results were announced on August 20th 2006, fighting broke out between Kabila's presidential guard and Bemba's men around the latter's residence in the capital. Kinshasa was the scene of three days of fighting with heavy weapons, leaving a few dozen people killed before it was quelled by forces of MONUC and EUFOR (Reyntjens, 2007: 312).

²⁰³ This quote from John Le Carré's latest novel about the Congo, included in René Lemerchand's forthcoming book, is particularly illustrative of the skepticism over the merits of electoral democracy in the DRC: "Elections won't bring democracy, they'll bring chaos. The winners will scoop the pool and tell the losers to go fuck themselves. The losers will say the game was fixed and take to the bush. And since everyone voted on ethnic lines anyway, they'll be back to where they started and worse." (Lemerchand, forthcoming - on file with the author).

²⁰⁴ In what must be one of the most unpronounceable acronyms, non-Congolese armed groups in the DRC underwent a program of disarmament, demobilization, repatriation, reintegration or resettlement (DDRRR) coordinated by MONUC. Between 2003 and 2007, MONUC repatriated over 14,000 soldiers from Rwanda, Uganda, and Burundi.

2008: 53-55). It is obviously difficult –and expensive- to keep up with incentives such as cash payments, coupons for foodstuff, job placement assistance, health care, civilian clothing, credit schemes, and counseling, that can compete with Kalashnikovs at \$20 and hand grenades at merely 50 cents in a predatory environment (Thakur, 2008: 63).

Any ex-combatant, including those that had not been included in previous peace agreements, could be integrated into the FARDC, a strategy that should logically lead to peace. However, this program has run into serious problems. For example, by co-opting so many militia leaders, in an environment of ever-splintering, ever-multiplying armed groups, the national army has now more commanders than footsoldiers.²⁰⁵ I mention DDR and SSR as evidence that accountability and ICC indictments are taking place simultaneously with programs that function as de facto amnesties for an overwhelming majority of fighters, many of them guilty of atrocities. On January 2005, for example, the government appointed four individuals suspected of perpetrating massacres and other war crimes, as generals in the army. A fifth individual was made a colonel after he had been convicted of committing arbitrary arrests and torture and sentenced to 20 years' imprisonment. One month later, militia leaders Jean-Pierre Guena (known as Shinja Shinja, meaning "throat-cutter" in Swahili) and Bakanda Bakoka –both from Katanga- came forward demanding military appointments in exchange for commitments to disarm their groups. In an interview with Radio Okapi, Guena threatened to burn down North Katanga if he received a rank lower than general (International Center for Transitional Justice, 2005). In fact, almost two hundred thousand former combatants are paid to stop fighting. This is consistent with the general approach of international criminal justice,

²⁰⁵ For example, the FARDC's 14th brigade in North Kivu has 950 generals out of a bit over three thousand troops (Thakur, 2008: 62).

which only targets leaders and high-ranking commanders, and is often overlooked by those arguing for fewer prosecutions in the interest of peace and stability. Furthermore, programs like these can also lead to instability. Many of the rebel leaders had been integrated within the army, often ranked as generals, but that was not enough incentive to co-opt them. Entire brigades of the FARDC have insurrected. The Mai Mai militias, many of them consisting of a few hundred combatants, and sometimes led by children, worked alongside the government during the war, had a seat at the table in the Inter-Congolese Dialogue in 2002, and were given positions in the national assembly, provincial administration and army. However, after 2002, many defected from the army, mostly motivated by personal enrichment through resource exploitation, and resisted DDR as a way to force the government to offer them even higher-ranking posts. When you make finite resources available –in the form of jobs, training, cash installments, or food- you risk exacerbating tensions between communities that receive adequate support and those that do not. It is not only ICC indictments and judicial interference that can provoke instability. In the context of the DRC, so can well-intentioned UN programs to reintegrate former combatants into the national army, and even democratic elections. Neglect and abandonment have fared even worse, while military operations carry their usual risks as well. The joint-operation that led to the killing of several remaining rebel commanders and the arrest of Laurent Nkunda provoked retaliatory massacres. Aware of such dilemmas, Spanish general Díaz de Villegas resigned in 2008 from the command of MONUC, allegedly over disagreements about the consequences that some military moves could have among displaced civilians (González and Pozzi, 2009).

Especially in Africa, where nearly everything of relevance happens at the sub-national and trans-national levels, it is of little use to analyze politics through the traditionally realist prism that understands states as ‘black boxes’ with a defined national interest and sees international law and international institutions as epiphenomenal or irrelevant. In that sense, the so-called post-internationalist literature, with its emphasis on multi-level governance and co-existing and overlapping spheres of authority, can be more helpful to describe the impact of the ICC in the DRC, or to explain the government’s position vis-à-vis the court. It is misleading to imagine the court, as a supranational institution, simply super-imposing its authority over the Congolese government. It is equally misleading to assert that the Congolese government is merely manipulating the ICC and using it as another political tool to advance a particular agenda. Instead, there is a much deeper and more complex interplay between domestic and international structures of governance, mutually influencing and reshaping each other. The ICC is just one piece of a mosaic that includes, besides the domestic actors, the role of neighboring Rwanda and Uganda, a heavily invested international community, and the first democratic elections in more than four decades in the Congo. But it must be understood that, although the ICC is or should be essentially non-political, its activities will have important political consequences in the country. This must be recognized and taken into account so that the court’s broader role is used wisely and can contribute to domestic reform, better governance, and accountability (Burke-White, 2005: 558-559)

First, there are unresolved questions over the Congolese government’s motivation behind the state referral of the Ituri situation to the ICC. When President Kabila announced it, some were surprised, given that the ICC is statutorily obligated to

investigate all sides, and Kabila or his allies were not clean of responsibility themselves. However, the government of the DRC has been, since the Pretoria agreement, a power-sharing scheme that puts together disparate groups and sworn enemies. If most governments do not act unified, that holds even truer for the transitional government of the Congo. It has been suggested that President Kabila did not consult his Vice Presidents, Bemba and Ruwerba, prior to issuing the referral. On one side, the situation in Ituri presented all the objective criteria to call for an intervention of the newly-created international court. There was genuine pressure from the international community to obtain Kabila's cooperation, as most deemed undesirable that the first investigation of the ICC be initiated *proprio motu* by the prosecutor. And it is perfectly probable that Kabila is sincere about the need to close the impunity gap, while recognizing that the collapsed Congolese judiciary was unable to perform this function. On the other hand, Kabila could anticipate that the intervention of the ICC would benefit his position vis-à-vis the upcoming elections. Given that many of the key political actors are somehow implicated in war crimes, international criminal justice offers a powerful mechanism to discredit enemies and reshape the domestic political landscape. Bemba, the second largest vote-getter in 2006, is now in The Hague. Before the elections, Bemba and Ruberwa, who had a powerful influence over domestic judicial reform, attempted to enhance the capacity of the national judiciary so as Congolese courts –which they can more or less control so as to minimize political damage-, conduct the trials instead of the ICC.²⁰⁶

²⁰⁶ Bemba and Ruberwa controlled a number of key governmental portfolios, including Justice, Finance, Budget, Foreign Affairs, and Defense, Demobilization and Demilitarization, which give them authority over domestic judicial reform and potential leverage points to control domestic prosecutions. See Burke-White, 2005: 569.

Although Kabila's hands are not clean, it is unlikely that he has commanded the commission of significant crimes within the jurisdiction of the ICC, since he has not been directly involved in the ongoing conflict in Ituri and the Kivus. Bemba, however, has been repeatedly implicated in war crimes and crimes against humanity in the Ituri region. The RCD Vice President Azarias Ruberwa has also been implicated in numerous crimes in the East, during the RCD's period of rule there. Another Vice President, Abdulaye Yerodia Ndobasi, though initially an ally of Kabila, was previously indicted in Belgium for serious violations of international law.²⁰⁷ However, the ICC will already have enough on its plate with individuals like Lubanga, Katanga, Ndujolo, Bemba, and some other names that are frequently cited in human rights groups' documents and media reports. In fact, if it does not go after more potential perpetrators, it may have more to do with lack of evidence or attribution, rather than a conscious desire to stay in a political comfort zone.

As for Ruberwa and the RCD, one can expect the results of the elections to have a greater destabilizing effect in this faction than the threat of indictments. The RCD, whose military wing once controlled over a third of the country, is unpopular and stands to lose most of its power at the polls, going from being a major national player to a small, regional party. This probability is linked to eruptions of violence in the east, where dissatisfied RCD elements remain a security hazard (International Crisis Group, 2006). A significant disarmament of the FDLR, militias of former Hutu *genocidaires*, would help diffuse Rwanda's perpetual threat to re-deploy troops to eastern DRC on the basis of national security. Interestingly, Ruberwa seems to have moderated its stance over the last

²⁰⁷ The proceedings against Ndobasi were stopped by the decision of the International Court of Justice in *Congo v. Belgium*, which upheld the principle of sovereign immunity, as he was then sitting foreign minister of Congo.

years, which has caused Rwanda to distance itself from him and support instead North Kivu's governor Eugene Serufuli, a hardliner who opposes a successful transition in the DRC and who allegedly assisted Laurent Nkunda in his attack on Bukavu. Serufuli is the architect of the strategy of uniting Rwandaphone Hutus and Tutsis in North Kivu against the remaining population, manipulating ethnic tensions in the province (Boshoff and Wolters, 2005: 11-12, 15).

Alternatives to the ICC do not seem to be preferred by most Congolese. The national judiciary is in dire state, and in the east is almost non-existent. Corruption and political bias would deprive their judgments of any semblance of impartiality. That explains, among other reasons, the failure of the Truth and Reconciliation Commission, which was formed by members of the warring factions, some of them accused of war crimes themselves (Borello, 2004: 18). According to a population-based survey undertaken by the Human Rights Center at the University of California, Berkeley, the Payson Center at Tulane University, and the International Center for Transitional Justice, an overwhelming majority of respondents in eastern DRC believes that it is important to hold those who committed war crimes accountable, and that accountability is necessary to secure peace. When asked what the best approach to attain peace is, arresting those responsible for crimes is chosen over dialogue, truth-telling, and military victory.²⁰⁸

With its limited capacity, the Congolese judicial system cannot adequately investigate and prosecute these crimes. In addition, the nature and scale of the crimes as well as the different nationalities of the perpetrators –representing several other countries

²⁰⁸ See "Living With Fear: A Population-Based Survey on Attitudes About Peace, Justice, and Social Reconstruction in Eastern Democratic Republic of Congo." Human Rights Center (University of California, Berkeley), Payson Center for International Development (Tulane University) and International Center for Transitional Justice. August 2008.

as well as the DRC- calls for international participation in the investigations and prosecutions. The Congolese national justice system is utterly debilitated by the conflict and a longstanding history of political abuse and interference. Although the DRC is known to have many lawyers, magistrates and judges, the judiciary has become ineffectual: deprived of sufficient resources, the system is widely corrupt, uniformly ineffective, and lacking in independence (Human Rights Watch, 2004). Even worse, the judiciary cannot evoke confidence in the ethnically and politically fractured population, suspicious of government courts and their motives. Several experts of the United Nations and the European Union reviewed the criminal justice system of the DRC, determining measures needed for its reconstruction, and suggesting funding proposals for donor governments and organizations. However, given the length of time that it will take to reform the DRC criminal justice system, other approaches should be considered. The DRC government and Congolese civil society have also proposed other approaches, such as an *ad hoc* international tribunal established by the UN Security Council pursuant to Chapter VII of the UN Charter, a regional criminal court or a mixed international-national tribunal. Nonetheless, it should be reminded that the International Criminal Court was created as a permanent institution, precisely to address the problem known as ‘tribunal fatigue’: the process of setting an international *ad hoc* tribunal –electing judges, selecting a prosecutor, hiring staff, negotiating headquarters agreements and judicial assistance pacts, erecting courtrooms, offices and prisons, and appropriating funds- turns out to be too time consuming and exhausting for the members of the Security Council to undertake on a repeated basis (Human Rights First, 1998).

Has the ICC been an impediment to peace? Unlike in Uganda, where many Acholis have expressed their willingness to trade peace for amnesties, the only ones that do not prioritize justice in the Congo are Western diplomats, scholars, and the governments of Uganda and Rwanda. It is true that although the French-led Operation Artemis and the expansion of the UN peacekeeping mission in the Congo (MONUC) in both mandate and troops helped restore a certain degree of order in the region, the killing, looting, and pillaging continued in the east for several years after the ICC became involved. Currently, the situation in the region is one of neither war nor peace, in many ways more reminiscent of organized crime and gang warfare than of conventional armed conflict.²⁰⁹ The self-financing nature of the conflict has led to a systematic criminalization of warfare, as rebel movements, ‘shadow states,’ and foreign corporations continue to engage in illegal economic activities through links with transnational networks (Vlassenroot and Raeymakers, 2004: 385).

Nevertheless, although other factors may account for the overall drop in violence since the investigations began, it cannot be denied that the Court, or the use that either the Congolese government or MONUC have made of the Court, has played a role. Those that claim that war crimes prosecutions make it harder to compromise and negotiate peace, forget that the absence of international criminal justice and the signing of various peace agreements –Lusaka in 1999 and Pretoria in 2002- did not prevent the subsequent conflict (Daley, 2006: 304). President Kabila had attempted to reach a ceasefire agreement in Dar es Salaam, reaching out to all the factions fighting in Ituri, to no effect (Apuuli, 2004: 82). Amnesties and other rewards are sometimes insufficient to entice spoilers.

²⁰⁹ In this unstable mosaic of non-state actors, militia leaders have often lost most of their control over their roaming recruits (Vlasenroot and Raeymaekers, 2004: 399).

Integrating rebel leaders into the regular army, for example, does not guarantee their loyalty, as the insurrection of Colonel Mutebusi and General Nkunda showed. The peace agreements signed in 2008 and 2009 with some rebel forces excluded amnesty for those most responsible for the gravest atrocities, another example of the type of amnesties that is increasingly used in conflicts around the world. One could make the case that, had amnesty for Nkunda been offered, he would have stopped fighting and Congolese civilians would have been spared another year of instability until Nkunda's arrest by Rwandan forces. However, if the past is any guide, it is unlikely that Nkunda's demands could be satisfied with amnesty alone.

The argument that arresting powerful warlords would destabilize the situation and lead to further bloodshed has been disproved so far in Ituri. The arrest of several leaders from the most powerful armed groups did not have any major repercussion other than some loud protests and minor incidents (Borello, 2004: 19). Especially in the Great Lakes region, failure to ensure accountability for grave war crimes has repeatedly led to outbreaks of violence from the groups that felt that their grievances had not been addressed. In Burundi, Rwanda, Uganda, and Sierra Leone among others, the slaughter eventually led to more slaughter, with perpetrators and victims merely reversing roles. Prosecutions, if led by an institution with some degree of legitimacy in the country, can strengthen the reform process by eliminating from the political arena some of the worst offenders. The indictment of Charles Taylor by the Sierra Leone Special Court, for example, undermined his political stature, hastened his departure from Monrovia, and helped to stabilize the region (Human Rights Watch, 2006).

It is clear that the involvement of the ICC has not derailed the peace process. But one can also argue a less modest claim: the threat of indictments is also having a deterrent effect. At a workshop in Cape Town convened by the International Center for Transitional Justice, Marie-Madeleine Kabala, Congolese Minister of Human Rights, was in agreement with most participants when she said that “the announcement by the Prosecutor that he is considering bringing his first case in the Congo, had a pronounced deterrent effect on the armed groups in Ituri.” (Borello, 2004: 31). Of course, international criminal justice is still in its infancy and one should not expect warlords and tyrants to turn magically into agents of peace.²¹⁰ In the case of the Congo, anecdotal evidence and interviews with high-level suspects of crimes in Ituri suggest that the ICC is altering the behavior of criminal actors. Only a month after the Moreno Ocampo’s announcement that he intended to investigate in Ituri, Thomas Lubanga expressed both awareness and concern, and requested a copy of the Rome Statute to consult with his lawyer about the legal implications. In an interview in 2003, while defending his innocence, he noted that ‘there is a palpable pressure not to do certain things’ and that ‘those responsible are now very worried.’ Another suspected war criminal, Xavier Ciribanya, who was the governor of South Kivu until 2004 and had already been sentenced to death in absentia by a court in Kinshasa, commented as well on the effect that the court was having in the leaders of the different factions: “We are all now thinking twice.” (Burke-White, 2005: 587-588). Bemba used to keep a helicopter full of fuel next

²¹⁰ The violence has not reached the levels of 1996-2003, but massacres, sexual violence, and forced displacement of entire villages, have continued to happen sporadically in a situation that is neither peace nor war. Even if the deterrent effect of the court is weak or unproven, there is stronger empirical evidence to support the claim, both in the domestic and the international realm, that criminal law deters private justice and revenge. In Bosnia, Kosovo, Sierra Leone, East Timor, Cambodia, or Rwanda, hybrid and international courts inhibit retaliation by the affected group. After decades of endless cycles of retaliation and counter-retaliation, this could be the case in the Congo as well.

to his office for quick escape. And MONUC has certainly been using the threat of indictments in their negotiations with the rebels. Interestingly, the Mai Mai leader Gédéon refused to surrender directly to Congolese military authorities for fear they would kill or torture him, and went instead to MONUC. Ngudjolo was interviewed before his arrest and transfer to The Hague, and he showed no fear of either local or international justice: “I cannot fear international justice because for what can I be arrested? I have created a political movement. In Congo we have so many criminals, we can’t just talk about the militia leaders. If the world wants justice, they must arrest the whole of the Congo!” (McConnell, 2008).

In fact, transitional justice advocates and many Congolese themselves argue that, if anything, the court is being too slow, too prudent, and too cautious. They routinely demand that more war criminals be indicted and transferred to The Hague. Some of them have been already captured or have turned themselves over. Others, like former Major Jules Mutebusi, remain at large (Human Rights Watch, 2006).

The Lendu militias were also responsible for horrific violence. Floribert Njabu, leader of the Nationalist and Integrationist Front (FNI), was arrested by Congolese authorities after the killing of nine UN peacekeepers in Ituri in February 2005. Njabu has not been brought to trial, and the Congolese government states that they have been waiting for the ICC to complete its investigation before taking further action. One of the worst massacres of the conflict, gruesome even by the standards of the Congolese war, was the responsibility of the APC and Ngiti militias in the town of Nyakunde on September 2002. The killing spree lasted 10 days, including a door-to-door operation called Operation Polio –mass murder as social vaccination. At least 1,200 Hema, Gegere,

and Bira were murdered, although most in Nyakunde believe the number of dead to be closer to 3,000. Rape was widespread and the hospital was a particular target for looting, burning, and slaughter (Human Rights Watch, 2006).

Furthermore, Bemba has only been indicted of crimes committed in the Central African Republic. However, in December 2002, long before Kabila's referral to the ICC, but within the period of valid jurisdiction, the forces of the MLC –led by Bemba- and RCD-National took the town of Mambasa as part of an '*effacer le tableau*' (erase the blackboard) campaign. Besides allegedly raping and looting the town and engaging in public cannibalism, these forces are also thought responsible for the three mass graves near Mambasa discovered by MONUC peacekeepers in January 2003 (Citizens for Global Solutions, 2004: 16).

