

## **WHEN TO INDICT? THE IMPACT OF TIMING OF INTERNATIONAL CRIMINAL INDICTMENTS ON PEACE PROCESSES AND HUMANITARIAN ACTION**

**PAPER BY:  
JACQUELINE GEIS  
DEVELOPMENT AND PROJECT MANAGER  
BROOKINGS-BERN PROJECT ON INTERNAL DISPLACEMENT**

**AND**

**ALEX MUNDT  
GUEST RESEARCHER  
BROOKINGS-BERN PROJECT ON INTERNAL DISPLACEMENT**

**PREPARED FOR THE WORLD HUMANITARIAN STUDIES CONFERENCE  
GRONINGEN, NETHERLANDS, FEBRUARY 2009**

---

### **Introduction**

Prosecutor Luis Moreno Ocampo's July 2008 request to the International Criminal Court (ICC) to issue an arrest warrant for President al Bashir of Sudan on charges of crimes against humanity, war crimes and genocide sparked a firestorm of praise, criticism, anxiety, and relief in equal measure among peacekeepers, aid workers, diplomats, and human rights activists. Opponents of the Prosecutor's move argued that it amounted to a call for regime-change and would imperil any future peace negotiations and the still-incomplete deployment of peacekeepers. At the same time, human rights organizations hailed Ocampo's courage and lauded the request as a bold and long-overdue step towards challenging impunity for state-sponsored violence against civilians. And between these two camps, thousands of aid workers on the ground in Darfur worried about further access restrictions and harassment by government authorities.

The potential reach of the ICC poses new dilemmas for humanitarian actors operating in tense politicized conflicts, where aid workers are often on the frontlines. For example in Darfur, the government's tight control over access to its territory has put aid workers in the uncomfortable position of serving as primary eyewitnesses to alleged atrocities and,

subsequently, the primary targets of government suspicion. Aid agencies have been forced to walk a careful line between adherence to humanitarian principles and supporting abstract notions of accountability and justice without explicitly collaborating with the UN-mandated war-crimes investigators. Given President Bashir's demonstrated sensitivity to international humiliation, the consequences of an ICC indictment are potentially devastating to the aid agencies and the 2.5 million IDPs they regularly assist.

The Bashir indictment is the latest—and most controversial—chapter in Ocampo's effort to establish the court as a legitimate actor and a credible deterrent force. Only a successful track record of interventions and subsequent prosecutions would bolster support for the court among signatories and prove its value to wavering countries, most notably the United States, which withdrew from the Rome Statute in 2002. Since 2002, the Prosecutor has issued criminal indictments in Northern Uganda, the Democratic Republic of Congo (DRC), the Central African Republic, and Sudan, carefully navigating turbulent national and international political waters. In each case, the timing of the indictments has elicited much comment and controversy, particularly regarding their potential impact on delicate peace agreements or ongoing negotiations. At issue is a fundamental debate over whether peace and justice can be pursued simultaneously. Proponents of the Court insist that justice can and should prevail, citing as examples the arrests and prosecutions of President Slobodan Milosevic of Serbia by the International Criminal Tribunal for Yugoslavia (ICTY) and former Liberian President Charles Taylor by the Special Court for Sierra Leone. However, a closer examination of the complexities of these two examples shows that the interests of peace superseded justice, at least in the short term. Furthermore, the cases suggest that certain pre-conditions – strong, unified international pressure and the ability to impose real costs for non-compliance – are necessary for indictments to have an impact on peace negotiations.

Prompted by the international reaction—both in favor of and opposed to—the indictment of Bashir and its potential effects on the conflict in Darfur, this study examines what impact, if any, the timing of international criminal indictments has on fostering peace and improving humanitarian conditions on the ground. An analysis of the court's trajectory, from its first indictments in Northern Uganda to the controversial indictment of the Sudanese President, highlights the delicate challenges of pursuing justice in the midst of international efforts to resolve some of the world's most complex and deadliest conflicts. Although the Taylor indictment does not fall under the jurisdiction of the ICC, it is included in this study because it often serves as a reference point for those arguing in favor of the court as an instrument to promote durable peace. After an examination of the Taylor indictment, the cases of northern Uganda, the DRC and Sudan are then looked at in chronological order, with a specific focus on the timing of the Prosecutor's indictments and the evolution of the court's strategy as a result of lessons learned.

