

A Question of Indictment: Preventing Crimes Against Humanity or Promoting the ICC?

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Introduction

“Judicial romanticism has serious systemic costs in a global community with sharply differing notions about the best way to mete out justice to individuals.”

Ratner and Abrams, 2001:345

Will international criminal law survive its long birth? Will the image of an overzealous Chief Prosecutor of the International Criminal Court (ICC) overshadow the potential contribution of a permanent court dedicated to trying those accused of engaging in the most heinous of human acts? Can this be avoided?

One of the more vexing questions facing advocates of global justice and peace is whether or not international criminal tribunals and courts should (either routinely, or in extraordinary circumstances) pursue the indictment of accused criminals while the latter retain positions of (state or non-state) power, or move beyond the goal of facilitating *post bellum* justice.² Absolute justice would demand indictment proceed regardless of the immediate consequences; yet if this either delays the cessation of violence or increases its intensity, it is not a utilitarian choice unless it can be argued such indictments serve as able deterrents for similar potential crimes. This paper will examine the conceptual dilemma inherent in prosecutorial decision-making by international legal bodies, with principal reference to the historic case of Milosevic in Serbia, and the extant cases of Joseph Kony of the Lord’s Resistance Army in Uganda and President Omar al Bashir of Sudan. It will conclude with argumentation to support my central position: political

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² I define power as authoritative decision-making capacity, regardless of the external legitimacy endowed on the position or entity of governance. Thus this includes heads of state as well as leaders of armed factions; it would also include chief executives of private or public corporations, though it is unlikely the ICC would find itself dealing with these individuals.

circumstances must trump judicial principle in order to preserve the utility of the ICC in the future and avoid increasing human misery in the present.

The ICC is by nature already politicized; it is a creature of politics as much as of law, if not more so (Roach, 2006; Broomhall, 2003), and part of its mandate is to seek peace as well as justice. To pretend otherwise and thus inflict it with a politically complicated and controversial mandate, if and when it pleases permanent Security Council members to do so, will not enhance its legitimacy or effectiveness. And yet it does have a vital role to play in punishing and publicizing egregious crimes against humanity and reinforcing the importance (if not the realization) of the principle of the responsibility to protect (Bellamy, 2009). However, it is at risk of becoming little more than a paper substitute (albeit one with real and deleterious consequences) for stronger international action in cases of urgent threats to human security.³

This paper will ask several questions related to the legitimacy of the indictments, questions present in discussions related to international intervention in general. The ICC is at a jurisdictional crossroads, and there are genuine fears that the extant arrest warrants have not only delayed active peace negotiations, but will also compromise the longer-term legitimacy of the ICC itself. The use of international criminal tribunals to pursue foreign policy ends is, of course, nothing new; many would agree that the International Criminal Tribunal for the Former Yugoslavia (ICTY), for example, was an instrument of NATO. This would be an unfair (if understandable) accusation, yet the use of the ICC by Security Council members will remain an ongoing issue regardless of the cases it decides to put to (or defer from) trial. Without this structural contingency, however, it is unlikely that any of the permanent members of the SC would have or will proceed to ratify the Rome Statute. Thus we are stuck in a conceptual bind, between justice, peace, and self-interest. Ironically, Security Council restraint might prove to be a silver lining.

Selectivity, Deterrence, and Counter-productivity

I do not propose to debate the proposition that former heads of state accused of crimes against humanity or war crimes should be forced, where possible, to stand trial, or that the principle of absolute immunity *ratione materiae* (Akanke, 2006:51-53) should be revived (on former Chilean dictator Pinochet, for example, see Wilson 1999; more generally, Orentlicher, 1991); or that leaders of militarized rebel groups should walk free after conflicts end. Rather, the sole focus here will be on leaders who retain office or extra-legal power while violent conflict is proceeding. Do such indictments in fact hinder peace negotiations, as is often alleged? Do they do more harm than they can possibly deflect from the human security of citizens caught in the midst of conflicts? This paper begs further empirical research into each of these questions, but offers some preliminary observations in the meantime.

Nor is it even reasonable to continue the debate over the validity of international legal responses to civil or intrastate wars. By their very nature, crimes against humanity,

³ As Thomas Smith writes, it is “relatively painless for states to endorse the morally pristine workings of a Hague tribunal that has been established under international treaty and which accords suspects the full complement of legal rights and safeguards. It will be much harder to seek immediate or preventive justice by intervening to stop atrocities” (2002:179).

genocide, and war crimes encompass behaviour during intrastate wars as well as international conflict. And though arguments for the justification of military courts - which are invariably courts where “victor’s justice” is practised – have been put forth (Thornberry, 1996), most if not all human rights advocates are firmly in favour of non-military tribunals to deal with mass atrocities today. But non-military tribunals invariably involve the outside community; amongst others, Grodsky believes that, while it is “human rights organizations or victims groups [which] frequently advocate for international trials ... it is external state actors that are the engine for justice” (2009:689).⁴ Thus “the gradual move towards the internationalization of criminal accountability can pit new political elites against two opposing pressure groups, international and domestic. High levels of political or economic pressure can convert international actors into important actors on the domestic stage ... Transitional justice is mutated into an exercise of subtle two-level bargaining....The resulting ... forms of transitional justice may be insincere, incomplete and, to the local community, irrelevant” (ibid, 694).

The promises of even limited ICC success are indeed enticing. Most notable is the possibility of ending (or, more reasonably, mitigating) the infamous culture of impunity that has frustrated the quest to end mass atrocities such as genocide and systematic rape. But we must also gauge the impact of indictments on the human security of those suffering most from the perpetuation of conflict, as well as their impact on transitional justice following the cessation of conflict (as we will see, determining that an end to hostilities has actually occurred is itself fraught with problems). Finally, if we are to take seriously the long-term prospects of the ICC’s legitimacy, we must ask the political – and not legal – question of whether such arrest warrants are increasing or decreasing the international opinion of the validity (and even the very function) of the court itself. Most profoundly, perhaps, we face a question of who justice is for: is it victim-centered, or need it serve a broader purpose where international actors are involved (Glasius, 2009)? There is limited empirical evidence to suggest this is a false dichotomization.