Advocates of amnesties over prosecutions stress the need to pay attention to political realities. But paying attention to political realities in the Congo would reveal that most of the rebel leaders do not, in fact, lead political movements, or have clear political goals, and that elevating them with political concessions is precisely what leads to further instability and further demands from other groups and other leaders. Despite the pleas of some human rights organizations, the Court does not seem to have the intention to go after the backers of these rebel groups in Kinshasa, Kigali, and Kampala. A more crusading Office of the Prosecution would be looking into the criminal complicity of the presidents of Congo, Rwanda, and Uganda.

The presence of Uganda and Rwanda and their backing of local militias and rebel groups have been singled out as the most important aggravators of the situation. Uganda charged Rwanda with supporting armed groups hostile to it, including the LRA, and the

Rwandan government, in turn, asserted that Uganda was assisting Rwandan rebels the Interhamwe militia involved in the 1994 genocide. First, Uganda, the occupying power in Ituri from 1998 to 2003, exacerbated the initial land dispute between Hema and Lendu that sparked the broader conflict by siding with the Hema. Second, the Ugandan authorities stimulated the formation of new political parties and militia groups, including the UPF. Third, when Ugandan forces exercised control or authority over the civilian population in the DRC, they were bound by provisions of the Fourth Geneva Convention that apply to occupied territories, which obliged them to respect and protect the fundamental rights of the civilian population and ensure public order and safety. Quite the contrary, Uganda failed in its obligation to protect the endangered civilian population. In their attempt to oust Lubanga and the UPF from Bunia, Ugandan troops deliberately killed large numbers of civilians during the attack on the governor's residence and surrounding areas in Bunia, in August 2002 (Amnesty International, 2003). On many other occasions, Ugandan forces failed to protect civilians in areas under their most direct control, sometimes even within one kilometer of the large Ugandan army camp at the airport. Finally, after its withdrawal, Uganda, driven by economic interests, has kept supporting local militias and rebel groups responsible for gross human rights abuses.

Uganda has heavily profited from the riches of the DRC, especially in gold and diamond exports. The United Nations Panel of Experts on the Illegal Exploitation from Natural Resources and Other Forms of Wealth of the DRC, published in 2002, documented the link between the conflict in the DRC and the exploitation of natural resources. They concluded that an elite network of Ugandan soldiers, officials, and politicians, local rebels, and international business plundered the Congo for their own

benefit and to finance the war. According to the Panel, Museveni's brother Salim Saleh and former Ugandan Army Major General James Kazini led some of these networks. The Hema, under the protection of the Ugandan troops, transport primary products from Ituri across the border to Uganda and bring back tax-free gasoline, arms and cigarettes. The elite networks and the armed groups that support them fight against each other over access to the mineral deposits, agricultural production, and local tax revenue, fueling the continuation of hostilities. As a response to this report, Uganda established in May 2001 the Porter Commission, which absolved the Ugandan government and its army officials' involvement in such exploitation, but supported the findings in relation to senior Ugandan army officers, in particular, General Kazini.

But Uganda has not been alone plundering the DRC's wealth of diamonds, gold, coltan, cassiterite, tin, copper or timber. The same UN Panel of Experts accused 85 companies of breaching OECD standards through their business activities. Rape, murder, torture and other human rights abuses followed the scramble to exploit Congo's wealth after war exploded in 1998. Some companies, including from the UK, US, Belgium and Germany, had lobbied to have their companies' names cleared from the list of shame (Walsh, 2003). Heritage Oil is only an example of how multinational corporations can fuel the conflict. This Canadian oil company was given exploration rights by the DRC government. Following the discovery of oil in the Semliki Valley, between Uganda and Ituri, representatives of Heritage Oil were reported trying to make contacts with local chiefs to oust the UPC from Bunia. It should be noted, however, that ICC's jurisdiction is confined to natural persons, to the exclusion of governments, corporations, or political parties.

By most accounts, both Kagame and Museveni share at least political responsibility for the exacerbation of violence in eastern Congo. What is less clear is that they also have criminal responsibility for actual atrocities, or that a prosecutor could link the commission of atrocities directly with orders issued in Kampala or Kigali, and prove this beyond reasonable doubt in a court setting. The same goes for Kabila, who emerged much stronger from the democratic elections in 2006 and receives the support of Western diplomats. Kabila did very well in the elections, deemed relatively free and fair by all observers, including the Carter Center, the European Union, and the Electoral Institute of South Africa (Reyntjens, 2007: 312). Most importantly, Kabila won over 70 percent of the vote in Ituri, North Kivu, and Katanga, and over 90 percent in South Kivu, whereas he scored lower among the Lingala-speaking of Equateur province, western Kasai, and the capital itself. Thus, if there is any indicator of political legitimacy among the victims of the conflict, as measured by relatively free and fair elections that had very high participation from the population, it is that a substantial majority of Easterners support Kabila's rule. That Bemba received such a high number of votes in the most developed part of the country, in the west as well as in Kinshasa, could spell trouble for the future now that the political system has shifted from inclusive power-sharing agreements to a system that magnifies the gap in government seats and positions of power between the winner and the runner-up in a democratic election. Bemba's fluency in Lingala, the predominant language in the west, as well as his successful framing of Kabila, a Swahili speaker, as a foreigner and an ally of Rwanda, yielded him most of the votes that explained his 42 percent overall share of the vote in the runoff election. However, although the anti-Kabila vote is very much alive and strong, and may pose problems as

Kabila tries to accommodate Rwanda and establish a new alliance with Kagame to solve the problems in the east, Bemba is not the charismatic leader of a political movement.²¹¹ Instead, his family and business connections were his most important assets. As the son of one of Mobutu Sese Seko's wealthiest collaborators, and the main beneficiary of much plundering of mineral resources during his years as a rebel leader, Bemba could lavishly finance a very expensive campaign (Lemerchand, forthcoming).

Kabila's popularity among Western diplomats and the United Nations officials is a consequence of how favorably he looks when compared with his father, Joseph Kabila, and with Mobutu Sese Seko. In less relative terms, Kabila's record leaves much to desire. Most importantly, the DRC remains a neo-patrimonial state, dominated by clientelism and nepotism, and where the state's power to distribute national resources more fairly is completely absent. The Congo's national army is notoriously ill-equipped, unpaid, and continues to live on extorting and looting civilians. Finally, the greatest tragedy of the Congo, extreme rape, remains unaddressed. Even with the arrest and prosecution of several rebel commanders, women continue to bear the greatest suffering. Tens of thousands of women have been brutally raped over the last few years. Many suffer from fistula and incontinence, as well as the corresponding ostracism and physical and psychological scars. Sexual violence, deployed as a deliberate weapon of war at times, or the consequence of an insecure environment full of men with guns at others, should occupy a higher place in the priorities of both the international court and the rest of the international community. The inadequacies of the justice system in the Congo are partly

²¹¹ Interestingly, Kabila scored high in the east precisely because, in his fight against the RCD first and Nkunda later, he is seen as the incarnation of popular resistance against Rwanda's hegemonic ambitions in the region. Kabila's ambivalence towards Rwanda is not new, as he went from being Kagame's protégé to his bitterest enemy, and now seems to return to accommodation (Lemerchand, forthcoming).

to blame. The ICC's involvement has prompted several military courts to take up war crimes cases, as in the case of the Mai Mai leader Gedeon Kyungu Mutanga and others for crimes against humanity between 2004 and 2006, but the judiciary and penitentiary systems are still riddled with problems. For example, several dozen army officers were allegedly involved in the rape of more than 100 women in Songo Mboyo in 2003. Among those, only twelve were apprehended, only six were convicted, and they had all escaped in less than a month.

Thus, although some of the latest development -the arrest of Nkunda, the DDR process, the growing number of warlords in the docket of The Hague, and the democratic elections- offer a glimmer of hope, only time will tell. Meanwhile, the Democratic Republic of Congo, for so many years in a row, is still a very sad metaphor of the whole African continent, richly endowed with minerals and natural resources, and yet continuously afflicted by the most abject poverty and violent conflict.

CHAPTER SIX

THE HARDEST CASE: THE INTERNATIONAL CRIMINAL COURT IN SUDAN²¹²

1. Introduction:

On April 1st 2005, the United Nations Security Council referred the situation in the Darfur region of Sudan to the International Criminal Court. Only two months later, the Office of the Prosecution accepted the referral and decided to initiate the investigation. This represented not only the first case referred to the ICC by the United Nations, but also the first time that the ICC becomes involved in a country where the sitting government categorically rejects its jurisdiction and refuses to cooperate. By 2009, the court had set a new precedent by issuing its first arrest warrant against a sitting head of state.

It is still very speculative to ascertain how the Court will fare in such a hostile and complicated political environment. It is often asserted that the case of Sudan disproves the oft-repeated claim that international criminal law can deter the commission of atrocities. There is more than a kernel of truth in this. Almost five years after the ICC began investigating, the conduct of the government of Sudan and its leader, Omar al-Bashir, does not seem to have been substantially inhibited by the threat of international scrutiny, investigations, and prosecution. Evidence of a significant drop in violence or a

²¹² Some of the individuals interviewed for this chapter include Suliman Baldo, Africa Director at the International Center for Transitional Justice, José Luis Vinuesa, European Commission officer in Sudan, Mukesh Kapila, and former Special Adviser to the United Nations, and Alex de Waal, perhaps the world's leading expert on Darfur. ICC staffers interviewed asked to remain anonymous.

behavioral change in either the *Janjaweed* or the Sudanese leadership is slim. This has only reinforced the growing skepticism surrounding war crimes courts, as deterrence sits near the top of the list of unqualified blessings that advocates attach to international justice. This chapter will explore the link between international courts and deterrence in the context of Sudan, and analyze whether the involvement of the court has had a positive, negative, or neutral effect on peace and stability.

Sudan poses the hardest test for the new International Criminal Court. Unlike the leaders of the Democratic Republic of Congo and Uganda, Joseph Kabila and Yoweri Museveni, the government of Sudan, led by Omar Hassan al-Bashir, refuses to cooperate with the court, and is publicly very hostile towards any foreign intervention. Since the Sudanese government actively obstructs the ICC's investigation, the prosecution will not be able to gather forensic evidence, shrapnel from bombs, or samples of poisoned water from wells (Rubin, 2006). Instead, it will have to rely on thousands of interviews and documents provided by Sudanese dissidents and activists, evidence gathered at the Chad refugee camps, and intelligence intercepts, so as to establish the chain of command and determine who controlled the militias and who had the authority to prevent the atrocities. Given that almost all accounts -from the report of the UN Commission of Inquiry to the recent ICC arrest warrant against Bashir himself- accuse the Sudanese government and military, it would logically follow that genuinely cooperating with the court would be tantamount to regime collapse (UN ICID, 2005). Over the last years, I have attended a number of conferences on Sudan, and most discussants seemed both supportive of the International Criminal Court and convinced of Khartoum's culpability, yet the question

of regime change and how it could come about was never part of the conversation or the agenda.

As in the case of Uganda and, less so, the DRC, many argue that the ICC will not deter, but exacerbate violence. Sudanese officials and intellectuals have voiced that threat vehemently, warning that Iraq or Somalia would be “picnics” compared to Sudan if the West intervenes and the situation degenerates into chaos.²¹³ The court and the UN Security Council backing it face the peace versus justice dilemma that comes with every call for accountability in conflicted societies, from Argentina in the mid-80s to Uganda in 2005. With a Comprehensive Peace Agreement holding a fragile peace between North and South after decades of bloodshed, the stakes in Sudan may be higher than anywhere else.²¹⁴

In 2005, television footage showed trucks unloading boxes of documents at the headquarters of the International Criminal Court in The Hague. The documents had been compiled by United Nations’ investigators, and contained photographs and videos of weapons and war damage, along with hundreds of statements from military officers, prisoners, and witnesses to the atrocities (Simons, 2005). In New York, Secretary General Kofi Annan had provided Luis Moreno Ocampo with a list of 51 suspects recommended for investigation and trial. As with an earlier and shorter list, put together by a group of US Senators, the names of the suspects were kept secret. However, it was well known

²¹³ Ahmed Ibrahim al Tahir, member of the Sudanese National Assembly, declared in September 2004, “if Iraq opened for the West one gate of hell, we will open seven such gates.” President Bashir said “Darfur will be a graveyard for any foreign troop venturing to enter.” (Farley, 2006).

²¹⁴ The Comprehensive Peace Agreement signed in Naivasha shares power between the existing Sudan government and the Sudanese People’s Liberation Movement (SPLM) for a period of six years, followed by a referendum on self-determination for the South. John Garang, former leader of the rebels—who soon thereafter died in a mysterious accident—, was to be vice president. Revenues from the oilfields in the South are to be divided fifty-fifty between Khartoum and Southern Sudan. The current national army is to withdraw almost wholly from the South. Pending implementation, the CPA is a remarkably good deal for the South. See <http://www.unmis.org/English/cpa.htm>.

that the list included ten high-ranking members of the central government, seventeen local officials, fourteen members of the *Janjaweed*, three officers of non-Sudanese armies, and seven rebel commanders (De Waal and Flint, 2006: 132). Given that the ICC, in its determination to prosecute only those bearing greatest responsibility, resembles more the Special Court for Sierra Leone than the International Criminal Tribunal for Former Yugoslavia, it is thereby expected that Moreno Ocampo and his investigators will target fewer people for prosecution. So far, this list includes Ali Kushayb, a leader of the *janjaweed*, Ahmad Harun, former Minister of Interior and current Minister of Humanitarian Affairs, and, as of March 2009, Omar Hassan al-Bashir, President of Sudan.

More than other cases, this question is reminiscent of earlier dilemmas surrounding the ICTY and its initial reluctance, due to pressure from Western governments, to indict Milosevic and other Serbian leaders. It was feared that indicting high-ranking Serbs would inevitably torpedo the peace negotiations and provoke further instability. Until the arrest warrants were unsealed, many assumed that the ICC Prosecutor would entertain similar political constraints and decide to be cautious, limiting the indictments to low-level perpetrators, such as a scapegoat from Military Intelligence that President Bashir could surrender to the Court to save his regime. With Bashir's arrest warrant, this option was foreclosed and the peace versus justice dilemma took again center stage.²¹⁵ The announcement of the Court's decision was greeted with protests in Khartoum, and hostility within the African Union, the Organization of Islamic Countries, and even within the United Nations Security Council. China, Russia, and most

²¹⁵ On March 12th, 2009, the headline in *The Economist* read: "The case against Bashir has opened a fissure between those who support international justice and those who fear it."

surprisingly, France have talked about a UNSC resolution asking for the court to defer investigations for the sake of peace negotiations. The immediate expulsion of a dozen aid agencies has put more than two million Darfuris at risk, as they depend on these organizations for food, water, and medicine. Even more to the point, President Bashir justified this action by claiming that these aid agencies were providing the ICC with evidence for his prosecution. The joint UN-AU peacekeeping force can also be endangered, and its task perhaps made more difficult.

On the other hand, it is almost impossible to argue that the security situation has worsened in Darfur since the involvement of the ICC, or the conflict made more intractable. Most of the violence took place from 2003 to 2004, and the level of fighting since then has receded. This may have less to do with the ICC than with the presence of a UN-AU peacekeeping force, or with the fact that the *janjaweed* managed to burn down most villages in Darfur and the majority of those refugees have not returned from Chad. Most importantly, the ICC has not inhibited the conduct of peace negotiations, nor precipitated their failure. Since 2005, there have been two major, partially successful, peace processes, first in Abuja in 2006 and recently in Doha in 2009 and 2010. Furthermore, one of the rebel leaders and former commander of the Justice and Equality Movement, Bahr Idriss Abu Garda, became the first suspect to ever surrender voluntarily to the Court, in connection with an attack on 12 UN peacekeepers. He is at liberty pending his trial, and remains confident in his ability to demonstrate his innocence.

Regardless of the outcome of its investigations, and whether the Court will ever be able to apprehend those within the government and Sudan that are responsible for atrocities, it is certain that no other action has done more to raise the court's profile.

2. Darfur's crimes, victims, and perpetrators:

Most chronological summaries of the crisis in Darfur begin in February 2003, when rebels from “African” tribes –mainly the Fur, Masalit, Zaghawa-, complaining about Darfur’s underdevelopment and lack of political representation, took up arms against the government. In response, the government launched a military campaign and unleashed the Arab militias popularly known as *Janjaweed* against the tribes suspected of supporting the rebels. The result is well-known: roughly 300,000 dead, two million internally displaced and barely surviving in camps, 90 percent of the “African” villages of Darfur burnt, and the innumerable scars of a brutal and systematic campaign of sexual violence against the women of Darfur. In 2004, Mukesh Kapila, UN Humanitarian Coordinator for Sudan at the time, warned that the only difference between Sudan and Rwanda were the numbers involved.²¹⁶ Shortly thereafter, Jan Egeland, UN Under-Secretary General for Humanitarian Affairs, declared it “the world’s worst humanitarian crisis” (Prunier, 2005: 90).

For the first time in history, both the legislative and the executive branch of the US government agreed in using the word “genocide.” Shying away from more decisive action, the international community’s response has been limited to the belated deployment of a joint force of African Union and United Nations’ peacekeepers and the Security Council referral of the Darfur situation to the ICC.²¹⁷ Khartoum’s reaction, meanwhile, has mainly consisted of denial and deception. It claims that its military

²¹⁶ Romeo Dallaire eloquently labeled it “Rwanda in slow motion” (Tinsley, 2005).

²¹⁷ The addition of UN peacekeepers to the AU force came after more than a year of back-and-forth with President Bashir. Hailed as an African solution to an African problem, the African Union had deployed only seven thousand soldiers in the largest region of the largest country in Africa, five times the size of France. In comparison, the candidacy of the city of Paris for hosting the Olympic Games in 2012, could rely on 41,000 policemen and soldiers. The AU force lacked a mandate to intervene and was severely deprived key resources, including, most critically, helicopters (Wax, 2005).

campaign of 2004 was a swift and restrained counter-insurgency operation against rebel groups, and that the atrocities against civilians are either propaganda of Western Islamophobes or, when acknowledged, the action of uncontrollable bandits or the product of old rivalries over resources between Arab nomads and African farmers.

It is unnecessary for the purposes of this investigation to engage in the never-ending debate over whether the Darfur crisis is genocide or not.²¹⁸ The unsolvable dispute over this label has obscured more than it has clarified. Besides, systematic crimes against humanity and war crimes are not less serious offenses. It is also beyond the reach of my argument to ascertain the truth or limits of the identity cleavages –Arabs versus Africans, nomads versus settlers, cattle-herders versus farmers- that supposedly characterize and inflame the conflict. However, a brief background of the conflict is necessary to put this situation in a historical and political context.

Darfur is the largest and most landlocked region of Sudan. It was an independent sultanate for centuries, until becoming a province of the Anglo-Egyptian Condominium in the first half of the 20th century. It has been one of Sudan's states since the independence of this country in 1956. It is often said that the recent crisis is merely the last expression of centuries-long clashes between pastoralists and farmers over limited natural resources: water, agricultural land, pastures.²¹⁹ However, as Professor Fouad

²¹⁸ Journalists and activists such as John Prendergast of the International Crisis Group, Eric Reeves, or Nicholas Kristof, insist that it is genocide. The ICC Prosecutor shares their opinion. The United Nations Commission of Inquiry and the ICC judges concluded otherwise.