## **Liberia**

In August 2003, a comprehensive peace agreement ended 14 years of civil war in Liberia and led to the resignation and subsequent exile of President Charles Taylor. The long-

running conflict, then one of Africa's most deadly, claimed the lives of more than 200,000 people and prompted the displacement of more than 2 million people, including 750,000 to neighboring countries as refugees. The conflict, fueled by ethnic rivalries and riches from abundant natural resources, resulted in the destabilization of the entire Mano River basin, most strikingly in Sierra Leone, where an estimated 50,000 people were killed in a grisly civil war. In December 2000, a UN panel issued a damning report implicating Liberia in the “blood diamond” trade with Sierra Leone’s brutal Revolutionary United Front (RUF) rebels, famous for their conscription of child soldiers and amputation of tens of thousands of victims’ limbs. The panel confirmed what many in war-torn West Africa already knew, namely that Charles Taylor was one of the principal organizers and sponsors of the RUF and was “actively involved in fueling the violence in Sierra Leone.”<sup>1</sup>

The Special Court in Sierra Leone, a mixed national and international – or hybrid – court, established with the assistance of the United Nations in 2002, was mandated with bringing to justice “those who bear the greatest responsibility for war crimes, crimes against humanity, and other serious violations of international humanitarian law.”<sup>2</sup> This “leaner and meaner” tribunal was intended to provide a cheaper and swifter alternative to its fully-international and costly predecessors, the ICTY and the International Criminal Tribunal for Rwanda (ICTR), and, significantly for the US government, demonstrate the utility of ad-hoc tribunals over the newly-established and permanent ICC. To complete its work within the established three-year timeframe, the targets of the Special Court were limited to a handful of the “big fish.”<sup>3</sup>

The unsealing of the indictment against Charles Taylor, then the sitting president of Liberia, in June 2003 brought into sharp relief many of the dilemmas regarding the pursuit of justice in the midst of fragile, complex peace negotiations. At the time, there was near universal condemnation of the Sierra Leone Prosecutor’s surprise move, in which he unsealed an indictment of Taylor as he touched down in Accra for a peace conference with all parties to the conflict and requested that Ghanaian authorities apprehend and deliver Taylor to the Special Court. Ghanaian officials angrily resisted, claiming that they had made guarantees of safety to all conference participants. African delegates and regional heads of state viewed the maneuver as an affront to their sovereignty and regional pride by what was largely perceived to be a western-led court, with an American prosecutor at the helm . “Could African leaders go to Europe and insist that a European head of state be arrested?” asked an aide of Taylor, voicing a common

---

<sup>1</sup> Williams, Gabriel I.H. “The Sierra Leone Special Court and Charles Taylor’s Possible Indictment.” *The Perspective*. Atlanta GA. 11 November 2002.

<sup>2</sup> “Bringing Justice: The Special Court for Sierra Leone.” Human Rights Watch. NY. 07 September 2004. <http://www.hrw.org/en/node/11983/section/3>.

<sup>3</sup> “The Special Court for Sierra Leone: Promises and Pitfalls of a New Model.” International Crisis Group. 4 August 2003.

sentiment in Accra.<sup>4</sup> Ghanaian Foreign Minister Nano Akufo-Addo condemned the Special Court's request to arrest Taylor as "embarrassing."<sup>5</sup>

Concerns about the timing of the indictment were not limited to African leaders. At least one high-level US official called the Special Court's Prosecutor, David Crane, a day in advance attempting to dissuade him from unsealing the indictment. The US Ambassador to Monrovia, John Blaney, strongly opposed Crane's timing and still believes that hundreds, perhaps thousands, would have died in retribution had Ghanaian authorities complied with the Court's request. "It would have ended the peace process and the war would have continued. How can you morally put at risk three-and-a-half million people?"<sup>6</sup>