While it is obvious that we have limited recourse to empirical evidence, since the ICC has in effect just begun its historic mission, it is certainly not too soon to delve into these political questions. Two opposing camps have formed: one argues that breaking international criminal law is a crime regardless of when it occurs and that absolute justice demands immediate treatment, regardless of the consequences; the other argues that peace settlements, with all the attendant possibilities of continued power or amnesties for accused criminals, should precede indictments, and that the latter will only prolong ongoing conflicts. It is difficult to escape this dichotomization of the issue. While the question of selectivity will always hound the quest for absolute justice in a system composed of sovereign states with marked discrepancies in power, and there will always be the possibility of counter-productivity in the joint pursuit of justice and peace, the indictment of leaders in positions of power is an especially thorny conundrum, and those members of the international community intent on establishing the permanency and effectiveness of the ICC must realize there are sharp political limitations to its abilities.

⁴ It is fair to say that the NGO community has played and will play a large role in the evolution of the ICC, as Roach suggests: “understanding the nature and scope of the ICC’s juridical power ... will depend on public perception of its fairness and efficacy of norms and the role of NGOs in promoting and upholding the ICC’s legal standards of fairness” (2006:3).

The question of prosecutorial aggression was always a contentious one. American representative David Scheffer had warned against the dangers of a self-initiating prosecutor who could “embroil the court in controversy, political decision-making and confusion” (1998:3).⁵ Of course, there are serious impediments to such a development written right into the Rome Statute. The Pre-Trial Chamber must approve of any investigative course of action. Article 53(2)(a)-(c) permits the Prosecutor to refuse an investigation if it is not “in the interests of justice.” As de Than and Shorts write, “it is the responsibility of the Pre-Trial Chamber to issue the arrest warrant, but only after it has been satisfied by the Prosecutor that there are reasonable grounds to believe that the crime comes within the jurisdiction of the court; and that the arrest appears necessary to ensure the suspects attendance at trial or to prevent obstruction to the investigation or the court proceedings or to prevent the accused from committing further crimes (Art. 58(1)(a) and (b))” (2003:333-334). The latter stipulation, in the continued absence of a police force capable of ensuring arrest and capture, is of marginal importance. But even the other stipulations leave little room for the Pre-Trial Chamber to reject a case that is bound to cause further human suffering, though the Chamber can in fact overrule a Prosecutor’s decision to *not* proceed (Art. 53(3)(b); see Cassese, 2003:414). The irony is that only the Security Council has, in effect, the ability to do this, by its legal right to defer an investigation: “Under Art. 16 the Security Council has the power... to defer a potential or ongoing investigation of prosecution for a period of 12 months ... It is conceivable that such as request could, in theory, be renewed indefinitely. [However] the words of Art. 16 refer to a ‘request’ as opposed to an order. Thus, it is submitted that the court may refuse such a request where it believes that it would be in the interests of justice to do so. However, taking such a path may cause problems and conflict between the ICC and Security Council” (!). (de Than and Shorts, 2003:326). Thus the irony: in the absence of flexible thinking by the ICC itself, the Security Council is the only authority that can save the ICC from following its responsibility to prosecute; and yet the Security Council is obviously driven by state interests of the permanent members, at least three of whom have yet to even ratify the Rome Statute. It is a fine mess we are in.

The ICC was conceived largely in terms of two purposes: it was designed to dispense justice, after crimes had been committed; and it was designed to act as a preventive mechanism, deterring potential war criminals from egregious acts by way of possible punishment and shaming.⁶ As Leonard writes, the “legal precedent for some form of an international criminal court” is found in the Genocide Convention (2005:27), which stipulates the need for both punishment and prevention; deterrence was viewed as an important function by many legal scholars and human rights advocates before the ICC was realized. The move away from the ad hoc tribunals that followed Nuremberg and Tokyo was seen as an effort to establish permanency, overcome the stigma of victor’s justice, and provide deterrence. The lack of a robust, coercive enforcement mechanism was always recognized as a potential problem, but the record of the ICTY indicates a surprising level of compliance, albeit with a myriad of complications, and though a corresponding dispute over the source of this compliance has already emerged (Lamont, 2010). It could be seen as the projection of American power, the pull of the European

⁵ Scheffer was the American Ambassador At large for War Crimes Issues and Head of the American delegation to the Rome Conference.

⁶ On the development of the ICC see especially Bassiouni, 1998; Bendetti and Washburn, 1999.

Union, or the development of a new normative compliance. Regardless, it would be phantasmal to assume an ICC arrest warrant will always result in an arrest.

Within national jurisdictions, arrest warrants have a long pedigree.⁷ But in international law they are rare indeed. The logic of charging political leaders is sound; under international law, leaders must be held accountable, and it is impractical to arrest all those who participate in atrocities, especially when many of them are children. As Ratner and Abrams suggest, in the case of mass abuses “a more nuanced form of accountability is required. This would entail that prosecutorial mechanisms limit their focus to those leaders with a policy-making responsibility over the crimes of the period ... While this line may not always be easy to draw, focusing on those leaders who directed the terror, as well as a select group of participants in particularly atrocious acts, will give these societies a sense of the identity of those most guilty of the crimes.” (2001:338). This principle has been explicitly invoked in trials pertaining to Yugoslavia, Cambodia, and Sierra Leone (see also Orentlicher, 1991). But this does not mean indicting acting leaders is necessarily sound logic.

We will use three general criteria to discuss the legitimacy of live indictments: deterrence, non-selectivity (or impartiality), and the need to avoid counter-productive human security scenarios. I will return to the deterrence argument in our conclusion; suffice it to say here that the threat of international prosecution has certainly not put an end to the commission of mass atrocities by leaders involved in bloody warfare, though of course it might be argued it is too soon to judge the ICC on this account.⁸ But the demands of impartiality and human security deserve some explication here.