²¹⁹ This memorable description, by Robert Kaplan, dates from 1986, but still feels contemporary: "Sudan, about as large as the United States east of the Mississippi River, and stretching from Egypt in the north to Zaire, Uganda, and Kenya in the south, is a microcosm of Africa's ills; indeed, it has all of them in exaggerated form. Famine, particularly in the west and the northeast, affects nearly one fifth of the country's population of 22 million. In northern Sudan the Sahara desert is creeping south. The east, as a result of famine and civil war in Ethiopia, harbors one of the world's largest concentrations of refugees. And in the south a conglomeration of Nilotic tribes, pagan and Christian, led by the Dinka, are waging a separatist struggle against Moslem Arab Khartoum (Kaplan, 1986). More than twenty years later, Stephen

Ibrahim puts it, “this is not the true cause of the current brutal war. In fact, the natural resources of Darfur are not meager at all” (Ibrahim, 1980). Darfur’s poverty has been a consequence of underdevelopment and malign neglect, rather than scarcity. In his pioneering work on the 1984-1985 famine in the region, Alex De Waal compellingly argued that to starve is a transitive action, “something people do to each other” (De Waal, 2002).”

Darfur has lived in a state of endemic insecurity since the famine. Hitherto, Sudan had been dubbed by Washington as “the future breadbasket of the Arab world” and a bulwark against communist Ethiopia. After the drought, farmers increasingly tried to hang on to all potential agricultural land, blocking the nomads from previously used routes and pastures, and Darfur became a time-bomb waiting to explode. Ethnic appellatives entered the discourse to exchange accusations: the “Arabs” accused the “Africans” of enclosing unused tracts of land, and the “Africans” accused the “Arabs” of getting weapons from Lybia and collaborating with Gaddafi’s dreams of pan-Sahelian unity and Arab supremacy (Prunier, 2005: 57-58). For years, these tensions were successfully handled and restrained through Darfur’s ancient tribal mediation system. Accountability for homicide was a communal responsibility and was settled through the payment of blood money to the kin of the individual killed in a feud. As elsewhere in Africa after the end of the Cold War, cheap and abundant AK-47s changed this.²²⁰

Faris made a similar argument about the political importance of drought and famine in the same publication, *The Atlantic Monthly*, this time linking it to global warming and climate change (Faris, 2007). In the same vein, Williams (2007: 1032-1034) links the concept in Darfur with environmental change and desertification.

²²⁰ “A jingle of the time ran: “The Kalash brings cash; without the Kalash, you’re trash.” (De Waal and Flint, 2006: 49).

Omar Hassan al-Bashir and his National Islamic Front had assumed power via a military coup in 1989. Ten years later, a “soft coup” changed the face of the regime: Hassan al-Turabi, the Guide of the Sudanese Islamist Revolution and until then one the most powerful figures of the ruling elite, was forced to resign from his position as president of the Parliament (Prunier, 2005: 81). Bashir had gotten temporarily rid of a dangerous rival.²²¹ For years, he had been bent on centralizing political power down to a small military clique. The NIF –now called National Congress Party (NCP)- had slowly dismembered the state bureaucracy and security structures through sidelining the Sudanese Army in favor of tribal militias and paramilitary forces named Popular Defense Forces (PDFs) and loyal not to the state, but to the regime itself.²²² By 1996, the PDF vastly outnumbered the regular army, whose officer ranks were drastically depleted by repeated purges. It was clear that Bashir wanted to avoid repeating the main mistake of his predecessor: the consolidation of a strong and independent military that could eventually oust him.

After ostracizing Turabi, the ruling elite correctly suspected that most Darfuri party members would side with him, posing a challenge to the regime. In May 2000, a

²²¹ Turabi was not only a challenge to Bashir, but, along with the current vice President Ali Osman Taha, had been the main figure responsible for Sudan’s decade of isolation in the 90s. Obsessed with spearheading an Islamic revolution in the Arab world, Turabi threw Khartoum’s weight in support of Saddam Hussein after the invasion of Kuwait, and opened the doors of Sudan to thousands of militants in the Islamic world, including Osama bin Laden. Turabi and Taha aimed at regime changes from Cairo to Kampala, with the result that by mid-90s Sudan was at war with Egypt, Eritrea, Ethiopia, and Uganda. Especially notorious was the assassination attempt against Egyptian President Hosni Mubarak, allegedly plotted by Ali Osman Taha and security chief Nafie Ali Nafie. By the end of the decade, it was clear that Turabi and Taha’s revolution had failed on both the social and the geopolitical level, and had managed to antagonize Washington. After the 1998 al-Qaeda bombings of US embassies in Nairobi and Dar es Salaam, the US fired cruise missiles against a pharmaceutical plant in Khartoum, making dubious allegations that it was engaged in producing chemical weapons and was linked to bin Laden. Most significantly, the US Congress began to support the Sudanese opposition forces led by John Garang. Bashir demoted Turabi and promoted Ali Osman from foreign minister to vice President (De Waal and Flint, 2006: 27-30).

²²² The Popular Defense Forces emerged in the 80s, and were composed of volunteers associated with the Muslim Brotherhood. According to regime’s propaganda, the PDF’s aim was to wage *jihād* to halt Christian expansion in Central Africa.

document known as *The Black Book: Imbalance of Power and Wealth in Sudan*, was written and distributed by an unheard-of group. It laid out how the state apparatus had been dominated, ever since independence, by a small group from the three Arab tribes who live along the Nile north of Khartoum, and how all the other regions had been grossly marginalized and neglected. Members of these three riverine tribes represented only 5.4 percent of Sudan's population and yet held the vast majority of government positions, from cabinet ministers to their drivers and everything in between (De Waal and Flint, 2006: 17-18). The government deduced that Turabi was behind the book, and that an insurgency was emerging in Darfur. As an anticipatory measure, Khartoum began replacing local administrators in Darfur with handpicked loyalists, and immersed the PDF –until then an apolitical entity- in the politics of Darfur. It was then that, increasingly armed, the Popular Defense Forces started to intervene in support of indigenous Arabs against the Fur, Masalit, and Zaghawa. For years, supremacist ambitions and a constant flow of weapons had infiltrated the region's Arab tribes, a spillover of Gaddafi's attempts at establishing an Arab belt into central Africa. Especially active was a group known as Arab Gathering, which already in the late-1980s had issued directives that, with hindsight, read as battle plans for the *Janjaweed*.²²³ It was also in these years that the word *janjaweed* was first heard in Darfur, and that Musa Hilal, current leader of the militia and first on all the lists of Sudan's suspected war criminals, began to build his violent career.

²²³ Gaddafi had sealed an alliance with Khartoum. In exchange for weapons, the Sudanese government would turn a blind eye to Gaddafi's use of Darfur as a rear base for his wars in Chad. Thousands of well-trained and well-armed militants, members of the Islamic Legion –which recruited Bedouins from Mauritania to Sudan- or part of the Arab Gathering, arrived in Darfur. Since the 80s, leaflets and cassette recordings from the Arab Gathering had begun to be distributed anonymously, proclaiming that the *zurga* (derogatory appellative to refer to members of the "African" tribes of Darfur) had ruled Darfur long enough and it was time for Arabs to have their turn (De Waal and Flint, 2006: 50-53).

The rebels that mounted a full-blown insurgency in 2002-2003 against the government had already formed self-defense groups during the previous decade (Mans, 2004: 291-292). In 1995, heavily armed Arab raiders had stolen 40,000 head of cattle and killed 23 civilians. In 1996, raiders burned seven villages in a single day. Abakir, who would become one of the leaders of the Sudanese Liberation Army (SLA/SLM), began to rally Masalit youths, under the premise that these were not signs of local trouble with Arab pastoralists, but part of a government plan to change the ethnic geography of the region. They had many reasons to believe this: many of them had served in the police or the army for years, and had read the secret directives of the Arab Gathering (De Waal and Flint, 2006: 67-69). As early as 1988, Musa Hilal had been taped thanking Gadaffi's Chadian protégées for "providing his tribe in Sudan with the necessary weapons and ammunition to exterminate the African tribes in Darfur." (De Waal and Flint, 2006: 56).

Several Fur, Masalit, and Zaghawa forged a tenuous alliance based more on common grievances than on a common agenda. It is usually said that the rebellion began with an attack in February 2003. However, during 2002 the rebels had already attacked police stations and army posts with impressive results and alarming military proficiency. The SLA entered into an alliance with another group, called the Justice and Equality Movement (JEM) and closely linked to the Islamist movement, the authorship of the *Black Book*, and perhaps to Mr Turabi himself.²²⁴ Fur MPs in the National Assembly had documented 181 attacks on 83 African villages in Darfur. At least two of them had been settled with Arabs and given Arab names (De Waal and Flint, 2006: 78). The Sudanese

²²⁴ Turabi's connection with the Justice and Equality Movement is often suspected by Khartoum officials and flatly denied by JEM's chairman, Dr Khalil Ibrahim: "We were marginalized in Turabi's time too. Turabi is nothing." (De Waal and Flint, 2006: 88). Turabi has been arrested and freed many times by the government of Sudan. Interestingly, the first political reactions from Khartoum to the ICC arrest warrant were the expulsion of aid agencies and the release of Turabi.

Army, untrained in desert warfare, was losing almost every encounter –34 out of 38 in the middle months of 2003 to the rebels. The head of security in Khartoum, Major General Salah Abdalla ‘Gosh’, warned that this insurgency posed a greater threat to the regime than the war in the South. The government feared it would lose the whole of Darfur, and probably Kordofan too, and decided to rely on its favorite tactic: using paramilitary militias as proxies (De Waal and Flint, 2006: 101).²²⁵

Among other reasons, this method of counter-insurgency was cheap and provided the Sudanese government with plausible deniability in case the atrocities attracted attention. The Sudanese army was already undermanned, under-equipped, and many of its conscripts were Darfuri themselves, members of the tribes that were being “cleansed.” Instead of paying fixed salaries for soldiers and mobilizing and sustaining a conventional armed force, Khartoum’s ruling clique preferred to assign the main task to the paramilitary Popular Defense Forces and the Arab *Janjaweed*, and allow them to loot, pillage, and keep the profits as payment for their services. This tactic was also extremely effective. A few months after announcing “we will use all available means, the Army, the police, the *mujahedeen*, the horsemen, to get rid of the rebellion,” Bashir declared victory. The human cost of this brutal campaign began to make headlines in the Western media after NGOs such as Amnesty International, the International Crisis Group, and

²²⁵ Examples of government-sponsored-violence through proxies are abundant throughout modern Sudanese history. In the 80s, the *muraheleen* (nomads) Arab militias from the Rizeigat tribes residing in South Darfur were employed as raiders against their Dinka neighbors. In 1998, government-sponsored militias attacked SPLA/M positions in the Upper Nile Province to secure oil drilling sites for foreign firms such as Calgary-based Talisman Energy. A similar pattern explains the arming of Chadian Arab nomads against Fur and Masalit populations in the late 1980s and mid to late 1990s. But the most blatant example can be found in response to the rebellion of Nuba tribes in Kordofan in the late 1980s and early 1990s. Declaring *Jihad* against the Nuba in 1992, the NIF trained and armed local Arab militias to fight the insurgency and relocate the entire Nuba population away from their ancestral lands and into camps (Norman, 1999: 228-230; De Waal, 2004: 15).

Human Rights Watch, documented, somewhat belatedly, the atrocities (Grono, 2006: 625).

In the event of a trial, it will be difficult for President Bashir and other high-ranking officials to deny their responsibility as they have consistently done in multiple public statements. In most attacks, the *Janjaweed* did not storm the villages until they had been previously burnt down by the government's air force. The raids were typically carried out by Russian-built four-engine Antonov An-12s, which are transports, not bombers, and thus have no aiming mechanisms. They dropped oil drums stuffed with a mixture of explosives and metallic debris. These primitive, free-falling cluster bombs were evidently unsuited for military targets, and had the only purpose of causing high levels of destruction among civilians. Helicopters and MiG fighter-bombers normally completed a second round, followed by the *Janjaweed*, sometimes in the company of regular Army units. In a clearly programmed pattern, the militiamen would loot personal belongings, rape the girls and women, execute some boys and men, steal the cattle, kill the donkeys, burn the houses, and shoot those who could not run away. There is nothing of improvisation in this type of violence (Prunier, 2005: 100).²²⁶

As Bashir promised, the government used a section of the Sudanese military, organized paramilitaries commanded by Sudanese military officers and senior tribal

²²⁶ Rape was so ubiquitous and systematic in Darfur that it appears to be an instrument of policy to destroy the fabric of the targeted communities, and perhaps even to create a new generation with 'Arab' paternity, a pattern too reminiscent of the use of sexual violence as a weapon of war in Bosnia, Rwanda, and elsewhere (Amnesty International, 2004). Several deserters have begun to talk to the media about the atrocities, confirming that the orders came from the government of Sudan, and that they were told to poison the water wells, burn the villages, kill all the women and "rape girls under 13 and 14." Forcible recruitment, especially of members of the same tribes that were being victimized, was common, as well as the deliberate enforcement of widespread atrocities as policy. "Even the children, if left behind in the huts, we had to kill them. Many couldn't take all their children. If they had more than two they had to leave them behind. If you saw them you had to shoot to kill." (BBC News, March 16th 2009). In 2008, aid workers were reporting that children as young as five were being raped in the IDP camps that are home to several million Darfuris. In some camps, rape has become so common that as many as 20 babies a month born from rape were being abandoned (Robertson, 2009).

leaders, and finally the *Janjaweed*, which operate under their own tribal structure and act many times on their own discretion. But it should be clear that all of these groups, including the *Janjaweed*, receive money, weapons, and orders from Khartoum.²²⁷ Musa Hilal, who was in jail on murder charges prior to the outbreak of the insurgency, was released by government authorities and given the assignment to organize *Janjaweed* brigades in northern Darfur. An intercepted directive from the administration ordered the local security officials to “allow the activities of the *mujahedeen* and the volunteers under the command of Sheikh Musa Hilal.” The directive specifically asked government’s officials to overlook offenses against civilians. Musa Hilal himself never bothered to hide this connection with Khartoum. In an interview with Human Rights Watch, he boasted, “all of the *Janjaweed* in the field are led by top army commanders. These people get their orders from the Western command center and from Khartoum” (UN ICID, 2005).

Musa Hilal, who controlled around 20,000 recruits and whose camp included a helicopter pad for daily deliveries of food, weapons, and ammunition, was also the leader of the Arab Gathering. In August 2004, a directive issued from Hilal’s headquarters, spelled out his ultimate goal: “Change the demography of Darfur and empty it of African tribes.” This directive was addressed to the Intelligence and Security Department, Military Intelligence and National Security, and the ultra-secret ‘Constructive Security’, confirming the involvement of the highest levels of Khartoum’s security apparatus.²²⁸ In fact, Hilal has regularly complained about being called *janjaweed* –who he refers to as ‘bandits’-, but never denies being a government agent. In documents obtained by Darfur

²²⁷ The UN established that the Sudanese government spent around 1 million dollars per day on salaries to paramilitary forces and militia. Volunteers received 79 dollars a month if they were on foot, or 117 dollars if they had a horse or a camel (Kristof, 2005).

²²⁸ According to Alex De Waal, Military Intelligence was the architect, arbiter, and, often, executioner of the Darfur campaign (De Waal and Flint, 2006: 38-39, 109).

experts Alex De Waal and Julie Flint, he sends his gratitude and greetings to his supporters, including some of the most important men in national and regional government.²²⁹

The government was also lying about their use of the air force to indiscriminately target civilians. If the testimonies of thousands of fleeing villagers did not suffice, at least two revealing conversations between Antonov pilots and officers from Military Intelligence were intercepted, exposing the ultimate goal of the air raids. The *Janjaweed* and the planes rarely attacked the guerrillas in their mountain bases. The Darfur campaign –call it genocide, ethnic cleansing, or counter-insurgency of the most criminal kind- was planned from Khartoum *and* executed with the government’s resources and following the government’s commands.

3. The international community and the government of Sudan:

How did Khartoum react when the international community got involved? The government of Sudan had a similar response vis-à-vis humanitarian aid, first, UN Security Council intervention, second, and, finally, the involvement of the ICC. In every instance, it was clear that Bashir and his inner circle were not indifferent, quite the contrary, to any negative repercussions that the international condemnation could bring, and devoted much energy to avoid them. At the same time, the government of Sudan never responded positively to the international community’s demands, refusing to cooperate or alter its course of actions. If the threat of ICC indictments failed to deter

²²⁹ “Major General Omar al Bashir (...), Ali Osman Mohammed Taha, Vice President and the hero of Sudan (...), Brother Major General Adam Hamid Musa, Governor of South Darfur (...), Airforce General Safi al Nur (...), Brother Osman Mohamed Yousif Kibir, Governor of North Darfur...” (De Waal and Flint, 2006: 39).

Sudanese officials, *janjaweed*, or even the rebels, neither did heavy pressure from Western countries and Security Council ultimatums. Two main reasons explain this: on one hand, the government of Sudan has good motives to believe that the ‘foreigners’ are only delivering empty threats and bluffs that they cannot carry out; on the other hand, a policy reversal may not be available for Khartoum anymore, as it is not clear that it is within the government’s power to disarm the Arab militia, and truly comply with international demands. This would perhaps mean the end of the regime.

Instead, Khartoum invariably chose denial and deception. From the start of the campaign, the government tried to black out comment on Darfur. Independent newspapers were suspended, correspondents were arrested and even beaten, and Al Jazeera was closed after it became the first station in the world to report the atrocities in Darfur (De Waal and Flint, 2006: 115). Foreign Minister Mustafa Osman Ismail shamelessly declared, “all those who have been killed, whether militia, rebels, soldiers, or civilians caught in the fighting, do not reach one thousand.” (Prunier, 2005: 135). Although violence never reached the peaks of 2004 –partly because the region had been successfully “cleansed” of African tribes-, the two million refugees and internally displaced Darfuris continued to endure untold suffering, in what has been called “genocide by attrition.” For example, the first shipment of food aid arriving at Port Sudan from the United States was blocked by Khartoum on the pretext that the wheat and sorghum cargo was genetically modified (Prunier, 2005: 108). This was only the first illustration of what would become an almost ritualistic strategy of impediments and hurdles to the distribution of aid by humanitarian agencies. Urgently needed medicines that had been unloaded in Port Sudan, for example, were held up in Khartoum under the

official excuse that they had to be lab-tested before use in the camps in case they were expired or deficient (Prunier, 2005: 133). Visas were denied or delayed, local translators were typically harassed and arrested, and all the red lines marked by the Security Council were crossed without exception.

Khartoum did prepare thoroughly for the visit of UN officials. The government regularized *Janjaweed*, emptied mass graves, and prevented the UN delegation from traveling to the worst affected areas. They arrested and tried some alleged *Janjaweed* in Nyala, but it was soon found that all were petty criminals, some of whom had been in jail for years, and none had been in the militia (Prunier, 2005: 115, 121).²³⁰ Despite government commitments to disarm and arrest the *Janjaweed* in compliance with a Security Council resolution, the militiamen continued to roam free and unimpeded. Months after the agreement to disarm, the *Janjaweed* were operating sixteen camps in just one of Darfur's three states. Five of these camps were shared with regular government forces, and three had pads for helicopters. Sham disarmament ceremonies were organized for visitors (De Waal and Flint, 2006: 104, 111).²³¹ Similarly, the government agreed to halt its military flights, but the air raids did not cease. On the very day that Khartoum signed the agreement in December 2004, seven government aircraft

²³⁰ In January 2005, the UN's Independent Commission of Inquiry reported that the government had been able to cite only once case of punishment since the rebellion began –that of a man who, apparently acting on his own initiative, had burned a single village and killed 24 people (De Waal and Flint, 2006: 111). Khartoum's efforts to prevent ICC jurisdiction by showing that they were taking matters on their own hands became a bit more serious with the establishment of a Special Court for Darfur in 2005. During the second half of 2005, this court conducted a few trials of low-ranking members of the armed forces and the Popular Defense Forces, on charges ranging from murder to armed robbery, theft of livestock, and possession of firearms without a license. Right before the prosecutor's report to the Security Council at the end of 2005, the special court opened three new locations in Darfur itself. As of 2006, the only case dealt with in West Darfur was that of a policeman accused of killing a student that was demonstrating against a militia attack against his village (Williamson, 2006: 23).