Politics may have also been a factor in the court's decision to go aggressively after Taylor in the spring of 2003, despite the fragility of the peace negotiations and the deteriorating humanitarian situation within Liberia. In March 2003, the Special Court indicted Samuel Hinga Norman, the former head of the vaunted Kamajors, who had defeated Foday Sankoh and his RUF rebels. The move was deeply unpopular within Sierra Leone, where many viewed Norman as a national hero. At the same time, with the failure to capture the former warlord-president Johnny Paul Koroma or the infamous General Mosquito, and with Foday Sankoh near death, the Special Court faced the prospect of having no significant figure other than Norman stand trial for war crimes. Whatever the motivation, opening the indictment of Charles Taylor gave the Special Court much-needed momentum and reestablished some measure of local credibility within Sierra Leone.

The Ghanaian authorities refused to arrest Taylor, and he immediately returned to Monrovia. The main rebel group, Liberians United for Reconciliation and Democracy (LURD), launched violent attacks in the center of Monrovia and its outlying suburbs. The renewed attacks resulted in significant internal displacement from the nexus of camps in and around Monrovia and led many observers to conclude that Crane's surprise indictment had dramatically derailed peace negotiations.<sup>7</sup> However, the chairman of LURD later claimed that the attack on the city was a result of Taylor's return to Monrovia and had nothing to do with the Special Court indictment. "Whether indicted or not indicted, we were going to fight until he would leave. That was our goal."<sup>8</sup>

Charles Taylor's position within the country was already tenuous: at the time of the Accra Peace talks, only three of 15 counties were under government control and Taylor's dwindling army had not been paid in months.<sup>9</sup> However, the timing of the unsealed indictment, which had been prepared nearly three months earlier, effectively stripped

---

<sup>4</sup> Hayner, Priscilla. "Negotiating Peace in Liberia: Preserving the Possibility for Justice." International Center for Humanitarian Dialogue/International Center for Transitional Justice. November 2007.

<sup>5</sup> "Liberia Coup Attempt Foiled." BBC. 5 June 2003

<sup>6</sup> Hayner, Priscilla. Op cit. 2007

<sup>7</sup> "Profile of Internal Displacement: Liberia" Norwegian Refugee Council/Global IDP Project. Geneva. 25 August 2005.

<sup>8</sup> Hayner, Priscilla. Op cit. November 2007

<sup>9</sup> BBC. Op cit. 05 June 2003

Taylor of any last vestiges of international support at a key moment in the talks, paving the way for ceasefire and an agreement on a transitional government that would not include Charles Taylor. The exclusion of Taylor from the new government took two weeks to negotiate, and several delegates to the peace talks credit the indictment of Taylor as the single most important factor in reaching an accord. In essence, the indictment provided a framework for a weakened Taylor and the mediators at Accra to negotiate an orderly exit from power, with a conditional agreement of regional states to not execute the arrest warrant.

The entire sub-region heaved a sigh of relief when Charles Taylor finally handed over power to his vice-president, Moses Bah, and flew into a comfortable exile in Nigeria, with a promise to avoid involving himself in politics. Nigerian President Olusegun Obasanjo pledged to hand over Taylor only at the request of an elected Liberian government, at the time a seemingly remote possibility. The human rights community decried the arrangement as a step backward for international justice and accountability. Within three years, however, the newly-elected president of Liberia, Ellen Johnson-Sirleaf, under heavy pressure from the United States, formally requested the extradition of Charles Taylor to the Special Court in Freetown to finally face the charges laid out in Crane's 2003 indictment.