Of course, one of the most compelling arguments for the establishment of the ICC was precisely that *ad hoc* tribunals are almost by definition the children of victor’s justice, and their reliance on Security Council approval in effect weakens the cardinal principle of sovereignty since some states are not only more equal than others but they are in essence free from prosecution (Bodley, 2001).⁹ Further, as A.M. Danner notes, “impartiality is critical in the context of the ICC because its absence constitutes the basis for the charge most frequently levelled at the court: that it will become a source of politicised prosecutions.” (2003:537). In retrospect, this may have been rather wishful thinking. In the end, of course, as with international intervention in general (Damrosch, 2000), some selectivity is inevitable, regardless of when charges are pressed. No international legal body exists which could possibly supersede this reality, let alone one with the ability to universally enforce such a mandate. But there is also the strong need to counter selectivity at every corner; to avoid its most outward manifestation. Is this even

⁷ Warrants need to be distinguished from trials which proceed *in absentia*: the former does not, in other words, demand an *in absentia* trial if the accused is not physically captured to stand trial. It is fairly widely accepted today that habeas corpus demands the rejection of *in absentia* trials, and the Rome Statute makes this clear.

⁸ Payam Akhavan, referring to the ICTY, has suggested that an immeasurable “general” deterrence effect can change the international political culture of impunity, even if it fails in specific cases (Akhavan, 1998 and 2001); this constructivist approach and its promise of “subliminal inhibitions” (Akhavan, 1998:748) against crimes against humanity is intriguing but I would argue that specific deterrence is still urgently necessary and carries more weight as an indicator of the ICC’s effectiveness.

⁹ As Leonard points out, *ad hoc* tribunals have been established over the post-war years with fairly limited scopes, including Nuremburg, Tokyo, the former Yugoslavia, Rwanda, East Timor, Cambodia, Sierra Leone, and Iraq (2005:47-48).

possible in a pre-settlement context? Rather than deny the persistence of selectivity, we should aim at developing a flexible code of priorities.

The demand to avoid counter-productivity is perhaps even more important, if we are to take seriously the first principle of intervention, which is to do no greater harm than that already occurring. If an indictment leads to further harm of civilians, it could be considered counter-productive, and a further challenge to what Danner refers to as the legitimacy and accountability of prosecutorial discretion (2003). The temptation to punish the international community for issuing an indictment by punishing the civilian victims of conflicts should not be ignored, and it constructs a situation whereby international timidity about actual intervention is substituted by a legal measure which only invites more violence.

I turn now to three brief case studies before returning to our conceptual discussion.

The Balkans and Slobodan Milošević

The most high-profile indictment of an international war crimes tribunal was probably that of Serbian leader Slobodan Milosevic, and his case presents an interesting prelude to future ICC actions. The relative neatness with which the indictment played out probably emboldened the ICC, over a decade later, to engage in its equally controversial indictment activity.

The ICTY has been criticized for many things, but most observers tend to agree that, unlike the International Criminal Tribunal for Rwanda (ICTR), which has failed to prosecute numerous RPF crimes during the genocide period in 1994, selective prosecution had not been an over-riding issue until the full-scale NATO aerial campaign against Serbia. Akhavan (1998), for example, claimed the neutral nature of ICTY was new and exciting; and though a lack of arrests was an ongoing problem (Beigbeder, 1999:160-163) even this has been overcome.¹⁰ The indictments of major Serb players in the conflict, including Milosevic, Karadzic, and Ratko Mladic lent weight to the argument that the court's lack of enforcement, or complete reliance on NATO forces for it, was a major cause for concern. Some observers deny any ICTY impartiality, such as Johnstone: "The ICTY's police force is NATO, since on 9 May 1996, the ICTY prosecution signed a memorandum of understanding with the NATO supreme command in Europe covering practical aspects of NATO assistance and delivery of suspects. ... if the Tribunal needed NATO, NATO needed the tribunal in order to complete its transformation from a traditional military alliance into a 'humanitarian' world police" (2002:121). It may be the case that the ICTY in general was viewed as a threat to the peace process in the region by chief negotiators such as Cyrus Vance and David Owen

¹⁰ Of course, this is not a universal opinion. Indeed the author encountered various views, based largely on the home city of the observer, while travelling through the Balkans in 2002. Serbian animosity toward the ICTFY is perhaps the most easily discerned, but some members from all sides to the original conflict expressed their concern that the tribunal was biased against them. Meanwhile, informal discussions with observers while in Arusha, Tanzania, in 2000, were uniformly of the opinion that the ICTR was not even making an effort to appear impartial.

(Lamont, 2010:77; Williams and Waller 2002:843). As early as December 16, 1992, U.S. Secretary of State Lawrence Eagleburger gave a speech in Geneva invoking an obligation to combat genocide and calling for the indictment of Milosevic, Karadzic, Ratko Mladic, and paramilitary leaders. Considering the fact that the first Bush administration was about to leave office, there was little likelihood of a follow-up to Eagleburger's recommendations. Incoming Clinton officials, meanwhile, gave no indication that they were willing to put American lives in danger to stop the war in Bosnia. Supporting a tribunal seemed like the next-best option.