²³¹ On August 27th 2004, the UN Special Representative witnessed 300 *Janjaweed* in Geneina hand over their weapons. Locals said they were handed back the following day.

were simultaneously bombarding the Labado area east of Nyala (De Waal and Flint, 2006: 106).

To be sure, the government of Sudan miscalculated, and was surprised by the reaction of the international community. They thought that the Darfur campaign would be a quick fix, similar to their fast repression of the Daud Bolad uprising in 1991, and that no one would pay attention because there are neither Christians nor oil in the region, as opposed to in southern Sudan. The Sudanese leaders were undoubtedly unnerved when the Security Council put Darfur in its agenda, where it stayed for review and discussion every month. But they were only upset to a certain extent, and were more than confident in their ability to out-manuever the United Nations. First, they found out soon that the Security Council had taken sanctions and military intervention off the table. Instead, the Council imposed unenforceable sanctions on several individuals and called on the government to disarm the *Janjaweed*, but attached no consequences for lack of adherence.

Why did the Security Council shy away from more forceful actions? Both Russia and China had sold the NCP advanced MiG fighters, attack helicopters, and tanks during 2003. China National Petroleum Company owns 40 percent of the Sudanese state owned oil production (Taylor, 2006: 949-950). The United States did not want to jeopardize the North-South peace agreement that had cost so many years and effort. After all, the North-South war had lasted for two decades and resulted in a greater number of deaths than those in Angola, Bosnia, Chechnya, Kosovo, Liberia, Sierra Leone, Somalia, and Rwanda, combined. Furthermore, Sudan has been cooperating with U.S. intelligence agencies and the Pentagon post-9/11, providing valuable information on international

terrorists. Sudan's director of National Security, Salah Abdallah Ghosh is, according to various lists, one of the top security men orchestrating Darfur's crimes. Yet in 2005 he was flown to Washington by the CIA for a debriefing, and the American government has been pressuring the United Nations not to make Ghosh a target of sanctions (Rubin, 2006). The Arab and Islamic world, which had worked so hard in response to ethnic cleansing in Bosnia, remained silent on Darfur, choosing Arab solidarity and status quo stability over promoting protection of co-religionists (Slim, 2004).²³² Meanwhile, the Europeans, despite much anti-Khartoum noise, preferred a humanitarian, and thus non-committal, approach to the crisis. The EU and its member states poured more money than the United States, but admitted that its troops were already engaged elsewhere (Prunier, 2005: 140-141). More than overstretched military forces in Iraq, Afghanistan, or West Africa, what transpired on both sides of the Atlantic was a profound international reluctance to see a strong military intervention in the wake of the invasion of Iraq. For several reasons, it is apparent that the Iraq war has caused a serious blow to the appeal of military interventions on humanitarian grounds, so favored and frequently used during the 1990s.

To date, the most decisive actions taken by the UNSC have been establishing the Independent Commission of Inquiry, sharing its results with the ICC, deploying peacekeeping troops, and activating Chapter VII of the Charter to refer the Sudan situation to The Hague. Khartoum offered the same response as with earlier UN actions: refused from the outset to cooperate with the court, surrender one single suspect, or even grant entry to ICC investigators, while at the same time implementing cosmetic and

²³² In the first year of the rebellion, more than sixty-two mosques were burned in West Darfur alone, where the desecration of Qurans was a usual practice during raids. Also, the Justice and Equality Movement has better Muslim credentials than the government forces. De Waal (2002), p. xviii.

deceptive measures to escape jurisdiction.²³³ As the ICC only has jurisdiction when a given country is either “unwilling or unable” to exercise it, Khartoum set up the Darfur Special Criminal Court on June 7th 2005, one day after the ICC prosecutor announced that he was opening investigations into the events in Darfur. This attempt is not very different from the sham disarmament ceremonies. Needless to say, the president and his cabinet, the members of the National Assembly, and the top-ranking members of the armed forces and police are immune from prosecution. So far, the Special Court has heard few cases, and handed less convictions –one of the harshest ones went to a man convicted of stealing 80 sheep. It has not tried a single individual connected to the atrocities; rather, it has punished with 10 to 20 years of jail-time several Darfuri Air Force pilots that refused to fly bombing missions over their homeland. Despite the efforts of organizations like the Amal Center of Nyala, that has compiled thousands of rape cases, crimes of sexual violence are entirely absent from the court’s hearings (Rubin, 2006). Interestingly, in one of the handful of cases they have tried, a defendant faced the charge of looting as defined in the Rome Statute. Although he was not convicted for this crime, this was the first time that the Rome Statute had been used in proceedings in Sudan. In the time since the ICC prosecutor announced that he was after Ahmed Haroun and Ali Kushaib, the government has periodically indicated that it was investigating Ali Kushaib for crimes in Darfur, and in November 2008 the government passed amendments to the criminal code to include international crimes such as crimes against humanity and war crimes (Human Rights Watch, 2009: 103). Of course, the Darfur Special Criminal Court does not fool Moreno Ocampo, nor does Khartoum expect it to.

²³³ One Sudanese foreign-ministry ambassador told the journalist Elizabeth Rubin, “we just have to get one step ahead of the game so we can outmaneuver the ICC when they finally request to send investigators (...). We make national trials, show no impunity, and ruin the ICC” (Rubin, 2006).

But it can quite effectively intensify domestic opposition against ICC involvement, and paint it as another sign of a Western conspiracy against the Muslim world and neo-colonialism.

It is not only the fragile Comprehensive Peace Agreement that is at play. The UN's top envoy to Sudan, Jan Pronk, has reported on growing threats from Al Qaeda against any kind of interference in Sudan by non-Africans (Farley, 2006). As in the other situations examined in this investigation, the questions raised are again: should peace be allowed to trump justice? How can the United Nations be a neutral monitor and implementer of a peace agreement while charging one of the parties with crimes against humanity in another conflict? Amnesties and reconciliation were the favored approach in southern Sudan and in Mali, and seem to be preferred by many tribal leaders in Darfur today. Why would Bashir work for peace with an international arrest warrant pending against him? Does the involvement of the ICC actually hurt the victims, by impeding the work of the humanitarian agencies they depend on for food? On the other hand, is it fair to claim that there is a meaningful peace process underway, susceptible to be short-circuited by the ICC? Prior to the arrest warrant, has the government of Sudan done anything to ameliorate the situation of the refugees or Darfur in general? Can inter-tribal agreements, on their own, satisfy the warmongers and war criminals? Thirty conferences over twenty years have not solved Darfur's problems. The Abuja peace process in Nigeria took place in 2006 *despite* the referral of the Darfur situation to the ICC by the Security Council, and its failure did not seem to be precipitated by the international court. As argued throughout this investigation, amnesties are at least as inefficient as courts and

indictments in preventing the resumption of conflict. Sierra Leone, Uganda, or Haiti are but a few examples of this.

Some members of the Security Council, like Algeria, Nigeria, and the United States, expressed their preference for an *ad hoc* African tribunal, similar to those set up for former Yugoslavia and Rwanda, and in line with the much-discussed principle “African solutions for African problems” of the Brahimi report (Kaufman, 2006: 347-348). In contrast, a large network of African-based and African-focused civil society organizations, created in Pretoria in 2004 under the name ‘Darfur Consortium’, has been actively supporting the intervention of the ICC on the premise that it is both an international *and* an African mechanism (Butegwa, 2006).

According to the UN Independent Commission of Inquiry, an ICC prosecution has several advantages over the existing alternatives: first, the prosecution of the crimes would be conducive to peace and security in Darfur; second, the ICC, sitting far from the perpetrators’ spheres of influence, would ensure that justice is done, regardless of the authority or prestige of the perpetrators; third, the ICC and the Security Council could complement each other and exert great pressure on those responsible for the atrocities; fourth, the ICC’s international composition and rules of procedure place this institution as the best suited organ for ensuring a veritably fair trial; finally, the creation of an *ad hoc* court would delay the process, and the ICC is presented as the most cost-effective option (Du Plessis, 2005). The Commission does not explain, however, how exactly the court will contribute to peace and security in the region.

Nonetheless, the United Nations Security Council, the international organ most directly in charge of peace and security, also faces the obstacle of Khartoum’s

obstruction. Despite having been repeatedly directed by the Security Council to disarm the *Janjaweed*, and having committed to do so on several occasions, the Sudanese government has yet to make even symbolic gestures in that direction (Grono, 2006: 625). The expulsion from Sudan of Jan Pronk, UN envoy to Sudan is only another episode of a long story of failed diplomacy. Although the Sudanese government is not impervious to the pressure of the international community, it will continue to evade its responsibilities as long as this pressure is not unified and strong enough. So far, Chinese and Russian interests in the region, Washington's security concerns, European timidity, and Arab silence, prescribe the prolongation of Darfur's plight. With the violence spilling over to Chad, the rebel groups fighting among themselves, and most victims now dying the slow-death of the displaced refugee, Darfur is starting to resemble Congo rather than Rwanda.

4. The hardest case: raising the stakes of the peace versus justice dilemma:

In a recent interview, the actor George Clooney –also a United Nations Messenger of Peace- weighed in on the peace versus justice debate: “I hear this people that want the ICC to come in and conduct trials, and in a perfect world, that’s fine, but when I’m in El Fasher or in Nyala and I’m with a father of six kids that only has three left alive and I ask them what does he want –justice for the three that were killed or security for the three that are alive-, the answer is always security for the three that are alive.”²³⁴ As this investigation tries to prove, it sounds like the perfect answer to the wrong question. His sentiment is, however, shared by many, and although this dichotomy of peace and justice has been present since the beginning of the conflict and the involvement

²³⁴ Interview with Charlie Rose on April 11th, 2001, available at <http://www.charlierose.com/view/interview/9033>

of the international community, it certainly reached a boiling point when the international court decided to go ahead with the arrest warrant against the President of Sudan, requested by the Prosecutor in the summer of 2008.

In March of 2009 a panel of ICC judges ruled that President Bashir should answer two counts of war crimes and five counts of crimes against humanity. Interestingly, the panel rejected pursuing an accusation of genocide, saying that there was insufficient evidence of a specific intent to destroy particular ethnic groups in Darfur.²³⁵ The United States and the European Union welcomed the ICC ruling, but some Arab and African nations said it would hinder Darfur peace efforts.²³⁶ The African Union, for example, warned that the ruling could strike a fatal blow to the peace process. Egypt called for the United Nations Security Council to defer implementation of the warrant for at least a year. The African Union commission chairman summed it up with this statement: “We support the fight against impunity, but we say that peace and justice should not collide, that the need for justice should not override the need for peace.”²³⁷ The Organization of Islamic Countries and the Arab League reacted in the same vein. Most infamously, the president of the United Nations General Assembly, Miguel d’Escoto Brockmann, raised a

²³⁵ Bashir’s charge sheet includes intentionally directing attacks against civilians, pillaging, murder, extermination, forcible transfer of civilian populations, torture, and rape. As the recent acquittal of Serbia’s ex-president Milan Milutinovic demonstrates, it is not easy to prove intent up the chain of command. Though head of state when the deeds were committed, Milutinovic was not deemed to have been in the loop. Command responsibility appears to be hard to prove in a court of law. Otherwise, the prosecution might attempt to charge Bashir with joint criminal enterprise, which is used as a dragnet to catch individuals who may not have individual culpability for a crime but who are deemed to have common purpose with others who have actually committed the crimes. This charge is often used in the United States to catch racketeers and gangsters, and it would have very significant consequences if used in international criminal justice against a sitting head of state or government ministries.

²³⁶ In one of the most surprising turn of events in the short history of the ICC, Nicolas Sarkozy, President of France, had stated at the General Assembly that Paris *could* support freezing a possible war crimes indictment, via article 16 of the Rome Statute, if Khartoum radically changed its policies in Darfur (Reuters, September 23rd 2008).

²³⁷ Not all African countries shared this position. Sierra Leone, for instance, a country that experienced civil war, amnesties, and international prosecutions, has emerged as a strong proponent of justice and a firm believer in the role it must play in ending conflicts (The Economist, March 12th 2009).

few eyebrows when he accused the ICC of racism and neocolonialism (MacFarquhar, 2009). China urged the ICC to suspend its case, saying it risked destabilizing Darfur.²³⁸ A spokesman of the government of Sudan stated that “the court is only one mechanism of neo-colonialist policy used by the West against free and independent countries” and ten foreign aid agencies were immediately expelled, accused of being part of a plot to gather evidence for the ICC prosecution team.

Thousands of government supporters gathered in Khartoum to denounce the court and express defiance against the West in general, as they had done when the Prosecutor first requested the warrant. Some representatives of Sudanese opposition parties worried that a warrant could derail the democratic elections scheduled for this year, in which Bashir is a candidate and his main political rival is Vice President Salva Kiir Mayardit, leader of the SPLA. These are the first democratic elections with multiple political parties in many years. A Sudanese political leader that publicly supports the ICC in principle stated that this was “a classic case in which justice and stability are at loggerheads” (quoted in De Waal, 2008). Additionally, news about the arrest warrant broke as peace talks between the government and JEM were being conducted in Doha. Khalil Ibrahim, the leader of JEM, said that Bashir should turn himself in and that the arrest warrant would not affect the peace talks. JEM pulled out of the talks shortly thereafter (BBC News, March 16th 2009). Most of Bashir’s enemies in Sudan –in the South, East and West of the country- celebrated the indictment, including many of those that are at risk of suffering retaliatory moves (The Economist, March 12th 2009). Sudan has signed, but not ratified the Rome Statute. However, as a UN member, Sudan is obliged to respect the UN

²³⁸ China’s statement also took sides on the peace versus justice debate: “China is opposed to any action that could interfere with the peaceful situation in Darfur and Sudan.” (BBC News, March 16th 2009).

Charter, and article 25 of the Charter provides that all member states agree to accept and implement Security Council decisions, such as UNSC Resolution 1593 referring the case to the ICC, or subsequent resolutions urging the disarmament of the *janjaweed* (Apreotesei, 2008: 9).²³⁹

In the United States, *The New York Times* published an op-ed by Franklin Graham titled “Put Peace Before Justice.” It said, among other things, that Bashir was someone with enough flexibility to deal with, and crucial to maintaining the 2005 peace agreement between the government and the SPLM: “Given all the warring factions in Sudan, there is no guarantee that his replacement would be better (...). His arrest could threaten the south’s elections and referendum, and hurl the country back into civil war. His removal could also spur retaliation by Bashir loyalists and other forces against civilians, United Nations peacekeepers, or international aid workers (...). Justice without peace would be a hollow victory” (Graham, 2009).²⁴⁰ Interestingly, the opposite opinion was offered by another well-known figure in the Christian church, Desmond Tutu, normally associated with a greater emphasis on forgiveness and reconciliation: “There is no peace precisely because there is no justice” (Tutu, 2009).

To be sure, there had been many voices against international intervention before the arrest warrant, even within the United States, where public awareness about the plight of Darfur was relatively high. In May 2006, *The New York Times* ran a controversial op-

²³⁹ Eleven states voted in favor of UNSC Resolution 1593, none against, and four (Algeria, Brazil, China, and the United States) abstained (Kaufman, 2006: 345).

²⁴⁰ Franklin Graham is the president and chief executive of Samaritan’s Purse and the Billy Graham Evangelical Association. The religious underpinnings of his position as a longtime activist in Sudan are clear: “Ultimately, justice will be served by a power higher than the International Criminal Court.” Bashir’s demonstrations of flexibility towards Graham’s organization include the grant of limited access to a hospital that they operated after it was seized by government forces, as well as some television time to broadcast a Christian program at Christmas and Easter. Strangely, those token actions seem to weigh more in Mr Graham’s opinion than the destruction of more than 500 Christian churches by Bashir’s forces, or the bombing of one of his hospitals in the South nine times in one year.

ed piece that blamed the Darfuri rebel groups for the both the beginning of the crisis and the failure of the peace negotiations, implied that humanitarian organizations like Save Darfur had only made matters worse, and called for the international community to let Sudan's army "handle any recalcitrant rebels." (Kuperman, 2006). In a conference at Columbia University, one of the most renowned African scholars, Mahmood Mamdani, argued that it was more accurate to think of the conflict in Darfur as the typical cycle of insurgency and counter-insurgency, and that Khartoum was waging its own war on terror against the SLA and JEM, and that calling it genocide only imperiled peace negotiations –just as including Iran in the 'Axis of Evil' had made it doubly harder for the United States to achieve a constructive outcome in its relationship with this country.²⁴¹

Were the critics right? Had the ICC been handed a task that was bound to fail? Sudan may well be an example of a situation that yields neither peace nor justice. In this way at least, it also conforms to the central thesis of this investigation, that is, that the peace versus justice dilemma is rarely a question of either/or, but rather of neither/both. What is disingenuous is to suggest that the pursuit of justice has run counter to the pursuit of peace, or that one has torpedoed the other. The critics would have a stronger argument if there were indeed a meaningful peace process under way which the indictment would jeopardize. Since the conflict began six years ago, however, it has not been clear what anyone would be gaining if justice were to be traded off.

First, there had been several rounds of peace talks throughout the years. As early as April 8th 2004 there was a Humanitarian Ceasefire Agreement, signed in Ndjamena,

²⁴¹ Mamdani even pointed out that it was quite hypocritical for the same groups that protested the invasion of Iraq to support an intervention in Sudan ("Sudan Divided: The Challenge to Humanitarian Action" in Columbia University, February 22nd 2007). Strikingly, this all-day conference featured several prominent speakers, and none made mention of the ICC. For more, see Mamdani (2009) and reviews of its latest book, such as by Nicholas Kristof (2009) and Richard Just (2009).

Chad. It allowed the African Union to dispatch ceasefire monitors, which would eventually grow into AMIS. However, there were two versions of this pact, no agreed text, and the ceasefire was not observed. At the time, Khartoum's preoccupation was not the ICC, but the end of the war with the SPLA in the South. While the more moderate leaders in Khartoum, such as the Vice President Ali Osman Taha, argued that peace deals in both the south and Darfur would lead to the normalization of relations with the United States –and thus the American government would support the unity of Sudan-, others, such as the country's security chief Nafie Ali Nafie, argued that whatever concession was made, the United States would simply demand another one, until it achieved either regime change or the complete dismemberment of Sudan. Since 2005, Taha's influence has waned while Nafie's has increased (De Waal, 2007: 1041-1046).