## **Uganda**

Northern Uganda has been the scene of simmering conflict for over 20 years. In the wake of the National Resistance Army's (NRA) 1986 overthrow of General Tito Okello's regime, the Lord's Resistance Army (LRA), led by Joseph Kony, began a guerrilla campaign against the new Ugandan government.<sup>10</sup> For most of the conflict, NRA leader and Ugandan President Yoweri Museveni has favored a military response to the LRA campaign, and, as a result, peace negotiations have habitually taken a backseat to largely unsuccessful military actions. The conflict has victimized the civilian population of the northern Ugandan districts of Gulu, Kitgum, and Pader, which are dominated by the Acholi ethnic group, and spilled over into neighboring Ugandan districts as well as the DRC and Sudan. Thousands of people have been killed; tens of thousands more, including around 60,000 children, were forcibly abducted; and over 1.8 million people have been displaced by the conflict.<sup>11</sup> Both the LRA and the Ugandan armed forces have been implicated in committing crimes that fall under the jurisdiction of the ICC.<sup>12</sup>

Despite the atrocities occurring in northern Uganda, the international community largely ignored Uganda's plight until the early 2000s. In a much publicized November 2003 statement, Jan Egeland called it the "world's worst forgotten humanitarian crisis."<sup>13</sup> As

---

<sup>10</sup> Tim Allen, *Trial Justice: The International Criminal Court and the Lord's Resistance Army*, 28.

<sup>11</sup> See Uganda profile at <http://www.savethechildren.org/countries/africa/uganda.html>

<sup>12</sup> International Crisis Group, "Northern Uganda: Understanding and Solving the Conflict" 14 April 2004, at <http://www.crisisgroup.org/home/index.cfm?id=2588&l=1>.

<sup>13</sup> Agence France-Presse, "War in Uganda World's Worst Forgotten Crisis: UN" at <http://www.reliefweb.int/rw/rwb.nsf/AllDocsByUNID/e1f176894430fdeec1256ddb0056ea4c>

an increasing number of international actors started to focus on the conflict, however, so did the calls for a peaceful solution to the conflict and for accountability for those responsible for the gross violations committed during the conflict. European governments advocated strongly for Uganda to become the ICC's first case. Adding to this increased pressure for accountability was the ICC Prosecutor himself: in several interviews, Ugandan public officials have indicated that Ocampo approached Museveni and persuaded him to refer the case to the ICC.<sup>14</sup>

Referral of the situation in northern Uganda to the ICC was politically beneficial for both Museveni and Ocampo. Internationally, it provided Museveni with an opportunity to raise the international profile of the conflict, and to shift the prevailing narrative about the conflict from the emphasis on the dramatic humanitarian situation to one on the crimes committed by the LRA and the Ugandan government's landmark cooperation with the ICC. Along with the completion of the Comprehensive Peace Agreement (CPA), the referral also put pressure on Sudan to stop its support of the LRA. The ICC referral also had significant domestic political advantages for Museveni, who faced increasing domestic pressure to bring peace to northern Uganda and there was a feeling in Uganda that the ICC could help bring peace.<sup>15</sup> Never a strong proponent of the publicly-popular blanket amnesty offered to the LRA under the 2000 Amnesty Act, the referral had the potential benefit of shifting the significant domestic political costs of prosecuting LRA members away from Museveni's government and onto the ICC. For Ocampo, the benefit was more straightforward but equally important: it gave him the ICC's first state referral of a case in December 2003.<sup>16</sup>

Once it obtained its first referral, the ICC's actions were marked by acute sensitivity toward domestic political considerations in Uganda, and especially the Court's dependence on the Ugandan government's cooperation. The prosecution set a broad mandate for itself in Uganda, aiming for indictments against the top LRA leadership and contending that these high-level investigations and prosecutions could "help deliver peace."<sup>17</sup> While the Prosecutor made a point to note that once a situation is referred to the ICC, he can investigate crimes committed by all parties to the conflict, Ocampo's office (often referred to as the Office of the Prosecutor or the OTP) focused its investigation on crimes committed by the LRA. The Prosecutor justified his focus on the LRA with the argument that the crimes committed by the LRA are the gravest of the conflict. However, the fact that indictments have been issued only against the LRA has further entrenched the perception that the ICC was being used as a tool by the Ugandan government against the LRA. In response to this criticism, the OTP has stated publicly that it has not yet closed its investigation in Uganda and could yet indict government or military officials.