The ICTY was officially established by Security Council Resolution 808 in February 1993 (see Bass, 2000:215); South African Richard Goldstone was appointed prosecutor in July 1994, and he would oversee a series of indictments, mostly of Serbs, and most importantly of Mladic and Karadzic for genocide, crimes against humanity, and war crimes, and Milan Martić, the president of the Republic of Serb Krajina, for a rocket attack on Zagreb. The indictments did not prevent the Srebrenica massacre, however. During the Dayton negotiations in 1995, the tribunal indicted three senior JNA (Yugoslav army) officers, Mile Mrksić, Miroslav Radic, and Veselin Šljivancanin, for command responsibility for a 1991 Vukovar hospital massacre (this was the first indictment to target Serbian political figures), as well as several Croatians. During the Dayton negotiations, Goldstone also issued a new indictment for Karadzic and Mladic, charging them with genocide, crimes against humanity, and war crimes at Srebrenica. Ultimately, the Dayton Accords mandated the signing parties to cooperate with the ICTY and stated that peacekeepers had the authority, although no obligation, to carry out arrest warrants. In March of 1996 the ICTY indicted its first Bosniaks, accusing Zejnir Delalic, Zdravko Mucic, Hazim Delic, and Esad Landzo, for committing atrocities against Bosnian Serbs. In late 1996 Canadian judge and criminal law professor Louise Arbour took over as prosecutor, and made the decision to begin releasing sealed indictments (which NATO appreciated for giving them the advantage of surprise during arrest).¹¹

On May 27, 1999, as NATO's extensive bombing campaign against Serbia proceeded, Arbour indicted Milosevic for crimes against humanity and violations of the laws and customs of war in Kosovo during the Serb security forces' expulsions of Kosovar Albanians, reserving the right to later amend the indictment by including atrocities in Bosnia and Croatia. She also indicted Serbian president Milan Milutinovic, Yugoslav army chief of staff Dragoljub Ojdanic, Yugoslav minister of internal affairs Vljeko Stojilkovic, and Yugoslavia's Deputy Prime Minister Nikola Sainovic. Two weeks later, Arbour resigned to take a seat on the Canadian Supreme Court, and Swiss attorney-general Carla del Ponte was appointed ICTY prosecutor. The bombing stopped, and the Milosevic regime fell, soon after. He was transferred to The Hague on June 28, 2001, and was subsequently charged with crimes committed by the JNA in Croatia and Bosnia-Herzegovina. His trial, in which he defended himself and succeeded largely in making a mockery of the Court, proceeded in February 2002 and ended with his in-custody death in March 2006.

¹¹ The threat of a sealed document against him was apparently taken so seriously that Milosevic refused to attend the failed talks at Rambouillet for fear of his arrest there. This does not necessarily mean that sealed indictments should be avoided as a rule, but that the threat of them against ruling politicians may inhibit important peace negotiations in undeniable.

Thus the first indictment of an active national state leader by an international criminal tribunal is often viewed as a successful precedent which helped stop the war in Kosovo and led to the fall of what had clearly become a thoroughly corrupt and illegitimate regime. Yet this viewpoint misses several key points. The indictment itself did nothing to end the conflict: NATO grew tired of endless bombing runs (and of tensions with Russia and China), and Serbs of receiving them. As NATO conduct was certainly questionable but largely escaped ICTY scrutiny, the spectre of selectivity was raised once again.¹² The indictment did close the door to a post-conflict Milosevic regime, however, unlike the Dayton Accords; as Lamont suggests, “indictment of Slobodan Milosevic along with the SRJ military high command during Operation Allied Force meant that a post-Kosovo rehabilitation of the Milosevic regime, similar to that which took place post-Dayton, could not take place without directly undermining the ICTY’s first indictment of a head of state.” (2010:80). There are competing stories as to how pleased or displeased NATO was at the indictment itself: Louise Arbour (ICTY Chief Prosecutor) claimed NATO members were upset, but US Secretary of State Madeleine Albright was publicly supportive (Bass, 2002:313).¹³ Regardless, an indictment of Milosevic after the cessation of conflict would have had the same effect in terms of the future legitimacy of his rule in Serbia.

Milosevic was certainly not overthrown in Serbia because of the indictment issued by the ICTY. A generation of Serbs had sacrificed a decade to the deprivations of war, and they had had enough. In the fateful election of September 2000, the opposition managed to unify for the first time since 1996, overcoming its “compulsive tendency to squabble”¹⁴ with the formation of the Democratic Opposition of Serbia (DOS) in summer 2000. The DOS’s presidential candidate, Vojislav Kostunica, was an excellent choice, possessing impeccable nationalist and opposition credentials without being tainted by corruption, which was more than could be said for many opposition figures after 1997 (Sell, 2002:338-339). Kostunica certainly did not run on a platform of turning Milosevic over to The Hague. Instead, his campaign pledged to root out corruption, an attractive proposition to Serb voters exhausted by economic mismanagement and postwar shortages. The student activist group Otpor (Resistance) was perhaps unique in that some of its street performances highlighted Yugoslav criminality during the wars of the 1990s and called for Milosevic’s prosecution (Nikolayenko, 2007:173). However, even Otpor members were generally motivated by desires for the reduction of corruption in higher education and a wider commitment to democracy, rather than sending Milosevic to The Hague (ibid).

Even after his forced retirement from office, there was little support for the indictment amongst the local population. His transfer to The Hague followed intense American pressure, coupled with the urge to accede to the EU on behalf of Serbians.¹⁵ It

¹² Note that Louise Arbour did establish a Commission to look into NATO war crimes, but there is considerable controversy surrounding its legitimacy and its finding – that NATO actions do not warrant further investigation – remain hotly contested (see for example Mandel, 2001; Hayden, 2003).

¹³ Lamont (2010:81) and Williams and Scharf (2002:194) note that Milosevic did not attend the Rambouillet talks preceding the bombing campaign because he feared the existence of a sealed warrant. This is significant because it suggests that the ICC had reserve power we do not often speak of directly.

¹⁴ “Can the Serbs get rid of Milosevic?” *The Economist*, July 3, 1999, p. 39.

¹⁵ I will quote Lamont at some length here (2010:82-83): “Milosevic’s transfer to the ICTY, while having occurred in the context of a domestic political conflict between the Yugoslav president and the Serbian

is in my view an error to view the ICTY indictment of Milosevic as a particularly helpful precedent, even if it served the historic purpose of breaking the taboo against publicly indicting acting heads of state. More to the point it had nothing to do with achieving the fragile peace in the Kosovo (or, even, Balkan) region, or the subsequent fall of the Milosevic regime. Would aggressive indictments of top leaders of war-fighting groups or state governments in the future establish a less complicated, selective, and controversial historical pattern?