Darfur gained international attention just as the negotiations to conclude the long-running hostilities between the central government and the SPLA were approaching an end in Naivasha, Kenya.²⁴² During the first half of 2004, the Western countries more heavily involved in the Naivasha process -the United States, the United Kingdom, and Norway- hesitated between dealing with Darfur as part of those negotiations, or at least stabilizing Darfur before concluding the talks, on one hand, or completing the CPA while the Darfur problem remained unresolved, on the other. Due to considerations of timing and feasibility, they preferred the latter. The SPLA, as well as representatives from the international community, did not want the peace between the north and the south to depend entirely on the outcome of the Darfur conflict. Instead, it was decided to address each problem sequentially.

²⁴² It should be noted that throughout the war between North and South Sudan in the 1980s and 1990s, the UN Security Council remained silent and never once condemned the central government or the rebel factions for human rights abuses and atrocities.

The merits of this strategy can be debated endlessly, but in Darfur the situation only got worse. To complicate matters even further, the government of Chad declared a state of war with Sudan in December of 2005.²⁴³ Khartoum allegedly supports the Chadian rebels of the Rally for Democracy and Liberty (RDL), which have been harassing the central government of Idriss Déby over the last years. In a pattern replicated all over the region, in which countries wage war against their neighbors through proxies, Sudan also accuses Chad of supporting the Darfur rebels. Hundreds of thousands of refugees from Darfur have been stranded in camps set up by the United Nations in Chad. As peace erodes in Chad as well and impedes the distribution of humanitarian aid, they run the risk of being victimized at both sides of the 600-mile border. An agreement to stop supporting each others' enemies was signed in May of 2007 in Saudi Arabia, but it is unclear whether it has been implemented.

Jan Egeland, UN Undersecretary General for Humanitarian Affairs Coordinator, called 2006 the worst year of the conflict in Darfur.²⁴⁴ Khartoum continued to bar humanitarian organizations from entering the area, and the international community spent two years issuing Security Council resolutions asking for the disarmament of the *janjaweed* and pressuring Bashir into accepting the deployment of a peacekeeping force in Darfur. It should be noted that Bashir had strongly rejected any foreign presence in Sudan for at least eighteen months prior to the ICC referral –a point rarely taken into

²⁴³ The intermittent Chad-Sudan war is directly intertwined with the fate of Darfur and the root of its problems. In the 1980s, the civil war in Chad spilled over into Darfur, and Khartoum looked the other way as militia drawn from Darfur's Arab tribes, supported by their Chadian brethren, tried to seize land from the Fur and the Masalit. The government of Sudan would, time and again until present day, choose to distribute arms to one side –always the Arabs– to suppress the other.

²⁴⁴ As Darfur sank deeper and deeper into misery, Sudan was experiencing double-digit economic growth due to the oil boom, and its benefits were being felt almost exclusively in the Arab heart of the country. In 2005, for example, the IMF predicted an annual growth of 13 percent. Oil accounts for about 80 percent of the country's exports, and most of the foreign direct investment comes from China and the Gulf states (The Economist, August 3rd 2006).

account by those that blame the ICC as the obstacle to the deployment of blue helmets into the region. After all, there was already a peacekeeping force in the South, which had chosen to forgo accountability for crimes committed over the last two decades of civil war.

As mentioned above, De Waal notes that, at this point, policy reversal was no longer available for the government of Sudan, and it was beyond their capacity to actually disarm the *janjaweed*, as requested by the Security Council. If the United Nations aimed at taking charge of this task, the prospects were not any brighter. Most successful disarmament initiatives have been voluntary, as with the United Nations DDR programs in other countries of the region. Somalia in the early 1990s is a well-remembered example of a coercive disarmament attempt gone awry (De Waal, 2007: 1045). To put it into perspective, a combined air-and-land attack by the Chadian Army and France's Special Forces was needed to defeat the first *janjaweed* along the Chad-Sudan border in 1988. Back then, there were fewer than 500 *janjaweed* militiamen. Today, there are more than 20,000 (De Waal, 2006b: 1).

Furthermore, many *janjaweed* units are now part of the Sudanese regular forces. A war on the *janjaweed* with the purpose of disarmament would entail declaring war on the Sudanese government. Only a very robust peace enforcement operation and a no-fly zone that could isolate Darfur from Khartoum's actions could have some meaningful impact in the lives of Darfuris, but that would imply sending upwards of fifty-thousand troops to another desert war in a Muslim country.

President Bush, who had notoriously scribbled 'not on my watch' in the margins of a brief on United States' passivity during the genocide in Rwanda, asked for

alternatives. The United States was, after all, the only country that labeled it a genocide. However, it was quickly understood that the United States government could not get mired in another shooting war in the Muslim world, especially in a country that held very little strategic value for the Americans.²⁴⁵ In early 2006, Bush empowered Zoellick –now president of the World Bank- to seek a peace deal between Khartoum and the Darfur rebel groups. Thus, the Bush Administration had chosen to pursue a policy of engagement with the Sudanese government, despite knowledge of its involvement in the orchestration and commission of the atrocities (Abramowitz, 2007). Hence, while the ICC had already accepted the Security Council’s referral of the Darfur file, and the prosecution had opened its investigations, peace negotiations took place in 2006 in Abuja, Nigeria.

The result was the Darfur Peace Agreement, accepted only by a faction of the SLA, led by Minni Minawi. The rest of the SLA, led by by Abdel Wahid, and the Justice and Equality Movement, refused to sign because the agreement did not adequately address the underlying sources of the conflict. It is possible that Wahid saw the involvement of the ICC as a sign that the international community was on their side, and that they would be better off holding out. It is much likelier, however, that Wahid was actually emboldened by the probability of an armed intervention by the United Nations similar to what had happened in the 1990s in the Balkans. As a whole, the DPA had turned out to be a very fragile accord (ICG, 2006). The rebels that signed the agreement

²⁴⁵ For a critical overview of US strategy in the horn of Africa, see Prendergast and Thomas-Jensen, 2007.

have accused the government of continuing to bomb their headquarters and adjacent villages around East Jebel Marra (Reuters, September 14th 2008).²⁴⁶

After the signing of the DPA, Darfur witnessed increased combat, further government reliance on aerial bombardment, and continued use of *janjaweed* militia. The situation of two million displaced Darfuris was catastrophic, and the effective distribution of humanitarian aid was rendered quixotic by Khartoum's obstructionism (ICG, 2007). Bashir's defiance vis-à-vis the Western countries, the United Nations, and the ICC did not let up. For example, one of the court's indictees was Ahmed Muhammad Harun, who had been Minister of the State for the Interior and head of the Darfur Security Desk, and thus allegedly in charge of recruiting the *janjaweed*. When the court unsealed his arrest warrant, the Sudanese government responded by appointing Harun as Minister of State for Humanitarian Affairs, and then Sudan's liaison with the United Nations/African Union Mission in Darfur (UNAMID).

In the end, it was China's pressure that forced Bashir into reluctantly accepting a hybrid force of UN and AU peacekeepers in Darfur. This joint operation now amounts to more than 15,000, including police and civilians, and this makes it the United Nations' second largest peacekeeping operation in the world, after MONUC in the DRC. However, let us not forget that Sudan is the largest country of the continent, bordering seven other conflict-prone states, and that Darfur is its largest region (Jooma, 2006: 49). It has already run into several problems, and its aircraft have been targeted several times by the rebels, who mistake them for government helicopters (Reuters, September 18th 2008). Back in 2007, a UN report had accused the Sudanese government of violating a

²⁴⁶ Minawi, who received an office in the presidential palace for his new post as presidential adviser, closed it in protest for the bombings.

string of international agreements by painting their planes and adding insignia to make them look like UN aircraft.

Almost unexpectedly, JEM launched a very bold attack on Khartoum in May of 2008. It was the first time that a regional insurgency had ever reached the capital, and it resulted in 200 deaths and hundreds more injured. Ironically, the Sudanese government responded with trials, sentencing to death several rebels and at least one senior commander (Reuters, July 29th 2008). It was around the same time that Luis Moreno Ocampo requested an arrest warrant against President Bashir, drawing scorn from the government of Sudan and some African and Arab leaders.²⁴⁷

Those that prefer politics instead of courts, and pragmatism instead of normative idealism, have a stronger case in Sudan than in the other situations in the ICC workload. Unlike Kony, Bemba, or Lubanga, Bashir is the president of a country, and has an army at his disposal. He has political resources and support that the others lack. It is unclear how the arrest warrants could be enforced while he remains in office, barring an internal coup or outside intervention. By most accounts, Bashir's actions seem driven by calculations of internal threats more than by his assessment of how threatening the ICC or the UN troops in Sudan might be.

Prosecutions have only been possible where the regime has either been militarily defeated or there has been a substantial change in the target regime's composition or agenda. This alone should not discourage advocates of ICC prosecution. Indictments can hamper the political career of the accused, and weaken their hold on power in the long

²⁴⁷ Even the presence of UNAMID was questioned. A presidential spokesman, for example, said that it was impossible that they would accept that "an international force that we don't command stays in Darfur with a warrant of arrest on our president." (Reuters, July 22nd 2008). At the time of this writing, the government of Sudan has not acted on such threats.

run. Charles Taylor's arrest is a reminder that, as demands for accountability proliferate, war criminals will have to be careful about their travel destinations, and concerned about their eventual overthrow or retirement.

Skeptics of war crimes' courts argue that, since they convict few people, solve few social problems and grievances, and deter no one, international courts are in reality set up to mask the inaction of rich countries. Initially, the International Criminal Tribunal for former Yugoslavia was born out of an attempt to deflect criticism for European and American passivity during the mass atrocities in Bosnia.²⁴⁸ It is plausible that the referral of the crisis in Sudan to the ICC was a second-best option to avoid sending NATO troops, a strategy to mask the inaction of rich countries. This argument has more than a grain of truth, but it helps very little in an assessment of the judicial process itself. Like the ICTY in its context, the ICC will act independently of those that triggered this particular mechanism. Courts quickly gather their own momentum and can sometimes surprisingly defy political constraints.

Nonetheless, most disenchantment with international courts has to do with the failure to deliver as the promising tool of deterrence that advocates augured. To be sure, the debate around the promises and dangers of international criminal justice has been marred by exaggeration on both sides. On one side, detractors and skeptics blame international courts for the perpetuation of violence in specific settings and the potential to provoke the commission of more atrocities rather than less. On the other, advocates enthusiastically attach to the cause an ever-expanding list of unrealistic goals. Thus, war crimes tribunals are not only expected to help in the apprehension, trial, and conviction of criminals, but, in addition, to reinforce the rule of law, enhance accountability, stigmatize

²⁴⁸ Hazan (2004).

malefactors, educate citizenries, heal societies, pacify conflicts, and prevent future ones. In fact, the ability of international criminal law to deter criminals from their wrongdoing is one of the arguments most used by supporters, and most discussed by scholars and practitioners alike. As Farer (2000) puts it, can prosecutions restrain the barbarians?

The deterrent effect of international courts remains a plausible, but largely untested, assumption. Nicholas Kristof (2005), arguably the Western journalist that has followed the crisis most closely, emphasizes the shrewd opportunism of Sudan's leaders and asserts that whenever the international community intensified its pressure on Khartoum, the level of killings and rape subsided. Unfortunately, these tactics tell more about the ability of Sudan's leaders to "play the game" than about the deterrent power of international institutions.²⁴⁹

Regarding international courts and deterrence, two things can be argued more forcefully. First, while indictments do not stop atrocities, many signs indicate that they instill a certain fear, which signifies a deterrent potential. Serbs did not stop killing in Kosovo, but they took greater care to hide the evidence. In East Timor, the militias carried victims hundreds of miles to mass graves over the border, for fear of war-crimes investigators. The same applies to the leaders of Sudan.

Second, stronger empirical evidence supports the claim, both in the domestic and in the international realm, that criminal law deters private justice and revenge. In Bosnia, Kosovo, Sierra Leone, East Timor, Cambodia, or Rwanda, hybrid and international courts inhibit retaliation by the affected group. Translated to the context of Darfur, it is arguable that successful prosecutions, and even the mere prospect of them, may inhibit present and

²⁴⁹ NATO Secretary General Javier Solana described Slobodan Milosevic's tactics in 1998 as "one village burned every day; but no more, so as not to upset NATO (Hazan, 2004: 118).

future generations of Darfuri groups to avenge the atrocities by inflicting them on the perpetrators' kin. It could be argued that the involvement of the international community through UN-AU peacekeeping and the ICC has not quelled the rebels' actions. As a matter of fact, the rebels' most aggressive and ambitious attack took place in May of 2008, when JEM launched a quixotic attack against Khartoum itself. Nonetheless, this happened in spite of the presence of a possibly unenforceable threat of international justice, not in spite of the presence of international justice itself. Neither had the root causes of the conflict been addressed, nor was there any sign that those most responsible for the ethnic cleansing of Darfuri tribes would be held accountable. Secondly, it is interesting that Khartoum's main response to the attack was mass arrests and trials, while at the same time they demand that the international community forgo prosecutions for the sake of negotiations, peace, and stability.

Another factor deserves further exploration: is policy reversal even an option for Khartoum? By the time the Security Council took up the Darfur file, most of the atrocities had already been committed. Furthermore, while using paramilitary forces has the benefits of improving deniability, it gives the government limited control over its proxies. Locked in path dependence, Sudan's leaders would be discouraged from risking a drastic reversal of policies. Musa Hilal himself warned the government that they would not retreat. Perhaps Khartoum was well aware that it could not disarm the *Janjaweed* even if wanted to (De Waal and Flint, 2006: 122). As it happens in many failed states in Africa, leaders turn very often to a strategy of warlordism, as a result of their own weakness and to shut out potential power rivals within the state bureaucracy, security apparatus, and traditional patronage networks. This strategy has its obvious

shortcomings, and forces the regime to use it chronically in detriment of the country's well being. However, in the absence of traditional features of sovereignty, such as control over territory, the existence of a centralized monopoly of violence, and some societal legitimacy –in the Gramscian sense of the word-, the priority of the rulers of a weak state becomes their own survival.

In any case, it is difficult to establish causal or predictive hypotheses regarding the deterrent potential of war crimes courts. The enforcement mechanisms of international criminal law are still in their infancy, and the number of successful prosecutions has been paltry compared to the scale of crimes. The purpose of penal sanctions in international law is largely coextensive with that in national legal orders. With regards to domestic criminal law, scholars and practitioners debate the intensity of deterrence, the relationship in terms of crime reduction between deterrence and harsher sentences, and the possibility and conditions of rehabilitation (Farer, 2000: 91-92). In the international realm, however, the link with deterrence is even weaker. Several reasons explain this: international criminal law has only been employed very recently and very selectively, a flaw that the permanence of the ICC expects to alleviate in the long term. Since international courts do not have automatic mechanisms to apprehend suspected criminals and enforce their decisions, and have to rely on the support of other actors, impunity rather than accountability still dominates the conduct of war. One widely accepted dictum of domestic law enforcement is that a high probability of punishment generally deters more effectively than a very severe sanction rarely applied. This

condition has yet to materialize in the international realm.²⁵⁰ In sum, to be effective, deterrence has to be credible.

Secondly, the threat of punishment –let alone an empty threat- has a limited impact on human behavior in a culture already intoxicated with hatred and violence. To expect that the *ad hoc* courts would have brought instant relief and reconciliation to Rwanda or former Yugoslavia misapprehends the complexities of these situations and the depth of the social wounds left in their wake. Once violence has erupted, threats of punishment can do little to achieve immediate deterrence. However, the outbreak of such violence *can* be inhibited, and its resumption in post-conflict situations prevented, because it often results from an elite's deliberate political choices. Contrary to the simplistic myths of primordial 'tribal' hatred, most conflicts are neither historically inevitable nor the spontaneous expression of collective blood lust. They result from the deliberate incitement of ethnic hatred and violence by which ruthless demagogues and warlords cement their power.

Since acting otherwise might be undesirable and unfeasible, international criminal law generally targets the top leadership responsible for the commission of the worst atrocities. The number of people that end up at the dock is minuscule in comparison to the number of persons that took part in the atrocities. Thus, with a measured and careful application of the principle of command responsibility or joint criminal enterprise, effective and fair prosecutions at international tribunals can become a powerful tool – albeit not the only one- to enhance prevention. Political leaders would be forced to calibrate their decisions with more caution, and generals would be compelled, for

²⁵⁰ Farer (2000), p. 92.

example, to better train their combatants on the specific prohibitions against sexual violence, or discipline breaches of compliance (Akhavan, 2001: 7).

An over-emphasis on the concept of short-term deterrence is of dubious analytical value. For the broader purposes of international criminal law and prevention, it should be more relevant to the cause of international justice to see if decades-long consistent jurisprudence succeeds in moving the conduct of war from a culture of impunity to a culture of accountability, in which the preventive benefits of the law would logically mirror those of domestic legal systems. Besides, deterrence remains a complicated concept when analyzed against the backdrop of other coercive measures, such as the deployment of troops, the use of force, or the possession of nuclear weapons. For example, why does a thin blue line of peacekeepers in Macedonia have a strong deterrent effect, whereas the threat of the full force of NATO or the U.S. military fails to ward off Hussein or Milosevic?

As Professor David Wippman observed in 1999, the general deterrent effect of international criminal prosecutions “seems likely to be modest and incremental, rather than dramatic and transformative.”²⁵¹ The lack of empirical evidence does not demonstrate that the international application of the rule of law fails in its goal of prevention, but that this movement is still young, incomplete, and needs firmer commitment and support from the other actors. In that sense, failure to dissuade the government of Sudan or the *Janjaweed* is the weakest argument employed by those that paint a dark picture for the ICC in Darfur, or remain critical of international justice initiatives in general.

²⁵¹ See Wippman (1999).

CHAPTER 7

THE PEACE VERSUS JUSTICE DEBATE: TALES FROM EVERYWHERE

ELSE

“Justice matters even –perhaps especially- to people who have nothing” (*The Economist*, March 12th 2009)

“One day of justice in this world equals 100 years of prayer”
(Ali Khashan, Minister of Justice of the Palestinian National Authority)

Since the proliferation of UN-established international courts in the 1990s and the creation of the ICC, the peace versus justice debate has surrounded every indictment, every statement of international prosecutors and the governments involved, and every national or international dialogue about post-conflict accountability. In some circles, this debate is seen as a spent, passé, unnecessary quandary that was already overcome at the turn of the millennium in favor of accountability for the worst crimes and perpetrators, and against blanket amnesties and sweeping atrocities under the rug. However, each time societies and policy-makers have a choice to make about justice in the midst or in the immediate aftermath of conflict, impassioned disagreements about timing, mechanisms, and consequences quickly spring up. In this sense, the peace versus justice debate is as common as the doubts and uncertainties behind a policymaker’s decision to use armed force or explore other means, a commander’s hesitation about executing a given enforcement operation or letting the opportunity pass for fear of retaliation against civilians, and a politician’s qualms about negotiating with the enemy and reaching a

settlement because it is tantamount to rewarding bad behavior, making a pact with the devil, and encouraging future defiance.