---

<sup>14</sup> Phil Clark, Op Cit. 43.

<sup>15</sup> International Crisis Group, "A Strategy for Ending Northern Uganda's Crisis," 11 January 2006 Policy Briefing, <http://se1.isn.ch/serviceengine/FileContent?serviceID=47&fileid=F14339D3-705C-6347-2EE7-2AB4593AECCD&lng=en>.

<sup>16</sup> The text of the referral can be found at [http://www.icc-cpi.int/menus/icc/press%20and%20media/press%20releases/2004/president%20of%20uganda%20refers%20situation%20concerning%20the%20lord%20resistance%20army%20\\_lra%20to%20the%20icc?lan=en-GB](http://www.icc-cpi.int/menus/icc/press%20and%20media/press%20releases/2004/president%20of%20uganda%20refers%20situation%20concerning%20the%20lord%20resistance%20army%20_lra%20to%20the%20icc?lan=en-GB).

<sup>17</sup> Phil Clark, Op. Cit., 42.

Given the ICC's dependence on the Ugandan government for the continued security of its investigation and the prosecution's general good relations with government officials, however, the prosecution of government-affiliated suspects seems unlikely.<sup>18</sup>

Initially, prospects for peace began to improve after the ICC referral and subsequent start of the investigation. In May 2004, Museveni's government engaged peace envoys, including the veteran Uganda peace negotiator Betty Bigombe, and, in late 2004, declared a unilateral ceasefire in a specific zone in northern Uganda. The government, Acholi politicians, religious leaders, civil society representatives, international observers, and LRA commanders started discussions on the modalities of a ceasefire agreement. The LRA, however, refused to sign the government's draft of a ceasefire agreement by the December 31<sup>st</sup> deadline and the process stagnated. In September 2005, Bigombe revitalized her efforts and prepared an extensive draft peace proposal, which was accepted by Museveni as a starting point to negotiations.<sup>19</sup>

The Court unsealed indictments against five top LRA commanders, including Kony, in mid-October 2005.<sup>20</sup> Bigombe was unable to present her proposal to Kony before the release of the indictments. The LRA's initial reaction to the ICC indictments was to back away from the peace process, insisting that any LRA ceasefire or movement toward peace would be misinterpreted by the government and its international partners as a result of pressure following the unsealing of the ICC warrants. Additionally, the LRA increased the intensity of its attacks on civilians and humanitarian workers immediately following the unsealing of the indictments. Relief agencies scaled down their operations outside of main towns and the UN suspended all non-essential travel outside of its base, preventing the delivery of aid to remote IDP camps.<sup>21</sup>

Less than two months after the indictments were issued however, LRA Deputy Commander Vincent Otti contacted the BBC World Service and called for renewed peace negotiations. The leverage provided by the ICC indictments has been widely characterized as one of the motivating factors in this course reversal by the LRA.<sup>22</sup> The renewed peace process, called the Juba process, began in earnest in June 2006 and produced five signed protocols in 21 months. The endorsement of the final three protocols in January and February 2008, including the 19 February annexure on transitional justice, had set up the expected signing of the Final Peace Agreement. Since then, the process has stalled and the Agreement remains unsigned. However, while the indictments helped to bring the LRA back to the table, they have proved to be one of the primary hindrances to concluding the peace agreement. First, the indictment against Kony meant that he never appeared at the negotiations and instead sent representatives with limited negotiation authority. More damaging, however, is that Kony has conditioned the LRA's return to the negotiating table on the withdrawal of the ICC

---

<sup>18</sup> Ibid., 42-43.

<sup>19</sup> International Crisis Group, 11 January 2006 Policy Briefing, Op. Cit.

<sup>20</sup> See indictment timeline at <http://www.icc-cpi.int/menus/icc/situations%20and%20cases/situations/situation%20icc%200204/related%20cases/icc%200204%200105/uganda>.

<sup>21</sup> International Crisis Group, 11 January 2006 Policy Briefing, Op. Cit.