Northern Uganda and Joseph Kony

The hostilities in Northern Uganda involve many actors but the main drama has unfolded as a battle between the Museveni government and the Lord's Resistance Army, led in recent decades by Joseph Kony, one of the more illustrious characters in the cast of contemporary tyrants.

As Apuuli (2008), Furley (2006), Allen (2006) and others suggest, there are various narratives at work in the violence of Northern Uganda, but the dominant one points to a long-standing conflict between north and south: "Broadly ... all the insurgencies in northern Uganda, including that of the LRA, can be explained as an attempt by the people of that region to regain power that they lost in January 1986 following the victory of Museveni's NRM" (Apuuli, 2008:53), as well as a reaction to the violent aggression of the NRM at the time (Simba, 2000:112; Doom and Vlassenroot, 1999:9-15; Van Acker, 2004). The Acholi people have borne the brunt of the conflict, living in terror of the LRA on the one side and forced into squalid camps by the government of Yoweri Museveni, which came into power in 1986.¹⁶ The conflict has been fuelled by its international dimension, since Sudan and Uganda have supported rebel groups in each other's territory (this largely ceased several years ago, forcing the LRA southward, where it has continued to commit atrocities in the DRC). In the early 1990s, Joseph Kony emerged as the leader of the surviving rebel group in northern Uganda, and, as a self-proclaimed prophet, popularized his vision of establishing a theocratic Uganda ruled by the Ten Commandments. His charisma is legendary but his violent tendencies and disregard for even basic human rights even more infamous. The LRA stands out in the African context as a particularly brutal rebel group which has made child abduction, child soldiering and sexual slavery part of the politico-cultural landscape.

In 2002, Ugandan troops launched Operation Iron Fist, which involved an incursion into southern Sudan to wipe out LRA forces (this was permitted by Sudanese President al Bashir in a very realpolitik exchange, brokered by Daniel Arap Moi of Kenya, which reduced Ugandan support for rebel Sudanese forces). The limited military success (in fact the LRA expanded its operations back in northern Uganda; Allen, 2006:52) was overshadowed by the humanitarian crises which followed as hundreds of

prime minister, was the direct result of coercive pressure applied by the United States, which threatened to use its votes in the IMF to block Belgrade's access to international financial assistance."

¹⁶ The LRA is the only surviving resistance movement in northern Uganda. Several others have been eliminated since the Museveni seizure of national power in 1986, including the Holy Spirit Movement of Alice Lakwena, the West Nile Bank Front of Juma Oris, and the Uganda People's Army of Peter Otai.

thousands of northern Ugandans became IDPs as the LRA moved across the country. The infamous IDP camps, where well over 1.5 million Ugandans have lived for nearly a decade in what are clearly unacceptable conditions, have not served to protect their inhabitants, as the LRA has been able to raid them and abduct children (over 8,500 in 2003 alone). Efforts to recruit locals (and surrendered LRA members) to protect the camps and pursue Kony have met with mixed results and raise further questions about any future peace settlement.

Despite an obviously desperate situation, the Ugandan government has denied the serious possibility of any humanitarian intervention in the region, beyond some emergency food supplies. The Ugandan government ratified the Rome Statute in June 2002 (see Afako, 2008) and requested an ICC investigation in December 2003, probably because of the frustration involved in locating Kony (who has moved with surprising regularity from Sudan to the DRC to the CAR).¹⁷ An ICC indictment could encourage other governments to turn Kony over, though this would seem a rather hopeful premise on the part of an experienced hardened politician such as Museveni (and became impossible in the Sudanese case after the indictment of al Bashir, as explained below). More likely, this was an effort to legitimize the Ugandan war against the rebels and justify the abysmal IDP situation, which was attracting the attention of human rights advocates at the time. According to HRW, “the UPDF has committed extra-judicial killings, rape and sexual assault, forcible displacement of over one million civilians, and the recruitment of children under the age of 15 into government militias”, as well as the widespread use of torture (Apuuli, 2008:56; Uganda acceded to the Optional Protocol on the Rights of the Child on the involvement of Children in Armed Conflict of 2000, and is a state party to the Convention Against Torture of 1984). In October 2005 the ICC Chief Prosecutor issued a statement that “the crimes committed by the LRA were much more numerous and of much higher gravity than alleged crimes committed by the UPDF”, though it is difficult to know how, exactly, he reached this precise conclusion.¹⁸

The warrant of arrest for Joseph Kony was released on 8 July 2005. Though much of the public version is redacted, it is clear that there is in the view of the ICC an overwhelming amount of evidence suggesting that Kony and his top leadership is guilty of crimes against humanity and war crimes. The charges include a staggering twelve counts of crimes against humanity (including sexual enslavement, rape, enslavement, murder and inhumane acts), and 21 counts of war crimes (rape, enlistment of children, murder, cruel treatment, attacks against civilian populations, and pillaging). The indictment was controversial; as it brought needed attention to plight of the children of northern Uganda, it also prompted fears of entrenchment of the LRA position and, even, retribution; and some expressed concern that the ICC was playing too closely to the government’s hand to avoid compromising any post-conflict transitional justice (Di Giovanni, 2006).

But the call for an ICC investigation had met strong opposition long before this, especially from the The Acholi Religious Leaders Peace Initiative (ARLPI), which has

¹⁷ Note the ICC has jurisdiction only for crimes committed after its implementation at 1 July 2002, long after the LRA began committing them; indeed tens of thousands of children were most likely abducted before this date. Human Rights Watch, “Stolen Children: Abduction and recruitment in Northern Uganda”, vol. 15(12); see <http://www.hrw.org/reports/2003/uganda0703>.