In the previous chapters, this investigation has focused on how this debate has framed the actions of and reactions to the ICC in three countries -the Democratic Republic of Congo, Uganda, and Sudan-, as well as a similar examination of three different models that preceded this court: the *ad hoc*, UN-sponsored International Criminal Tribunal for Former Yugoslavia, the hybridized Special Court for Sierra Leone, and post-conflict accountability dispensed by national courts in the case of Argentina. I have argued that, for war crimes' courts to serve as a disincentive for peace negotiations and settling conflicts, one would have to ascertain, in scenarios where the ICC has become an actor the following: that the announcement of the court's intervention has been followed by a deterioration or exacerbation of the conflict, that peace negotiations have not then taken place subsequent to the issuing of indictments, and that one could reasonably infer that the ICC's absence would have facilitated a peaceful end to the conflict. This has not been the case in Congo, Uganda, or Sudan. Instead, this analysis attempts to render a more nuanced picture in which the ICC is only one variable in complex situations involving multiple political and non-political actors, and where the judicial track and the political track are neither mutually reinforcing nor directly contradictory, but follow different, parallel tracks that sometimes coincide. Thus, I maintain that the political nature of war crimes courts, and the ICC in particular, is often exaggerated, and that the responsibility for the resolution or prolonging of conflicts usually lies elsewhere. The flip-side of this suggestion is that arguing that the ICC or justice measures in general help bring conflicts to an end and act as a deterrent against

atrocities is similarly misleading. One can instinctively contend that, over time, as post-conflict accountability builds up a consistent record, the peacemaking and deterrent potential of an international court will increase, and justice will be the norm and impunity the exception, but the current empirical base for such argument remains tenuous at best.

As a closing exercise, the following pages offer a backdrop of the peace versus justice debate in other theaters of action, from Colombia to Afghanistan. This can be used as illustrations of the different manifestations of this debate, and as a way of contrasting this investigation's main points with similar situations all over the world.

The Central African Republic

The Central African Republic is the fourth country that completes the full docket of the International Criminal Court. Although several other situations are under preliminary examination –including Afghanistan, Kenya, Colombia, Georgia, and the Republic of Guinea-, the court has so far become active in only four countries, and they are all geographically contiguous African countries. Furthermore, some of the next situations taken up by the Court might be Kenya, Guinea, and Chad. This has led many to accuse the ICC of letting others off the hook, especially powerful countries' wrongdoing, while only focusing in Africa. Even the President of the General Assembly, the Nicaraguan Miguel d'Escoto, has publicly accused the institution of neo-colonialism and political motivations.

It is very plausible that the prosecutor has refrained from pursuing cases against powerful countries, such as the United States, Russia, or Israel, among others. However, the accusations of neo-colonialism and a bias against Africa do not withstand serious

scrutiny. More than twenty African countries were among the founders of the International Criminal Court, and of the 111 nations that have joined the court, thirty are in Africa. Three of the countries involved requested themselves the intervention of the Prosecutor, and the fourth, Sudan, was referred to the ICC by a UN Security Council resolution under Chapter Seven of its charter in response to alleged atrocities in Darfur. Last but not least, the victims of these crimes are Africans, and it is doubtful, and possibly demeaning, that Africans care less about justice than people from anywhere else.

The situation in the Central African Republic, though the most recent and least publicized, is interesting for many reasons. First, the only individual indicted so far is not from the CAR, but from the DRC. Significantly, all individuals in custody in The Hague are Congolose: Lubanga, Katanga, Ndujolo, and Bemba.²⁵² Secondly, the accused Jean-Pierre Bemba Gombo is the first one in the dock with significant political stature, given that he is the former vice President of the Democratic Republic of Congo, was the leader of the rebel force that controlled a third of the country for several years, became the main rival of President Kabila in the 2006 elections, and still has scores of loyal followers in the capital and other parts of the country. Third, this is the first time the Prosecutor is opening an investigation in which allegations of sexual crimes far outnumber alleged killings, in yet another manifestation of the deliberate use of sexual violence as a weapon of war.

In late 2004, the government of the CAR submitted a referral to the ICC, but the Prosecutor did not take it up until May 2007. The country's highest judicial body, the *Cour de Cassation*, had confirmed that the national justice system was unable to carry out

²⁵² The Sudanese rebel leader Bahr Idriss Abu Garda, accused of an attack against AU peacekeepers in 2007, appeared voluntarily before the court in mid-2009, but is not currently in custody, but at liberty pending trial.

the complex proceedings necessary to investigate and prosecute crimes of such magnitude.²⁵³ The arrest warrant against the former leader of the *Mouvement de libération du Congo* (MLC) was unsealed in May 2008, taking advantage of Bemba's presence in Belgium for medical reasons. After his transfer to The Hague and the confirmation of charges, Bemba is currently awaiting trial. Allegedly, Bemba's forces were responsible for much of the killing, raping, and looting that characterized the worst bouts of violence in October-November 2002 and February-March 2003, in the midst of fighting between the government and the rebels in and around the capital, Bangui. Bemba was assisting the government of then-president Ange-Félix Patassé against the insurgency led by the current president, François Bozizé, who was backed by France and Chad and consolidated his power in the 2005 elections.

The ICC did not take up the government's referral until mid-2007.²⁵⁴ By then, the country had gone through two devastating waves of violence. The first was the aforementioned 2002-2003 violence. The second, which may ultimately implicate the criminal responsibility of President Bozizé himself, took place largely from mid-2005 to mid-2007. The state security forces, and the presidential guard in particular, may have committed widespread acts of brutality during operations aimed at repressing a rebellion in the north, including the summary execution of hundreds of civilians. Since the ICC announced its involvement, the most significant political development has been an Inclusive Political Dialogue in late 2008, which brought most of the country's political

²⁵³ According to the International Crisis Group, for example, the CAR is a phantom state where government has ceased to have meaningful institutional power or the monopoly of legitimate use of violence. See International Crisis Group, "Central African Republic: Anatomy of a Phantom State." Africa Report 138 (December 13th 2007).

²⁵⁴ According to CAR activists, this delay may have been caused by the Prosecutor's desire not to upset elections in the DRC, where one of the main candidates, and eventual second largest vote-getter, was Jean-Pierre Bemba (Glasius, Marlies, "Global Justice Meets Local Civil Society: The International Criminal Court's Investigation in the Central African Republic" in *Alternatives*, 33, 2008, p. 417).

and social actors to the table, including the president's camp, opposition politicians, most rebel groups, ex-President Patassé, and civil society. This culmination of years of unsuccessful peace negotiations resulted in Patassé's acknowledgment that his former chief of staff and ouster, Bozizé, was the legitimate president of the country, the rebel groups' readiness to disarm in exchange for roles in state institutions, and opposition parties' settling for reform instead of all-out regime change.²⁵⁵

However, the CAR is still in a very difficult position. President Bozizé will challenge any attempts by the ICC to indict government officials for their responsibility in atrocities committed in the North from 2005 to 2007.²⁵⁶ An amnesty is in place, but does not extend to war crimes and crimes against humanity. The Lord's Resistance Army continues to terrorize Uganda's neighbors and reportedly entered the CAR in mid-2009. The UN Mission in the CAR and Chad (MINURCAT) only has a few hundred peacekeepers in the country, and is unable to cope with multiple security threats. And Bozizé has failed to implement several of the agreements reached in the Inclusive Political Dialogue. However, a cursory analysis of the situation indicates that the case of

²⁵⁵ See International Crisis Group, "Central African Republic: Keeping the Dialogue Alive." Africa Briefing 69 (January 12th 2010).

²⁵⁶ Without any sense of irony, President Bozizé sent a letter to the United Nations Security Council in August 2008, calling on the council to declare his country's courts competent to try any war crimes committed in the CAR since the end of the coup that brought him to power in 2003. According to the country's High Commissioner for Human Rights, a government-supported institution, Bozizé had "asked the ICC to suspend its work to find a way out of the ongoing violence. (...). The ICC would have jeopardized peace because the dialogue was based on amnesties." This move may have been prompted by two developments: a letter from the ICC Prosecutor demanding the President to pay attention to his security forces' atrocities in the north, and the announcement in July 2008 that he planned to ask ICC judges to indict Sudanese President Al-Bashir, proving that Moreno Ocampo was not going to shy away from prosecuting heads of state. See Glasborow, Katy and Melanie Gouby, "Bozizé Call for End to ICC Probe under Scrutiny" in Institute of War and Peace Reporting (January 2009). So far, only individual, low-ranking members of the security forces have been convicted in military courts of ordinary crimes, such as assault, battery, and manslaughter. In September 2008, the CAR government established an office for international humanitarian law within the army, responsible for conveying the laws of war to its members, and withdrew much of the Presidential Guard from the area where most abuses had been committed (see Human Rights Watch, "Selling Justice Short: Why Accountability Matters for Peace," July 2009, pp. 104-105).

the CAR is consistent with the others reviewed in this investigation and the pursuit of accountability measures has not undermined peace initiatives. The Prosecutor did ponder “the interests of justice” before making a determination, as requested by Article 53 of the Rome Statute, but as in the other situations, this did not constitute a political decision based on the odds that the court’s actions would hurt peace, but rather an assessment of the views and interests of the victims. Incidentally, despite many challenges, the court operates in a very receptive environment in the CAR, especially because its involvement was instigated by local civil society (Glasius, 2008: 413). In the case of the CAR, local and regional NGOs have been the most vocal supporters of justice measures as critical to peace and have taken considerable risks to collect data, especially on a sensitive issue like sexual violence, that can be used by the Prosecutor. As Glasius put it, “while there are differences of opinion between civil society figures –with religious leaders prioritizing peace, human rights defenders generally prioritizing justice, and journalists divided- these are not passionate controversies” (Glasius, 2009: 421). If anything, most anxiety among victims and activists is associated with the excruciatingly slow pace of the court’s work. The UN representative to the CAR believed the ICC investigation to be one of several reasons for the sharp decline in burning and looting by the army since mid-2007, and Human Rights Watch found a rebel leader eager to work with UNICEF on demobilization once he realized the use of child soldiers could be prosecuted at the ICC.²⁵⁷

²⁵⁷ For more information, see Human Rights Watch, “Central African Republic – State of Anarchy: Rebellion and Abuses Against Civilians,” vol. 19, no. 14 (A), September 2007. Available at http://www.hrw.org/sites/default/files/reports/caro907webcover_o.pdf.

Afghanistan

It is difficult to imagine a more hopeless scenario than Afghanistan. In a country that has been in a state of perpetual insecurity for thirty years, most Afghans have never known peace. After overthrowing the Soviet Union, aided by American weapons, Pakistani training, and Saudi money, many Muslim *mujahideen* who had come from all over the world to join the Afghan resistance looked elsewhere for adventure. Meanwhile, Afghanistan was engulfed by a deadly civil war among competing warlords. By 1996, Kabul was divided into forty-two separate militia checkpoints, had remained in the dark without electricity for more than two years, and had endured approximately forty thousand violent deaths—at its lowest estimate- and unspeakable crimes against women. In this environment, the Taliban, a radical Islamist movement formed by Pashtun Afghans, Pakistanis, and volunteers from other Muslim countries, took control of the capital and most of the country, implementing the harshest interpretation of Sharia law ever seen.²⁵⁸ Since the responsibility for the September 11th terrorist attacks in the United States was quickly traced back to Osama bin Laden and the previously obscure network *Al Qaeda*, which resided mostly in Afghanistan and received the protection of the Taliban, Afghanistan has become the longest war in American history. And yet, in spite of the overwhelming support from the international community—encompassing from NATO's first-ever activation of the provision of its charter that declares an attack against

²⁵⁸ For a superb historical analysis of the engagement of the international community, and particularly the United Nations, with Afghanistan in the 1990s, see Niland, Norah, "Justice Postponed: The Marginalization of Human Rights in Afghanistan," and Donini, Antonio, "Principles, Politics, and Pragmatism in the International Response to the Afghan Crisis," in Donini, Antonio, Norah Niland, and Karin Wermester (eds.), *Nation Building Unraveled: Aid, Peace and Justice in Afghanistan* (Bloomfield, CT: Kumarian Press Inc., 2004).

one an attack against all, to unprecedented amounts of military and development aid every year, Afghanistan is still an unequaled, intractable human drama.²⁵⁹

The nations involved in Afghanistan have oscillated aimlessly between centralization and decentralization of government, eradicating or tolerating opium, fighting or appeasing warlords, arming or disarming militias, and supporting or blaming Karzai.²⁶⁰ Their approach to accountability has been similarly ineffective.

The Bonn Peace Accord, unlike other peace agreements carried out by the UN, did not address the issue of transitional justice and no mechanism was established to deal with past abuses. All parties to the peace agreement were involved in serious human rights violations, and key international actors felt that it was necessary to obtain peace first and pursue justice later (Nadery, 2007: 174).. This was explicitly articulated several times, both by the UN envoy, Lakhdar Brahimi, and the EU envoy, Francesc Vendrell, who said that “in 2002, the Americans were relying on the warlords to pursue the War on Terror. There was a lot of emphasis on stability and therefore justice had to wait. These unsavory characters were seen as providing stability.”²⁶¹

For the sake of peace, security, or stability, accountability was sidelined in every process, including disarmament, security sector reform, rule-of-law reform, elections, and the formation of government.²⁶² This fostered a climate of lawlessness, impunity, and

²⁵⁹ The British for International Development put 80 percent of its funds into direct budgetary support for the Afghan government and NGO development projects, and the United States spends annually on Afghanistan more than that country's gross domestic product.

²⁶⁰ See Stewart, Rory, “Afghanistan: What Could Work” in *The New York Review of Books*, Vol. 57, No. 1, January 14th 2010.

²⁶¹ Quoted in Human Rights Watch, “Selling Justice Short: Why Accountability Matters for Peace,” July 2009, p. 36.

²⁶² For example, General Abdul Rashid Dostum, implicated in the suffocation deaths of hundreds of captives inside shipping containers, is one President Karzai's main emissaries. The new Vice President, Karzai's running mate in the allegedly fraudulent November 2009 elections, used to command troops implicated in widespread rape and summary executions in the mid-1990s (Baker, Aryn, “The Warlords of

corruption that has eroded the new regime's legitimacy and boosted that of the Taliban.²⁶³ One cannot confidently say that a different path would have been possible or desirable, but it is clear that the peace-first-justice-later paradigm did not work in Afghanistan. An Afghan human rights activist, Horia Mosaddeq, puts it best: "Lakhdar Brahimi has said, first we get the peace, then we work on justice. Today, what has happened? We have lost the peace and we have lost the justice."²⁶⁴

Interestingly, civil society mobilized strongly in Afghanistan in favor of justice. With the support of the United Nations Development Programme (UNDP), the Office of the High Commissioner for Human Rights (OHCHR), and the United Nations Assistance Mission in Afghanistan (UNAMA), Afghan civil society formed the Afghanistan Independent Human Rights Commission (AIHRC), a quasi-judicial body with the power to summon anyone living in Afghanistan, examine such persons as witnesses, and compel them to produce documentary or material evidence in their possession or under their control (Sajjad, 2009: 429). The AIHRC has to date received more than ten thousand complaints of human rights violations, enjoys great social legitimacy, and has been at the forefront of denouncing the tragic impact of airstrikes on civilians. In 2005, they engaged in extensive national consultations on the issue of justice and accountability, using social science methodology to obtain quantitative and qualitative data, and engaging thousands of Afghans in hundreds of focus groups in 32 out of 34 provinces. The results of the consultations were compiled in a report in which the primary conclusion drawn was that

Afghanistan" in *Time Magazine*, February 12th, 2009, available at <http://www.time.com/time/magazine/article/0,9171,1879167,00.html>.

²⁶³ See Human Rights Watch, "Blood Stained Hands: Past Atrocities in Kabul and Afghanistan's Legacy of Impunity" (New York: Human Rights Watch, 2005).

²⁶⁴ Quoted in Sajjad, Tazreena, "These Spaces in Between: The Afghanistan Independent Human Rights Commission and Its Role in Transitional Justice" in *The International Journal of Transitional Justice*, Vol. 3, 2009, p. 438.

there was overwhelming support for justice and the removal of perpetrators from power.²⁶⁵ Karzai's government initially endorsed the recommendations of the report and adopted an Action Plan for Peace, Justice and Reconciliation in order to implement them, but failed to follow through. Instead, both houses of Parliament passed a bill that provided blanket amnesty for all those involved in the Afghan conflict. Although this amnesty was never signed by the President, it again sidetracked any effort to pursue justice measures (Kouvo, 2009: 2).²⁶⁶

However, because Afghanistan is a signatory of the Rome Statute, the ICC Prosecutor announced in September 2009 that he was gathering information about possible war crimes committed by NATO soldiers and insurgents in the country.²⁶⁷ This puts Afghanistan in the same portfolio of countries under preliminary examination as Kenya, Georgia, Gaza, the Republic of Guinea, and Colombia.

Colombia

Colombia has never been on the agenda of the United Nations Security Council. This is somewhat puzzling, because the conflict between the government and several armed groups has lasted for nearly half a century, has important cross-border implications, and features bombings, massacres, and vast areas of territory under the control of rebel guerrillas.²⁶⁸ In the world, only Sudan has more internally displaced

²⁶⁵ Kouvo, Sari, "Transitional Justice in the Context of Ongoing Conflict: The Case of Afghanistan." ICTJ Briefing (September 2009), p. 1.

²⁶⁶ Arguably, more than human rights activists, it was the pressure from Islamic clerics –maintaining that, under Islamic law, only the victims have the right to forgive- that may have convinced the President to refrain from signing the blanket amnesty.

²⁶⁷ Charbonneau, Louis, "ICC Prosecutor Eyes Possible Afghanistan War Crimes." Reuters, September 9th 2009.

²⁶⁸ The origins of the conflict can be found in the assassination of the charismatic, leftist leader Gaitán Ayala in 1948, which sparked a decade of violent confrontations between Liberals and Conservatives, and

people, and only Cambodia and Afghanistan have more victims of anti-personnel land mines. Colombia is the third largest recipient of U.S. military aid, hosting now a total of seven American military bases, and has more troops in proportion to its population than any other country in Central or South America. Over the last few years, it has come dangerously close to war with its neighbors, Venezuela and Ecuador.

And yet, Colombia has been touted as an example of well-crafted amnesties still being a useful tool to end conflicts. Following controversial amnesty legislation offering significantly reduced jail terms of no more than eight years to right-wing paramilitaries, the overwhelming majority of them have been demobilized.²⁶⁹ Thanks to the Justice and Peace Law of 2005, more than 30,000 militants have demobilized, confessed to murders, and led officials to the graves of more than 2,000 Colombians. The government's Justice and Peace Office compiled a list of nearly 30,000 disappeared Colombians between 1988 and 2002, with nearly three quarters of them allegedly kidnapped by right-wing militias.²⁷⁰ With regards to the Revolutionary Armed Forces of Colombia (FARC), President Uribe has offered mixed signals, alternating between a hard-line approach and

the illegalization of the Communist Party, prompting many of its supporters among peasant communities to form guerrilla groups. The best known are the *Fuerzas Armadas Revolucionarias Colombianas* (FARC) and the *Ejército de Liberación Nacional* (ELN). In response, right-wing paramilitary organizations supported clandestinely by the state were formed as a means of protecting landowners, druglords and local businessmen from guerrilla attacks and kidnappings. Both sides have since engaged in criminal activity, sometimes with the conflict itself as a sideshow. See Díaz, Catalina, "Colombia's Bid for Justice and Peace." Working paper for the International conference *Building a Future on Peace and Justice* (Nuremberg, June 25-27 2007). On file with the author.

²⁶⁹ For a good overview of the law's strengths and weaknesses, see Jacobson, Douglas, "A break with the past or justice in pieces: Divergent paths on the question of amnesty in Argentina and Colombia" in *Georgia Journal of International Law and Comparative Law* (2006).