<sup>22</sup> Ibid.

indictments. This pre-condition continues to place the goals of peace and justice for those most responsible for the conflict in strong contrast in northern Uganda.

### **Democratic Republic of Congo**

While the 2003 Sun City Agreement ended the fighting in most of DRC, various rebel groups continued battling for land and resources in the eastern provinces of Ituri, North Kivu, South Kivu, and Katanga. Sustained low-level conflict has been punctuated by periods of intensified fighting among rebel groups and between rebel groups and allies of the national army for control of territory and natural resources. The conflict in these eastern provinces has kept death rates due to war-related causes constant at approximately 1,000 per day and caused the number of displaced persons to rise to over 1.4 million.<sup>23</sup> There is widespread agreement that serious human rights violations were committed by all sides in the conflict, and many calls were made for the ICC to investigate the situation.

President Joseph Kabila was initially reluctant to refer the situation to the ICC due, at least in part, to concerns over how such a referral would affect the fragile peace process and transitional government, a precarious power-sharing agreement among various rebel groups. At the same time, however, a number of international actors amplified their calls for Kabila to refer the situation to the ICC in 2003. Ocampo identified the DRC as “the most urgent situation to be followed” by the ICC in July.<sup>24</sup> He increased the pressure at the Assembly of States Parties of the Rome Statute in September 2003, noting he was ready to act on his own authority but would prefer to wait for a referral of the situation. Many international human rights advocacy organizations pushed for the referral. The European Union and France also encouraged Kabila to engage the ICC.<sup>25</sup>

In addition to this increased external pressure, domestic political considerations factored into the referral decision. First, and perhaps most importantly, Kabila had less to fear from the ICC than some of his government colleagues. When compared to his adversaries in the transitional government, Kabila is not as easily implicated in the mass atrocities in Congo from July 2002 onward – the period under the temporal jurisdiction of the ICC. Furthermore, the ICC had the potential to weaken his political adversaries and, consequently, further strengthen his power. As Pascal Kambale, a researcher from Human Rights Watch noted, “the ICC could turn out to be [an] extremely profitable currency [for Kabila].” A lawyer from the region concurred, “[the ICC] suited Kabila as a weapon against his adversaries.”<sup>26</sup>

---

<sup>23</sup> Lydia Polgreen, “Congo’s Death Rate Unchanged Since War Ended, *The New York Times*, January 23, 2008, <http://www.nytimes.com/2008/01/23/world/africa/23congo.html> and BBC Democratic Republic of Congo Country Profile [http://news.bbc.co.uk/2/hi/africa/country\\_profiles/1076399.stm](http://news.bbc.co.uk/2/hi/africa/country_profiles/1076399.stm)

<sup>24</sup> UNA-USA, The Current Investigation by the ICC of the Situation in the Democratic Republic of Congo, July 2005, at [www.unausa.org/site/pp.asp?c=fvKRI8MPJpF&b=345921](http://www.unausa.org/site/pp.asp?c=fvKRI8MPJpF&b=345921)

<sup>25</sup> Benjamin N. Schiff, *Building the International Criminal Court*, Cambridge University Press, 2008, 213.

<sup>26</sup> Theirry Cruvellier, “ICC joins the Congolese Chess Game”, July 05, 2004 at [www.justicetribune.com/v2\\_print.php?page=v2\\_article&mode=print](http://www.justicetribune.com/v2_print.php?page=v2_article&mode=print).

The weak DRC police and judicial systems – and the strain that domestic investigations and prosecutions would put on them -- were also of concern to Kabila. Both systems suffered from endemic corruption and manipulation by political parties and could not be counted on to act effectively or impartially. As Benjamin Schriff writes, the ICC “could provide a surer route to trials.” Indeed, the judiciary’s inability to address mass crimes was the reason cited by Kabila in his referral of the situation to the ICC.<sup>27</sup>