¹⁸ ICC, OTP, “Statement by the CP on the Uganda Arrest Warrants”, 15 Cot. 2005; <http://www.icc-cpi.int>

denounced the indictments of LRA leaders as counter-productive, and which has also been outspoken about the need to investigate government criminality as well. An Amnesty Act passed in 2000 offered LRA members amnesty if they lay down arms, and this alternative seemed more promising to many than the military defeat of the LRA and a controversial international criminal trial. The Amnesty Commission itself argued that the ICC probe would make a settlement impossible, though initially Museveni was quick to reject amnesty for the LRA leadership (Allen, 2006:74). Peace talks in Juba, Sudan began with some promise in 2006, and Museveni offered amnesty to Kony if he participated. But, with an ICC indictment over his head, the offer of amnesty must have seemed rather empty. In June of 2007 the Gov't and LRA reached an "Agreement on Accountability and Reconciliation", which affirms that Uganda has the necessary formal and traditional justice mechanisms to address the abuses committed during the conflict, and does not mention the ICC. Despite a February 2008 ceasefire and Museveni's public call for the ICC to rescind the warrant, the latter has steadfastly refused to do so.

This raises a particularly sticky issue in the Kony case, since even the government which initially asked for the investigation cannot stop it, despite its insistence that its own amnesty laws should supersede it. There is, of course, an extensive debate about the legality and morality of the use of general amnesty to end conflict (see Chigara, 2002; Meintjes, 2000), and the implications this has for sovereignty. The principle of complementarity, so central to getting the Rome Statute passed, would suggest that an amnesty could over-ride a indictment from an international tribunal; the principle of *jus cogens*, so central to global justice advocacy, would imply it could not (indeed, nothing could). Both Bassiouni (1996) and Scharf (1999), for example, rejected the claim that amnesties should overpower the jurisdiction of the ICC, before it was put to the test. The confusion resulting from the LRA cases has already become legendary and hardly strengthens the legitimacy of the ICC amongst the many actors who need to help the court implement investigations and proceedings. In the meantime the United States has taken steps to legalize contributions to the Ugandan military effort against the LRA, which could well result in a controversial form of summary justice not covered in the Rome Statute.

As for the direct question of whether the indictment has prolonged the conflict, it is debatable whether we can pin this on the ICC itself. For example, Kony's refusal to sign the Final Peace Agreement, which was slated for April 2008, is often attributed to his demand that all forms of justice, not just the ICC, would be denied (this, coupled perhaps with the fear that he would be killed on the spot by government troops if he physically attended a signing ceremony, not an unreasonable assumption on his part).¹⁹ Viewed this way, the ICC warrant was just another contributing variable in his decision-making process, albeit a strong one, since it quashed subsequent efforts to at least pursue the amnesty option. But it remains, of course, debatable whether the issuing of the warrants has, in itself, prolonged the conflict, despite fairly widespread acceptance of this thesis.²⁰ This would require counter-factual speculation of an irresponsible fashion, and

¹⁹ ICG, "Northern Uganda: The Road to Peace, With or Without Kony", *Africa Report* 146 (Dec. 10, 2008).

²⁰ Responsibility to Protect advocate Alex Bellamy: "...it is clear that the court will add a new layer of complexity to international society's engagement with genocide and mass atrocities because it involves balancing the pursuit of justice and the pursuit of peace. Efforts to end the conflict in northern Uganda faltered because Kony's LRA insisted that the charges against their leader should be dropped as part of any

discount the need to pursue much broader paths to establishing sustainable peace in the region.²¹ While many close observers, including Apuuli (2006), predicted that the “issuing of the arrest warrants seems to have ended all hopes of resolving the conflict peacefully”, we have no way of knowing such resolution would have been achieved in their absence. But it does beg the question: if the ICC’s involvement is so problematic when it comes to indicting an active rebel commander, what could we expect with the indictment of an active state leader?

Darfur and Omar al Bashir²²

On April 26, the Sudanese government released the results of the first multi-party election in Sudan in over two decades. Unsurprisingly, the ruling party of President Omar al Bashir won the election with 68% of the popular vote. Of course, this was a controversial election for a variety of reasons, and it is unlikely any serious observers will accept these results at face value. From the viewpoint of international criminal law, the results are certainly a disaster, since the winner of the election – a brutal yet cunning dictator who rose from the ranks of military service to head one of the most offensive regimes in recent history -- has been publicly indicted by the ICC for several years, a fact he has indeed used to rally strong anti-western sentiment in the country. It may be hyperbole to claim the election makes a mockery of international criminal law, but it certainly puts into comic relief the notion that arrest warrants are a serious threat to the culture of impunity.

Darfur has achieved a strong media presence since the escalation of conflict in this historically contentious region. The northern Ugandan conflict, and its millions of victims, have languished in relative obscurity next to the Sudanese situation, and the longer-standing conflict between the Khartoum regime and the south has been overshadowed by media attention paid to the Darfur region. The conflict generated hundreds of thousands of refugees and more IDPs, and resulted in what is usually estimated at over 300,000 unnecessary deaths. While there are differing opinions on whether or not the government of Sudan and the Janjaweed forces have committed genocide, there is no question about the continued process of ethnic cleansing, rape, and pillage in the region, and the agonizing over the international response has been perhaps without precedent (Grzyb, 2009; Daly, 2007).²³

agreement. This prompted the Ugandan government to ask the ICC prosecutor to drop charges against Kony, which the prosecutor is unable to do. A similar problem was created in July 2008, when Moreno-Ocampo moved to lay charges against the president of Sudan, Omar al-Bashir, for crimes committed in Darfur. Many fear that this proposed indictment could jeopardise efforts to deploy AU/UN peacekeepers in Darfur and to negotiate a peaceful settlement to the conflict...” (2009: 123)

²¹ As van Acker writes in the Ugandan context: “the way forward is unambiguous ... The best anti-terrorism strategy is an expansive approach of democratic, social and political change by non-violent means, complemented by an equally expansive approach to augment the opportunity costs of rebellion by increasing the endowment of economic and human capital” (2004:354) .