²⁷⁰ See International Crisis Group, "Colombia: Towards Peace and Justice?" Latin America Report No. 16 (March 14th 2006), available at <http://www.crisisgroup.org/home/index.cfm?id=4020>.

vague overtures. By 2008, the FARC had suffered a serious of setbacks and violent crime and kidnappings were at a 20-year low.²⁷¹

Nevertheless, several important caveats must be noted. First, the Justice and Peace Law may have resulted in a level of dissatisfaction among certain groups of victims, and criticism from other quarters, but it has not led to a general sense of impunity. As former High Commissioner for Peace Luis Carlos Restrepo puts it, “it is a modern legal instrument that will allow peace processes to develop in Colombia without forgetting justice.” Second, the voluntary confessions of paramilitaries have given credence to long-held claims that the state was actively aiding these illegal right-wing militias. This scandal dubbed “parapolitics” sent a dozen members of Congress to jail, as well as put many others under investigation for their links to the United Self-Defense Forces of Colombia (AUC). Almost 2,000 voluntary depositions have implicated 140 members of the Armed Forces and more than 200 politicians as alleged allies of the paramilitary. Third, several well known paramilitaries will even begin to serve jail sentences as a result of their confessions. Lenient sentencing is different from entirely sweeping the past under the rug. Admittedly, many have been extradited to the United States on drug trafficking charges instead of being prosecuted for war crimes at home.²⁷² At times, the Colombian Supreme Court has halted such extraditions because they violate victims’ rights and paralyze the truth-seeking process that is integral to the Justice and Peace Law.²⁷³

Unfortunately, many former paramilitaries have reintegrated into normal society holding

²⁷¹ For example, there were 3,500 kidnappings in 2000, compared to under 400 in 2007, half of which were freed. However, both FARC and ELN have been again more active in 2009.

²⁷² Conversely, Colombian officials have pushed to reclassify some of the crimes committed by the famous drug lord Pablo Escobar as crimes against humanity, so as to avoid the statute of limitations.

²⁷³ Ferrero, Juan, “As Colombian War Crimes Suspects Sit in US Jails, Victims’ Kin Protest” in *The Washington Post* (October 4th 2009).

similar political and economic power as when they were brandishing weapons. Some of them, however, have since reconstituted themselves in smaller, more autonomous units, collectively known as *Águilas Negras* (Black Eagles). And, as with other transitional justice mechanisms, their depositions often served to give legitimacy to the victimizers' version of history, much to the chagrin of their victims. However, this is still a much better outcome than past demobilizations efforts of rebels, like the *Movimiento 19 de Abril* (April 19th Movement) in the 1980s, in which they were disbanded and forgiven without undergoing any judicial or quasi-judicial processes.

Kenya

In contrast to its neighbors Ethiopia, Sudan, Uganda, and Somalia, Kenya had enjoyed relative peace and stability for some time, until a horrific bout of violence erupted after the controversial December 2007 elections. More than 1,000 civilians died in a few days, and some of the massacres were eerily reminiscent of the Rwanda genocide.²⁷⁴ Former UN Secretary-General Kofi Annan brokered a power-sharing agreement between both camps, establishing a government of national unity. However, this has not meant that accountability measures will be forgotten for the sake of stability. In fact, even though some of the suspected ringleaders of the violence are now members of the cabinet, the Kenyan government, under pressure by the international community and social demands, has promised to cooperate with the International Criminal Court if the judges accept the Prosecutor's request to initiate an investigation.

²⁷⁴ For example, the burning of a church sheltering 200 Kikuyu, who belong to the same ethnic group as President Kibaki.

For the purposes of this research, one of the most interesting facts about Kenya's post-election violence is that the dual role played by Kofi Annan shows that the pursuit of peace and the pursuit of justice can follow two different paths without necessity of contradiction. Annan brokered the deal that formed an inclusive government with up to 40 ministers and 50 assistant ministers, and then handed the Prosecutor of the ICC a list with the names of those most responsible for the worst acts of violence.²⁷⁵ The government itself has published a report of the Kenya National Commission on Human Rights that names more than 200 suspects, including several high-ranking ministers, such as the Finance Minister –who is also the son of the country's founding president- and the Minister of Agriculture. Some of them are prominent politicians that had never previously been held accountable for instigating violence in the 1992 and 1997 elections.²⁷⁶ After promising to prosecute the suspects in Kenya's national courts, the government, unable to ensure the security of witnesses and following the parliamentary defeat of a bill setting up a special court, has been requesting that the ICC step in.²⁷⁷

Republic of Guinea

At the time of this writing, the Deputy Prosecutor of the International Criminal Court, Fatou Bensouda, is expected to travel to the Republic of Guinea as part of the

²⁷⁵ See BBC, "Kenya Backs Poll Violence Trials" (October 2, 2009), available at <http://news.bbc.co.uk/2/hi/8286733.stm>.

²⁷⁶ Human Rights Watch, "Selling Justice Short: Why Accountability Matters For Peace" (2009), p. 77.

²⁷⁷ In Kenya, Tanja Chopra has explored another dimension of the peace versus justice debate. In the local disputes over land and cattle among pastoralist communities in the north, the government has chosen to privilege local peacebuilding approaches that may be in contravention with the rule of law and national standards of justice. In her words, "this points to a general dilemma in the relation between peacebuilding and statebuilding (...). The contradiction between peacebuilding and statebuilding is a logical extension of the peace versus justice dilemma in transitional scenarios, where the pursuit of perpetrators is often subordinated to the short-term interest of consolidating peace in a society with the consequence that perpetrators escape punishment" (Chopra, Tanja, "Why Peacebuilding Contradicts Statebuilding: Notes from the Arid Lands of Kenya" in *International Peacekeeping*, 16: 4, p. 543).

court's assessment of whether to initiate an investigation. Human rights groups and a UN-established international commission of inquiry have suggested that crimes against humanity were perpetrated against civilians on September 28th 2009, when Guinean security forces cracked down on a pro-democracy rally organized by the opposition in Conakry's stadium.²⁷⁸

The Republic of Guinea, also known as Guinea-Conakry, is one of the poorest countries in the world, and has been ruled by autocrats and military juntas since independence. Its stability is crucial in a region that has been plagued by cross-border, spillover violence and that is only now slowly recovering from a string of violent wars at the turn of the century -from Sierra Leone to Liberia and Ivory Coast. Its latest dictator, Captain Moussa Dadis Camara, took power in a military coup at the end of 2008. This coup was widely condemned by the international community, including the African Union and the Economic Community of West African States (ECOWAS), which suspended Guinea's participation from their respective organizations. When it became clear that Camara was not planning to make good on his promise to restore constitutional order and hold free, national elections, the opposition organized a demonstration and the military junta responded with a crackdown. Video footage and witness accounts soon gave testimony to the extraordinary brutality of the crackdown.

The response from the international community involved an arms embargo, a package of sanctions, and a mediation process brokered by Burkina Faso's President Campaoré, and the UN Secretary-General established a commission of inquiry to ascertain the facts and recommend accountability measures. The UN has used

²⁷⁸ See Human Rights Watch, "Bloody Monday: The September 28th Massacre and Rapes by Security Forces in Guinea" (December 17th, 2009), available at http://www.hrw.org/sites/default/files/reports/guinea1209web_0.pdf.

commissions of inquiry for various purposes in the past, from investigating ethnic cleansing in Darfur, to the assassination of a prominent politician, as in the case of Benazir Bhutto.

The commission of inquiry and the likely involvement of the ICC had immediate repercussions. President Camara, isolated by the international community, attempted to blame his aide-de-camp, Lieutenant Aboubacar Chérif Diakité, and arrest some of his men. In a surprising turn of events, Diakité shot President Camara in the head, forcing him to seek medical treatment in Morocco, which is not a member of the African Union or party to the ICC statute. Since this incident, the Commission submitted its findings, which highlighted more than 150 killings, the rape of more than a hundred women, and widespread torture and abuses.²⁷⁹ Furthermore, the interim leader of the military junta proposed the formation of a transitional government led by a civilian Prime Minister to be designated by the opposition. This would be unprecedented in the history of the West African nation.

Guinea offers an important lesson for the overall debate on the impact of accountability on peace. In 2006 and 2007, Guinean security forces violently repressed protests and strikes organized by the trade unions and the opposition to the military rulers, resulting in more than 130 people killed. The government established a national commission of inquiry, but it never got underway. Guinea continued to receive military aid from France and others, and by 2008 the Special Rapporteur on extra-judicial, summary, or arbitrary executions reported that the commission of inquiry had been put

²⁷⁹ See United Nations, “Report of the International Commission of Inquiry mandated to establish the facts and circumstances of the events of 28 September 2009 in Guinea,” (S/2009/693), available at <http://www.securitycouncilreport.org/atf/cf/%7B65BFCF9B-6D27-4E9C-8CD3-CF6E4FF96FF9%7D/Guinea%20S%202009%20693.pdf>.

together solely as a distraction to ensure impunity.²⁸⁰ The Guinean leaders took the lessons of this experience to heart, and felt free to engage in even more violent repression against the pro-democracy movement.

Cambodia

The main difference between Cambodia and other countries undertaking the implementation of transitional justice mechanisms is that the crimes under trial in the Extraordinary Chambers in the Courts of Cambodia (ECCC) took place more than three decades ago, between 1975 and 1979.²⁸¹

In 2006, after several years of discussions and negotiations, the United Nations and the government of Cambodia launched a hybrid tribunal to try a handful of Khmer Rouge leaders in connection with the genocide of almost two million Cambodians. This war crimes' court model privileges national ownership, as it is premised upon the assumption that war crimes courts can have a greater impact if they take place in-country, instead of in The Hague or somewhere else, and suggests that there should be a majority of national judges in each panel.²⁸² It is the first internationally-backed criminal court to do so, and also the first to permit victims to participate as civil parties.²⁸³

²⁸⁰ See Amnesty International, "Submission to the UN Universal Periodic Review – Eighth session of the UPR Working Group of the Human Rights Council, May 2010" (November 2nd 2009), available at <http://www.amnesty.org/en/library/asset/AFR29/007/2009/en/bdee6cc5-b703-4dad-ab48-bc0171c94672/afr290072009en.pdf>.

²⁸¹ For extensive research on the genocide and the ECCC, the Documentation Center of Cambodia collects ample materials. See <http://www.dcam.org>.

²⁸² Incidentally, this has not helped the legitimacy of the ECCC so far. A recent survey by the University of California, Berkeley, shows that up to 85 percent of the population has very limited or no knowledge of the court, and most of those that know the ECCC fear that they are hopelessly hampered by political interference from the government and lack of capacity (see Doung, Virorth and Sophal Ear, "Transitional Justice Dilemma: The Case of Cambodia" in *Peace and Conflict Review*, Volume 4, Issue 1, 2009; also Stensrud, Ellen Emilie, "New Dilemmas in Transitional Justice: Lessons from the Mixed Courts in Sierra Leone and Cambodia" in *Journal of Peace Research*, 46, 5, 2009). This is especially troubling, because almost every living Cambodian can be considered a victim of the Khmer Rouge, and most studies show

The decision to try a handful of senior leaders of the Khmer Rouge –most of whom will probably die before receiving their verdicts due to advanced age²⁸⁴ - represented a reversal of years of amnesties and the international community’s support to the regime.²⁸⁵ It would be difficult to argue that choosing impunity over accountability has helped Cambodia in its path towards peace. First, Cambodia continued to suffer through nearly two decades of low-intensity conflict after the overthrow of the regime by Vietnamese forces. During the 1990s, the Cambodian government negotiated with former Khmer Rouge leaders and offered them amnesty, reintegration into society, and the possibility of participating in elections, while at the same time, the government was requesting the UN’s assistance in establishing a trial to prosecute the senior leaders, as early as 1997. Some of the individuals that benefited from that deal, such as Ieng Sary, are among the accused at the ECCC now.

The current Prime Minister, Hun Sen, has been publicly opposed to the ECCC, deeming it wiser “to dig a hole and bury the past” (quoted in Kurlantzick, 2006).²⁸⁶ He has starved the court of funds and threatened to terminate it if there are additional indictments, claiming they could destabilize Cambodia’s peace. The narrow focus of the

that the desire of revenge against the leadership is particularly intense. However, Cambodia’s turbulent past is sanitized or not even discussed in public school curricula, and many in this young country, born after the genocide, cannot believe that a crime of such magnitude took place. See Pham, Phung, and Patrick Vinck, Mychelle Bhaltazard, Sokhom Hean, and Eric Stover, “So We Will Never Forget: A Population-Based Survey on Attitudes About Social Reconstruction and the Extraordinary Chambers in the Courts of Cambodia.” Human Rights Center, University of California, Berkeley, January 2009).

²⁸³ Cambodians have tried to take advantage of this feature. For the case against Nunon Chea, Ieng Sary, Ieng Thirith and Khieu Samphan, more than two-thousand victims applied to participate (see International Center for Transitional Justice, “Progress of the Extraordinary Chambers in the Courts of Cambodia,” November 2009).

²⁸⁴ Pol Pot, “Brother Number One,” his commander-in-chief Ta Mok, and the minister in charge of security Son Sen have already died.

²⁸⁵ Nevertheless, in the immediate aftermath of the regime’s overthrow, the People’s Revolutionary Tribunal in Phnom Penh, then controlled by the occupying Vietnamese, tried Ieng Sary and Pol Pot *in absentia*, and found both guilty of the crime of genocide.

²⁸⁶ Kurlantzick, Josh, “Trial and Error: Cambodia’s War Crimes Tribunal” in *The New Republic* (July 12th 2006), available at <http://www.carnegieendowment.org/publications/index.cfm?fa=view&id=18530>.

indictments suits the ruling party's version of the genocide as committed by a small clique, for it consists of many former Khmer Rouge members that defected to Vietnam in the late 70s. Despite this political interference with the court's activities, one important piece of information stands out. As mentioned above, the government requested the UN's assistance with the court in 1997, but the Khmer Rouge leadership did not fully surrender until 1999. Once again, it does not appear that the threat of prosecutions acted as an impediment to a settlement.

Liberia

Liberia offers one of the most dramatic examples of the intersection of transitional justice and peace negotiations. During the opening of the peace talks in Accra, Ghana, in the summer of 2003, the President of Liberia Charles Taylor told the attendees: "Some people believe that Taylor is the problem. If President Taylor removes himself from Liberia, will that bring peace? If so, I will remove myself." A few moments later, CNN was breaking the news of the indictment issued by the Special Court for Sierra Leone, Taylor sought refuge in Nigeria, and the dynamics of the peace talks changed drastically. As Hayner put it, "from a gathering for which few had hopes of success, and none expected to last more than two weeks, it became a drawn-out process of 76 days. It concluded in a transitional government and an agreement for institutional reforms, a human rights inquiry, massive disarmament and demobilization, and a plan for national elections in two years" (Hayner: 2007, 1).²⁸⁷ In spite of the angry reactions among the African heads of states involved in the peace talks, and the warnings that the indictment

²⁸⁷ Hayner, Priscilla, "Negotiating Peace in Liberia: Preserving the Possibility for Justice." Centre for Humanitarian Dialogue, November 2007.

jeopardized any chance of attaining peace, history proved otherwise. Before the 2003 Comprehensive Peace Agreement, Liberia had seen almost one attempt at peace per year throughout the fourteen years of civil war, and most of these settlements held for only a few weeks or less.

Liberia has not slipped back into conflict since then, but it does not fit comfortably the narrative that the pursuit of accountability measures contributed to peace. In fact, the prevalent climate in Liberia since 2003 has been one of impunity. Charles Taylor is in The Hague, but answering for crimes committed in Sierra Leone, not in Liberia. Prince Yormie Johnson is only the best known among warlords-turned-legislators, and loudly defies any attempt to make him accountable for past actions.²⁸⁸ Other war criminals walk the streets of Monrovia freely, like General “Butt Naked,” who openly and grossly boasts about personally killing twenty thousand people, and basks in the fame provided by his brigade’s cruel exploits. The president, the first female head of state of an African country, has rejected the activities of Liberia’s Truth and Reconciliation Commission.²⁸⁹ And Leymah Gbowee, the admirable and renowned leader of the women’s movement that played a key role in the success of the peace negotiations in Accra, has admitted that all calls for justice were silenced by the urgent need of bringing the conflict to an end. The leaders of the warring factions saw their shelling of Monrovia rewarded by positions in the transitional government.

In the end, the Comprehensive Peace Agreement left the question of accountability open. Earlier calls for justice, supported by the United States and civil

²⁸⁸ The report of the Truth and Reconciliation Commission names Johnson, former leader of the Independent National Patriotic Front of Liberia and currently a popular senator, the number one most notorious individual perpetrator of gross human rights abuses (see Gordon, Glenna, “You Can’t Look Back – An interview with Prince Johnson” in *Foreign Policy*, July 7th, 2009).

²⁸⁹ See Gberie, Lansana, “Truth and Justice on Trial in Liberia” in *African Affairs*, 107 (2008), pp. 456-459.

society, were withdrawn, and replaced by the following: *The National Transitional Government of Liberia shall give consideration to a recommendation for a general amnesty to all persons and parties engaged or involved in military activities during the Liberian civil conflict that is the subject of this Agreement.* Instead, the text established a truth and reconciliation commission, which would have the power to issue nearly mandatory recommendations on individual cases, both for amnesty or for prosecutions. However, the Truth and Reconciliation Act, which later gave content to the vague provisions of the peace agreement, explicitly excludes amnesty for violations of international humanitarian law and crimes against humanity. Of the prior fourteen peace agreements, only one –the Cotonou Agreement of 1993- contained an amnesty, and it did not cover war crimes. The legal representatives of the warring factions were knowledgeable about international human rights law and the emerging prohibition against blanket amnesties. Although discussions and negotiations would linger on endlessly, once a general agreement was achieved, the drafters would spell out the details leaving little time for the signatories to review with a close eye. And this can all be explained because, at the negotiating table, it never crossed their minds that there would be prosecutions, or that this was an issue that should worry the rebel leaders. In fact, the rebels themselves demanded justice, thinking that Taylor and his associates would be the only ones under scrutiny, and some of them wrongly thought or assumed that there was a blanket amnesty in place, or took the establishment of a truth and reconciliation commission, based on the South African example, to mean just that. Calling for an amnesty would be tantamount to admitting wrongdoing and they all saw themselves as fighting for a noble cause. The issue of accountability occupied only a few hours of discussion out of almost eighty days,

and it did not center on the issue of trials or pardons, but on whether leaders of the warring factions should be allowed to form part of the transitional government. Initially, the facilitators of the talks and civil society demanded they be excluded, but the rebel leaders simply intensified the shelling of Monrovia to leverage their firepower into positions of power (Hayner, 2007: 15-21).