Some scholars have noted that international pressure and domestic politics have also affected the decisions of the OTP. When Ocampo opened his first investigation into the DRC situation in July 2004, it focused solely on the crimes committed in the Ituri province, which are considered to be among the conflict’s gravest. The Ituri conflict is also the most removed from the political arena in Kinshasa, limiting the damage the investigation could cause to the fragile transitional government and signaling a more politically cautious approach from the OTP. Its limited ability to destabilize the government was a “crucial consideration” for the ICC in selecting the Ituri situation.<sup>28</sup> Not only did ICC need to continue good relations with the DRC government for security reasons, but the ICC was also under serious pressure from foreign donors to avoid creating political instability in the lead-up to the first post-independence elections in 2006. Unlike in the provinces of North and South Kivu and Katanga, where government and rebel forces backed by Kabila are directly implicated in serious crimes, there is little clear evidence linking Kabila to the crimes committed in Ituri. Although the Prosecutor has indicated that he will open a second investigation, explicitly mentioning the Kivus, there has been no official opening of a second inquiry to date.<sup>29</sup>

The release of each of the first three arrest warrants was marked by close collaboration between the DRC government and the ICC. The ICC issued arrest warrants for Thomas Lubanga, the Union of Congolese Patriots (UPC) leader, in 2006; Germain Katanga, chief of staff for the Patriotic Force of Resistance in Ituri (FRPI), in 2007; and Mathieu Ngudjolo, a Lendu chief of staff for the Front for National Integration (FNI) and then a colonel in the Armed Forces of the Democratic Republic of the Congo (FARDC), in February 2008.<sup>30</sup> Lubanga and Katanga had been in DRC custody since 2005 in relation to the killing of nine UN peacekeepers, so their timely transfer to The Hague did not have significant political implications for Kabila’s government. The situation was different, however, with respect to Ngudjolo, who was an active-duty colonel in the national army at the time of his indictment and not in custody. Some observers viewed the DRC government’s arrest of Ngudjolo during military training in Kinshasa as a growing willingness of the government to hold those in official positions to account.<sup>31</sup> By some reports these indictments sent a strong deterrent signal to the armed groups. The swift

---

<sup>27</sup> Phil Clark, “Law, Politics and Pragmatism: The ICC and Case Selection in the Democratic Republic of Congo and Uganda,” in *Courting Conflict? Justice, Peace and the ICC in Africa*, 42.

<sup>28</sup> Clark, 40.

<sup>29</sup> See Clark, 40 and International Crisis Group, “Maintaining Momentum in the Congo: The Ituri Problem,” 26 August 2004.

<sup>30</sup> “Situation in the Democratic Republic of Congo,” International Criminal Court, <http://www.icc-cpi.int/Menu/ICC/Situations+and+Cases/Situations/Situation+ICC+0104/>

<sup>31</sup> Human Rights Watch, “ICC/DRC: New War Crimes Suspect Arrested,” February 7, 2008, <http://www.globalpolicy.org/intljustice/icc/investigations/drc/2008/0207chui.htm>

transfers also prohibited the indicted from becoming spoilers in the ongoing Ituri peace process.

In contrast to the first three indictments, the April 2008 unsealing of the arrest warrant against Bosco Ntaganda strained the collaboration between Kabila and the ICC. Ntaganda's warrant was for alleged crimes during his tenure as a UPC deputy in Ituri. At the time the warrant was unsealed, Ntaganda was Laurent Nkunda's National Congress for the Defence of the People (CNDP) chief of staff in his native North Kivu, where fighting was ongoing but peace prospects were high. Some raised concerns that the unsealing of Ntaganda's indictment had the potential to derail the fledgling Goma peace agreement signed only three month earlier, while others, including Alan Doss, the head of UN operations in DRC, believed that it would not endanger the North Kivu peace process. Nkunda stated in various news reports that he would not hand over Ntaganda without a fight. Unlike the case of the previous three indictees, there was not a timely arrest and Ntaganda remains at large.