²² Also known as Omar al-Bashir, Omer Hassan Ahmed El Bashire, Omar Elbashir and other names found in the arrest warrant ICC-02/05-01/09-1.

²³ In March 2004 UN humanitarian coordinator in Sudan Mukesh Kapila called the Darfur crisis a genocide; in September 2004, after a related U.S. Congress resolution in June that year, the U.S. Secretary of State, Colin Powell, also used the term to describe the violence. However the 25 January report of the

Hostilities in Darfur reached critical proportions in early 2003. After a series of rebel attacks on police stations and army posts, and counter-attacks, in April the Sudan liberation Army (SLA) and Justice and Equality Movement (JEM) attacked a government air base at El Fasher (the capital of North Darfur). The Government of Sudan launched its counterinsurgency campaign in March, using both air attacks and Janjaweed militias; the assaults escalated in frequency and violence in the summer of that year, especially against the Fur, Masalit, and Zaghawa ethnic groups. Indeed the summer of 2003 massacres formed the basis of the subsequent ICC indictment against al Bashir.

By November it was clear that the government was denying basic food aid to people in the region, and famine took root by early 2004. In March 2005, the UN Emergency Relief Coordinator estimated that 180,000 people died in Darfur from hunger and disease in the previous 18 months, an extraordinary figure in a short period of time. The deliberate destruction of villages continued, with the UN estimating that between 700 and 2000 villages destroyed in 2003-4 (Flint and de Waal, 2008:145). Refugees which then flooded Chad have had to remain and relations between Chad and Sudan remain highly strained. Rape has been especially widespread weapon in the region, and the use of government air assaults has been widely reported.

A Comprehensive Peace Agreement was signed in January 2005 ending the decades-long North-South conflict in Sudan, but this was overshadowed by continued violence in Darfur and an escalating chorus of high-profile western voices calling for something concrete to be done. The International Commission of Inquiry Report on Darfur released in late January of 2005 recommended the Security Council immediately refer the situation to the ICC, which it did in late March 2005. The requisite Security Council Resolution was passed 11 to 0 with the U.S., China, Brazil, and Algeria abstaining. Splintered rebel groups continued the military conflict, and a Darfur Peace Agreement signed in May 2006 further divided them. Sudan initially rejected the idea of a UN peacekeeping force for the region, but would eventually accept a “hybrid” UN-AU force (UNAMID).

The ICC issued arrest warrants for the Sudanese minister of Interior and a Janjaweed militia leader in April of 2007, and on July 14 2008 ICC Prosecutor Luis Moreno-Ocampo submitted to the pre-Trial Chamber a sealed request for a warrant of arrest against Sudanese President al-Bashir on three counts of genocide, five counts of crimes against humanity, and two counts of war crimes. Soon after, the Peace and Security Council of the African Union warned that the warrant’s approval would undermine peace efforts, and called on the UNSC to defer the ICC process in accordance with Article 16 of the Rome Statute. In August of 2008 the Organization of the Islamic Conference made a similar plea.²⁴ As late as February 2009, during talks in Doha between the Sudanese Government and the JEM (boycotted by the Abdel Wahid faction of the SLA), JEM leader Khalil Ibrahim promised the JEM would redouble efforts to overthrow the al Bashir government if the ICC officially indicted him.

International commission of inquiry on Darfur found the Government of Sudan and Janjaweed responsible for serious violations of international humanitarian and human rights law, but that genocidal intent was in fact lacking (UNSC document S/2006/60, p3).

²⁴ These events and dates are culled from various websites including www.iccnw.org and www.irinews.org and www.timesonline.co.uk. For an engaging discussion on the debate over ICC intervention on Darfur see Kastner, 2007.

Which, of course, it did, on March 4 of 2009, on four counts of crimes against humanity and two counts of war crimes, with genocide to be added when the Appeals Chamber reversed the initial Pre-Trial decision in February 2010. The immediate response on Sudan's part was the expulsion of 13 foreign aid agencies from Darfur, including Oxfam, CARE, Save the Children UK, and *Medecins Sans Frontieres* (three internal organizations were also shut down). Most have resumed their work since, but the temporary dislocation can only have been harmful in a region with severe food security issues. The Security Council was unable to arrive at a Resolution calling for Sudan to reverse this decision due to Chinese opposition; though it is unlikely such a Resolution would have had any impact (Chinese investment in Sudanese oil operations has become legendary and is a long-term commitment free from serious human rights concerns). In July of 2009, meanwhile, a group of African parties to the Rome Statute called on AU member states not to cooperate with the ICC with respect to the warrant for al Bashir's arrest, in effect nullifying the de facto travel ban represented by the indictment.

This is a very bare thumbnail sketch, and much more research will no doubt be conducted into the entire affair by specialists in the near future. But we can identify some key results and/or subsequent events following the indictment: the alienation of the AU from the ICC; the expulsion of western aid agencies; firmer resolve on the part of the rebel groups who are ultimately fighting a losing war without substantial external intervention; open defiance and political success for al Bashir's ruling party. (Far from Roach's hope that "the ICC indictment of perpetrators of genocide, crimes against humanity, or war crimes might justify and even facilitate other proposals to induce Security Council action" [2006:170]). It is difficult to see where the advantage lies in this aggressive approach on the part of the ICC, unless one can plausibly make the argument that the indictment will deter future mass atrocities by political leaders, which is sheer nonsense. The symbolic value of the indictment may be difficult to measure, but its immediate empirical impact has been counter-productive.

Analysis

It is of course impossible to isolate the ICTY/ICC variable in the evolution of the conflicts taking place at the time of the issue of arrest warrants in any of the three case studies explored in this paper. Certainly, all three indicted leaders made subsequent reference to the indictments: they were aware of them, and naturally disparaged them; vowed to fight on regardless of them; and in one case immediately deployed a policy which, arguably, increased abject human suffering.