This behavior continued in the post-conflict period, through the proceedings of the TRC. None of the alleged perpetrators appearing before the commission asked for an amnesty before they gave their testimonies, or seemed particularly regretful about the atrocities they had committed. The commissioners themselves did not lead by example, sporadically laughing when victims narrated the most bizarre forms of rape (Gberie, 2008: 459). In the end, the report they produced caused much controversy, dissatisfaction, and boilerplate accusations of politicization. When I visited the country, several Liberians that followed the TRC closely resorted to blaming the inadequacies of the TRC report on politics. As we have seen in this investigation, it is almost unavoidable that war crimes courts will be accused of being political organs in the service of their paymasters, but Liberia shows that Truth and Reconciliation Commissions are also not exempt. Nevertheless, uncritically labeling these institutions as inherently political and flawed is misleading. Civil society organizations accused the TRC of political chicanery, argued that it threatened to derail the fragile peace process, and dismissed the report as a political document targeted at potential political rivals. But unless one is speaking about the individual political ambitions of the commissioners themselves, one risks confusing the personal with the political, and private ambitions with public interest. One of the best known highlights of the report is the recommendation to ban President Johnson Sirleaf

from public office for the next three decades, due to her early association with Charles Taylor. It is not possible to square this with the notion of a TRC promoting the political interest of its backers. Not only did the report accuse the president of the country that hosted it, but it is openly unfavorable to the interests of the American and European powers that enabled the Liberian transition and funded the TRC.²⁹⁰

Meanwhile, Charles Taylor is in The Hague undergoing the latest ‘trial of the century,’ after human rights activists and international justice activists saw Pinochet, Milosevic, Tudjman, Pol Pot, and Sankoh die without a sentence, and Saddam Hussein executed after a rushed, flawed proceeding. A growing number of countries -Timor Leste, Rwanda, Guatemala, Morocco and many others- are at various stages of their journey between peace and justice. Others, like South Africa, are still debating the meaning and lessons of their own past experiment with transitional justice. It may not seem like much, but only a couple of decades ago there were barely any accountability mechanisms, as imperfect and modest as they are, chipping away at the preponderance of impunity in world affairs.

Concluding remarks

When I set out to undertake this study, the International Criminal Court was barely a year into officially opening its doors and had only begun to look into alleged human rights atrocities in the Congo and in Uganda. Although by now 111 countries have ratified its founding document, the Rome Statute, and the Office of the Prosecution is

²⁹⁰ The TRC was funded by the United Nations Development Programme, USAID, Danish and Swedish development aid, the European Union, and the government of Liberia (see Cibelli, Kristen, Amelia Hoover and Jule Kruger, “Descriptive Statistics from Statements to the Liberian Truth and Reconciliation Commission.” Report from the Benetech Human Rights Program, June 2009).

conducting investigations in five different countries, the ICC has yet to complete its first trial. In fact, interest on the court has ebbed and flowed throughout the decade, and it picked up again last year with the beginning of the first trial and the first arrest warrant for a sitting head of state, the President of Sudan. Several other events outside of the ICC –the trials of Duch in Cambodia, Charles Taylor and Radovan Karadzic in The Hague, the guilty verdict against former President Alberto Fujimori for crimes against humanity in a Peruvian domestic court, and a new wave of trials in Argentina- demonstrate the strong currency of this push for accountability to replace impunity after mass atrocities.

The goal of my study was to challenge the notion that war crimes courts may undermine peace and stability, and I wanted to do this by adapting this old debate to the new institution, the ICC, and its involvement in contemporary conflicts in Central and Eastern Africa. I concluded that, in the contexts that I reviewed, the pursuit of justice measures has not undermined peace or become a disincentive for peace negotiations. And the reason why I wanted to do this was a sense of dissatisfaction with prevailing opinion and the way the peace versus justice debate was discussed. On one hand, we had a quite large number of people –academics, practitioners, policymakers- arguing that relying on justice and accountability after mass atrocities risks causing more pain than it hopes to prevent, pays insufficient attention to political realities, and cannot succeed unless it is implemented in a way that privileges the logic of consequence over the logic of appropriateness and understands the need for political bargaining. These are the people that say that politics can do more than courts after wartime atrocities, that justice does not lead, but follows, and that international justice is false hope. They view the ICC as weak and counterproductive, designed to alienate the single most necessary country for the

implementation of its decisions. They see no evidence of deterrence, embrace any indication that the universal jurisdiction ‘craze’ has faded away, and believe that amnesties and negotiated settlements are a more effective way out of conflicts. On the other hand, many of the Court’s advocates attach all kinds of unqualified blessings to the new institution, even suggesting that international prosecutions can solve once and for all the problem of human rights enforcement and strengthen or accelerate the democratization of transitional states, deter war criminals from future wrongdoing and have an independent, peacemaking effect in existing conflicts. Thus, war crimes tribunals are not only expected to help in the apprehension, trial, and conviction of criminals, but, in addition, to reinforce the rule of law, enhance accountability, stigmatize malefactors, educate citizenries, heal societies, pacify conflicts, and prevent future ones.

The position I reached with this research falls somewhere in between. I do not sustain that there can be no peace without justice, but that the pursuit of justice is not detrimental to the pursuit of peace. In other words, there *can* be peace without justice, but it is harder to imagine a scenario where justice hurts peace. My central proposition is thereby different from both those that argue that peace and justice are on different sides of complicated but necessary trade-offs, as well as those that argue that all good things go together. Thus, in my view, the limited capacity of the ICC to exacerbate conflicts or to deter war criminals from wrongdoing represents two sides of the same coin. The framework I used for this study understands the ICC as only one piece in the conflict resolution puzzle, and not precisely one of the most important ones. I depict the uneasy coexistence of political mediation and international courts as two tracks that converge at

times and diverge at others, rather than as the carrot and stick of a coherent strategy, or two different strategies in permanent collision.

To reach this conclusion, I examined whether the court's multiple interventions in this region of the world have been followed by a deterioration or exacerbation of the conflicts under study and/or the failure of peace negotiations caused by the question of accountability. The core of this study is devoted to analyzing closely the involvement of the ICC in Uganda, the DRC, and Sudan, but in order to buttress my argument, I also looked for non-ICC processes that have wrestled with the same peace versus justice dilemma. For that I chose three examples that represented three different models of adjudication in international accountability: the International Criminal Tribunal for Former Yugoslavia, the Special Court for Sierra Leone, and the domestic trials of Argentine military leaders and their subordinates. The ICTY, for example, faced significant political pressure aimed at avoiding indictments or arrests of the main players while they were involved in peace negotiations, and was the subject of much criticism when its existence did not deter Mladic in Srebrenica or Milosevic in Kosovo. The SCSL was accused of undermining the prospects of peace, especially by issuing an indictment against Charles Taylor while he was attending peace negotiations in Ghana. And the mid-80s trials in Argentina and the backlash that they provoked are often mentioned as illustrations of the need to let justice take a backseat for the sake of peace and stability. However, a more careful look at these cases reveals several lessons that are consistent with the central proposition of this dissertation. To name a few, amnesty offers and pardoning deals are often not sufficient rewards to appease leaders of armed groups and lure them into playing nice; warnings that indictments to parties to the conflict will deal a

fatal blow to the prospects of reaching a settlement through peace negotiations are grossly misleading and do not fit the actual chronological sequence of events; even in the absence of the meddling of courts and the possibility of accountability, peace negotiations collapse again and again; and finally, the argument that justice mechanisms can undermine the political track to conflict resolution ignores that there is often not one such political track, but several, sometimes contradictory, and always fluctuating.

All of these insights provide hints for how the peace versus justice question will affect the future of the ICC. But it is important to remember that the ICC has a specific setup –in its structure, in its functioning, and in its rules- that minimize the possibility of its involvement undermining peace efforts. Although I use a battery of examples from other countries and other institutions, I have focused on the ICC for three main reasons: its relative independence from its political backers, and especially from the United Nations Security Council; the fact that its procedures, focused on only the worst perpetrators of the worst crimes, and with the principle of complementarity as its cornerstone, already strike some sort of balance; and the understanding that the Court can coexist with qualified amnesties of lower level perpetrators. The policy of targeted prosecutions at the international level for those who are “most responsible” can complement national amnesties, as it assumes that these low-level offenders will be dealt with at the national level through either prosecutions or an amnesty in conjunction with other mechanisms, such as truth commissions.

My main three case studies have all been affected in one way or the other by the peace versus justice debate. The indictments against the LRA leaders coincided with a

fresh round of peace negotiations that seemed to have better prospects at succeeding than ever before, and many said that the ICC should let Joseph Kony be awarded amnesty to end the 20 year old conflict. The indictment of the President Sudan risked making it harder for humanitarians to deliver care, peacekeepers to deliver protection, and peace negotiators to reach a settlement. And in the Congo many preferred to privilege everything else over the pursuit of justice: democratic elections, state-building, a military solution to the problem in the East, and sporadic peace negotiations that resulted in the reintegration of most former rebels into the new Congolese army. For each situation, I asked questions like these: have the security conditions worsened after the involvement of the ICC? If so, can the exacerbation of the conflict be attributed in any way to the indictments? Have these indictments made it impossible for new rounds of peace negotiations to take place? If peace talks have taken place but failed, can the collapse of the negotiations be mainly associated with the ICC? The answers to these questions support this dissertation's central argument that the pursuit of justice through *ex ante* war crimes courts does not hurt the simultaneous pursuit of peace.

Take northern Uganda, for example. Uganda went through one of its worst peaks of violence from 1998 to 2004, *before* the Court became involved, and one can accurately speak of an intermittent succession of negotiations, truces, and ceasefires, from 2004 to 2008, precisely the first four years after the ICC entered into the picture. The ICC was indeed a thorny issue from the beginning, but the negotiations collapsed due to many other irreconcilable differences, as well as general lack of trust among the parties. In fact, the delegations of the LRA and the government signed an agreement on justice and accountability that did not contemplate amnesties for the LRA leadership. Furthermore,

there is no evidence that indicates that the rate of defections to benefit from amnesty and reintegration packages has slowed down since the intervention of the ICC, and senior LRA commanders had never accepted offers of amnesty prior to 2004.

The DRC also presents an interesting case study and teaches us similar lessons. It has been more than ten years since the Lusaka agreement, the first one of a series of peace treaties, as well as ten years since the establishment of one of the largest UN peacekeeping operations in the world, and life has not improved for many Congolese in the East. Overall, however, the Congo is now relatively more stable than at any point in the last twelve years. Several years after the first indictments and arrests of these warlords, the province of Ituri in which they operated is much more peaceful, while the provinces of North and South Kivu have remained intermittently mired in conflict. The possibility of being sent to The Hague has not inhibited peace negotiations either, some of which took place in 2008 and 2009 with various rebel groups. Questions of accountability or impunity do not occupy much space in peace negotiations. Perhaps not surprisingly, hardened war criminals go to peace tables not to get rid of prosecutions, but to gain power and wealth, and amnesties and other rewards are sometimes insufficient to entice spoilers. Integrating rebel leaders into the regular army, for example, does not guarantee their loyalty.

But no other action raised the profile of the ICC more than the indictment of the President of Sudan. It is the first time that the United Nations Security Council refers a case to the ICC, the first time that the ICC targets a country whose government is openly hostile to its operations, and the first time that a sitting head of state has been indicted. It is feared that this indictment, as well as previous arrest warrants issued against a high-

ranking minister and a militia leader, might jeopardize the possibility of peace. The announcement of the Court's decision was greeted with protests in Khartoum, and hostility within the African Union, the Organization of Islamic Countries, and even within the United Nations Security Council. China, Russia, and France casually talked about a UNSC resolution asking for the court to defer investigations for the sake of peace negotiations. The immediate expulsion of a dozen aid agencies was justified by President Bashir by claiming that these aid agencies were providing the ICC with evidence for his prosecution. The joint UN-AU peacekeeping force can also be endangered, and its task perhaps made more difficult.

On the other hand, it is not possible to argue that the security situation has worsened in Darfur since the involvement of the ICC, or the conflict made more intractable. Most of the violence took place from 2003 to 2004, and the level of fighting since then has receded. This may have less to do with the ICC than with the presence of a UN-AU peacekeeping force, or with the fact that the *janjaweed* managed to burn down most villages in Darfur and the majority of those refugees have not returned from Chad. Khartoum has been impeding humanitarian work in the area long before the indictment, and the international community spent two years prior to it issuing Security Council resolutions asking for the disarmament of the *janjaweed* and pressuring Bashir into accepting the deployment of a peacekeeping force in Darfur— a point rarely taken into account by those that blame the ICC as the obstacle to the deployment of blue helmets into the region.

Most importantly, the ICC has not inhibited the conduct of peace negotiations, nor precipitated their failure. Since 2005, there have been two major, partially successful,

peace processes, first in Abuja in 2006 and recently in Doha in 2009 and 2010.

Interestingly, one of the rebel leaders and former commander of the Justice and Equality Movement, Bahr Idriss Abu Garda, became the first suspect to ever surrender voluntarily to the Court, in connection with an attack on 12 UN peacekeepers. He is at liberty pending his trial, and remains confident in his ability to demonstrate his innocence. As a side note, this reminds us that a trial at The Hague is sometimes the best possible fate for many of these individuals. Acquittals are possible and happen often, as command responsibility is hard to prove in a court of law.

Since the proliferation of UN-established international courts in the 1990s and the creation of the ICC, the peace versus justice debate has surrounded every indictment, every statement of international prosecutors and the governments involved, and every national or international dialogue about post-conflict accountability. In some circles, this debate is seen as a spent, passé, unnecessary quandary that was already overcome at the turn of the millennium in favor of accountability for the worst crimes and perpetrators, and against blanket amnesties and sweeping atrocities under the rug. However, each time societies and policy-makers have a choice to make about justice in the midst or in the immediate aftermath of conflict, impassioned disagreements about timing, mechanisms, and consequences quickly spring up. In this sense, the peace versus justice debate is as common as the doubts and uncertainties behind a policymaker's decision to use armed force or explore other means, a commander's hesitation about executing a given enforcement operation or letting the opportunity pass for fear of retaliation on civilians, and a politician's qualms about negotiating with the enemy and reaching a settlement

because it is tantamount to rewarding bad behavior, making a pact with the devil, and encouraging future defiance.

Every time one thinks these questions are settled, the peace versus justice debate resurfaces. Every no-peace-without-justice proclamation is quickly followed by a barrage of criticism, from idealism and naiveté to recklessness and imprudence, as well as condemnations of unwarranted political interference and legal imperialism. Sometimes these accusations come from self-interested statesmen that want to avoid scrutiny. But they also come from the victims themselves, or from humanitarian workers that toil with them daily and are aware of the precariousness of their environment. These concerns are often genuine and noble, so much so that at times it seemed advisable to stop writing about peace and justice from a remote, comfortable place in the First World. These fears were only partially allayed when I traveled to some of these countries and spoke to many people about these matters, but they have not completely left me. However, I should note two things. Humanitarian workers, like peace makers or accountability seekers, are also bound by the confines of their profession. By the nature of their work, they devote their lives to alleviating suffering and managing crises, but not to solve them. And, fully knowledgeable of the fragility of the context and the vulnerability of the victims, they tend to have a pessimistic bias towards change. However, as countless examples show, an indictment from a faraway court is hardly the only factor that can precipitate change. And it is impossible to know beforehand the unintended consequences of any response, from deploying peacekeepers and enforcing no-fly zones to imposing sanctions and embargoes or simply doing nothing. Furthermore, for each survey that contends that victims would rather see perpetrators go unpunished in exchange for peace and security, there is another

equally valid survey that shows that the desire for justice is strongest among victims, and also many others that portend that peace and justice are not incompatible in their eyes. For better or worse, international justice is not only about the victims. It makes little difference if the victims express their wish for a no-trial execution of their wrongdoers, or for pardoning or even rewarding them with positions of power or a luxurious exile. International justice is different precisely because it concerns itself with matters of peace and security, and with crimes that offend all humanity. In this regard, it is not only about the victims, but about the security of future, potential victims.

The ICC deserves much of the criticism levied against it in its first decade of existence. Its proceedings have been slow and cumbersome, even by the standards of other war crimes courts. It has sometimes fumbled, failed to reach out appropriately to the communities involved, and struggled to obtain the necessary cooperation from member states to make a meaningful impact. However, if this investigation is more right than wrong, the notion that its activities can sabotage the prospects for peace should be the least of their concerns.

This investigation has not argued that power politics are divorced from the activities of the International Criminal Court. Quite the contrary, the tension between *idealpolitik* and *realpolitik* will always be present (Bassioni, 2006).²⁹¹ Just as the court was born out of an idealistic thirst for justice and an equally compelling disgust at impunity, its creation was also facilitated by a sobering, realistic assessment that the old political trade-offs were yielding terrible results. International criminal justice is, in the words of Professor Cassese, “a giant without legs and arms” (Williamson, 2006: 26) and

²⁹¹ Bassiouni, Cherif, “The ICC – Quo Vadis?” in *Journal of International Criminal Justice*, 4 (2006), pp. 421-427.

must therefore rely on others with enforcement powers. For this reason, it is unlikely that even an independent institution like the ICC will go out of its way to stand up to the most powerful states. Global justice is, indeed, selective and marred by double standards.

Nonetheless, I have attempted to suggest that the interplay between law and politics does not happen in the simplistic, unidirectional way often portrayed, and that it is not always, not even frequently, in the interest of *realpolitik* to sacrifice accountability in the altar of peace. We often fail to recognize a more nuanced picture in which the ICC is only one variable in multi-layered, complex situations involving multiple political and non-political actors. Sometimes, peace versus justice, or truth versus justice debates are caught up in a-historical, de-contextualized abstractions without looking closely and carefully at what actually happened in each situation and without unpacking the political motivations and interests at play. This dissertation aimed to address this gap.

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1998 until today: National University of Long Distance Education (Universidad Nacional de Educación a Distancia). Currently a 3rd year Law student.

2002-2003: Wesleyan University (Connecticut).

2003-2010: Rutgers University (Newark campus). Ph.D. Candidate (Cumulative GPA: 3.95). Dissertation: "*The International Criminal Court in Central and Eastern Africa: Between the Possible and the Desirable.*" Expected completion: May 2010. This dissertation was nominated by the Division of Global Affairs for the Dean's Dissertation Award.

Honors and Awards:

Teaching Assistantship awarded by Wesleyan University from September 2002 to May 2003.

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In fulfillment of Teaching Assistantship at Wesleyan University:
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As adjunct professor at the Department of Liberal Studies, Fordham University:

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Publications:

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- ** “Rethinking Deterrence: The International Criminal Court in Sudan” in *UNISCI Discussion Papers* (Peer-Reviewed Journal), Number 13 (January 2007).
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- “De la Primavera Árabe a la Sexta Guerra” (From the Arab Spring to the Sixth War). Op-Ed published in *La Opinión* (Spanish newspaper), on July 17th 2006.
- “Cambio de marea” (Turn the tide). Op-Ed published in *La Opinión* (Spanish newspaper), on February 11th 2007.
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- “La culpa del chiita” (Blaming the Shia). Op-Ed published in *La Opinión* (Spanish newspaper), on September 26th 2007.
- “Candidato Obama” (Candidate Obama). Op-Ed published in *La Provincia* (Spanish newspaper) on September 29th 2007.
- “A buena hora lo dicen” (Now They Tell Us). Op-Ed published in *La Opinión* (Spanish newspaper) on October 20th 2007.
- “De Kosovo a Euskadi” (From Kosovo to Euskadi). Op-Ed published in *La Opinión* (Spanish newspaper) on November 3rd 2007.
- “Iowa y el Mundo Al Revés” (Iowa and the world upside down). Op-Ed published in *La Opinión* (Spanish newspaper) on January 6th 2008.
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- “America the Confused.” Op-Ed published in *Brooklyn Downtown Star* (May 11th 2009).
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“Guinea-Conakry: The Price of Political Rape” co-written with Letitia Anderson for *OpenDemocracy* (February 10th 2010), available at <http://www.opendemocracy.net/5050/pablo-castillo-diaz-letitia-anderson/guinea-conakry-price-of-political-rape>.

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