While the issue of selectivity is not always raised in connection to these cases it cannot be ignored. The ICTY has yet to try NATO commanders for bombing raids which, arguably, exceeded the doctrine of proportionality and just warfare. The ICC Prosecutor's Office has not seriously investigated the actions of the Museveni government in Uganda, despite a plausible argument that the latter has failed its own responsibility to protect the Acholi people, and allegations of crimes committed by government troops. Regarding Darfur, the ICC did summon a rebel commander in connection with an attack on AU peacekeepers in September 2007, but the Pre-Trial Chamber rejected his prosecution in late 2010, and no one is under the illusion that the ICC does not have an understandable if

counterproductive fixation on the Sudanese leadership. No doubt, any court with such severe resource restrictions and structural constraints will be accused of selectivity. The question remains, however, whether engaging in limited pre-settlement indictments does not demonstrate an especially problematic form of selectivity, one which also presents the moral hazard of the option of a less robust interventional response (see Smith, 2002).

Again, the argument here is not that state leaders (much less of course rebel commanders) are above international law. Indeed the Nuremberg Tribunal Charter explicitly rejected this defense, as do the ICTY, ICTR, and ICC Statutes. Similarly, the ICTY made it quite clear in the so-called “Celebici Judgement” that the doctrine of command responsibility “is ultimately predicated upon the power of the superior to control the acts of his subordinates” (IT-96-21-T Nov. 16, 1998, at para.377). Clearly, Milosevic had at least a strong hand in events in Bosnia and Kosovo. It is not difficult to establish this relationship in the case of someone such as Kony, who has publicly executed those of his own group who are suspected of breaking rank; or al Bashir, whose military and political background have produced a textbook north African dictator. Nor should the tired debate over universalism and particularism (or relativism) be allowed to shield dictators from personal accountability (Teitel, 1999). They should certainly be indicted by the ICC or some other international tribunal; though, as the principle of complementarity suggests, it might be best to try them in their own states following their political demise, should it precede death. But to indict them while hostilities are ongoing may be a premature step which can only alienate the ICC from the state actors it needs for the realization of its claims to justice.

As for the deterrence value of war-time indictments, I find this a rather spurious argument. As de Than and Shorts concluded before the ICC and Moreno-Ocampo took any prosecutorial action, the “deterrence factor may in fact turn out to be an illusion. Where atrocities occur within the confines of a State’s borders, the more powerful the perpetrator and the more popular the policies of that State are, the more difficult and politically awkward it will be for that State to prosecute its offenders and even less probable that they would hand those people to the ICC, short of military action against that state or bestowing some incentives to surrender the suspects. ... it is doubtful whether the prosecution of a few (state) leaders will in reality diffuse a persistent volatile situation which is embedded in the political and social culture of such a State” (2003:341). Sudan and Uganda are two amongst many possible examples here. Regarding Yugoslavia, Johnstone’s rather harsh dismissal of a deterrence benefit is perhaps a bit strong but a useful reminder of how many view the international tribunals: “This infantile notion is suitable for children in a candy shop, where the prospect of ‘getting caught’ can weigh more heavily than the fun of grabbing the goodies. It is totally irrelevant to unforeseeable historic dramas, such as the disintegration of an established country” (2002:95).

Conclusion

There is an uncomfortable irony at work here for peace and human rights activists. The Pre-Trial Chamber can reject arrest warrants based on what it deems to be faulty evidence or argumentation from the prosecutor, but not based on whether or not

the pursuit of indictments will prolong or worsen conflict or damage the legitimacy of the ICC itself. This is left largely to the Security Council, which has the option of indefinitely deferring investigations. Yet it is the Security Council (including non-party states) whose members are most likely to use the ICC for their own foreign policy ends, reinforcing the inevitable charges of selectivity in the process.

The structure of the ICC within the international system produces this frustrating situation, and ICC reform seems pragmatically impossible at this stage. The ICC's mandate includes peace and security; it is inherently politicized and accepting this obvious fact may enable us to steer toward a more realistic understanding of its capacity, while building its legitimacy at the same time (Roach, 2006; Broomhall, 2003). Security Council reform might by extension enhance ICC legitimacy but this is a largely unrealistic expectation. Ultimately we will need to craft creative policy responses to ongoing conflicts and seek to mitigate the potential damage to international justice efforts, which will never be non-political but could be less politicized than they have proven so far. As unpalatable as it may be to those who fight both injustice and the irrational impulses of war and mass atrocities, judicial restraint may be necessary in order to promise a stronger international criminal law regime in the future; or to promote a "new political space for imagining and even concretizing the possibilities of a flexible form of global juridical power" (Roach 2006:90). And there are broader implications for the global human security agenda as well. Even guarded optimists such as Antonio Franceschet remind us that if "human security assumes linkages among complex forms of political causality – linkages that can mask the tough political and ethical dilemmas of world politics – legalism provides a solution that on the surface fixes all problems" (2006:33). Our case studies demonstrate that the surface is a thin one.

Of course the argument can be made that justice demands immediate action regardless of the situation on the ground; that present sacrifices must be made to construct a culture of intolerance of crimes against humanity (though we might suggest the Responsibility to Protect doctrine is supposed to accomplish this, it has hardly gained wide acceptance or implementation). From a political perspective, however, it would seem that unless minimal political stability and a cessation of immediate violence is accomplished, justice will be but an unattainable goal. It is imperative that those bravely pushing forth the instruments of global justice keep this foremost in mind. The ICC has gained fame for its innovative character, and the strong role played by NGOs in the Rome process (Kirsch and Holmes, 1999); it now risks assuming the reputation of how Harris-Short (2003) believes some regard the Convention on the Rights of the Child: "imperialist, inept, and ineffective."

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