Ntaganda's recent split from Nkunda and claim to be the leader of the CNDP, combined with the subsequent arrest of Nkunda by Rwandan officials, leave unresolved many questions about Ntaganda's future. At the moment, it is unclear whether Ntaganda cooperated with DRC and Rwandan officials in Nkunda's arrest. Ntaganda has recently said that he is willing to surrender to the ICC once peace comes to North Kivu. He pointed to Nkunda as the main stumbling block to achieving peace. With Nkunda in custody, time will tell if peace in Kivu is indeed Ntaganda's requirement or simply a pretext. Similarly, it remains to be seen if the DRC government will risk further bloodshed and damage to peace prospects by trying to arrest Ntaganda.

## **Darfur**

In mid-July 2008, the Chief Prosecutor of the International Criminal Court requested the indictment of President Omar al-Bashir of Sudan on charges of genocide, crimes against humanity, and war crimes committed in Darfur. The indictment, if confirmed by the pre-trial chamber, represents the first time the ICC has directly charged a sitting head of state. Not surprisingly, it provoked immediate reaction from every corner: human rights activists hailed the move as a bold and momentous step; the Sudanese government predictably denounced the indictment as neocolonialism and a western-backed conspiracy; diplomats attempting to broker peace fretted that it would derail efforts to revive the Darfur peace process; and humanitarian workers on the ground in Darfur feared for the worst. Both the nature and the timing of Ocampo's indictment re-energized the broader debate over the pursuit of peace versus that of justice in situations of ongoing conflict around the world. "Will this be a historic victory for human rights ... or will it be a tragedy, a clash between the needs for justice and for peace, which will send Sudan into a vortex of turmoil and bloodshed?," asked noted Darfur scholar Alex de Waal.<sup>32</sup>

---

<sup>32</sup> De Waal, Alex. "Sudan and the International Criminal Court: a guide to the controversy." Open Democracy News Analysis. 14 July 2008.

There is unanimous agreement among observers of Darfur's six-year conflict that the government of Sudan colluded with and supported the Janjaweed militias to quell an insurrection of indigenous tribes over political marginalization and underdevelopment. This collusion has continued with some variation over the years, as the conflict transformed into a much more complex political and humanitarian crisis, involving multiple actors and spilling over into Chad and the Central African Republic. With the exception of senior Sudanese officials, few contest that serious war crimes, crimes against humanity, and possibly genocide were committed in the early years of the conflict.

Ocampo's indictment did not occur in a political vacuum. Diplomats from across the political spectrum argued that an indictment of Bashir would be counterproductive to achieving peace in Sudan and could jeopardize the fragile comprehensive peace agreement that ended the 20 year north-south conflict. Despite having been requested by the Security Council to investigate the situation in Darfur, Ocampo came under intense diplomatic pressure to avoid aiming for the leadership in Sudan.<sup>33</sup> At the same time, he has faced considerable criticism from the human rights community, including former UNHCHR Louise Arbour, for his "small steps" approach, targeting lesser figures and then working his way up the chain of command.<sup>34</sup>

The prior indictments of Humanitarian Affairs Minister Ahmed Mohammed Harun and Janjaweed commander Ali Kushayb on charges of crimes against humanity and war crimes were ignored by the Sudanese government, which adamantly refused to cooperate with the ICC and pledged never to hand over the suspects. Several senior diplomats linked the looming indictment of Bashir with the prosecutor's frustration over the lack of cooperation with the regime in Khartoum, hinting that an indictment could be avoided in exchange for cooperation with the ICC. "Bashir's refusal to cooperate in bringing to justice those that the ICC thought were responsible for the actual killings on the ground adds force, adds evidence to the allegation of command responsibility for those killings," said a senior Security Council diplomat. "Were the situation to change, the prosecutor's attitude might change."<sup>35</sup>

The timing and potential consequences of Ocampo's charges against Bashir, rather than any suspected political motives, have generated the most debate among long-time observers of the Darfur conflict. The charges against Bashir come nearly two years after the collapse of the 2006 Darfur Peace Agreement. In the interim, the conflict in Darfur has morphed from the relatively straightforward insurgency-counterinsurgency of 2003-04, to a more complex web of splintering rebel groups, a proxy war involving Chadian-backed rebels and Sudanese government troops, Janjaweed militias fearful of betrayal by the Sudanese government, and increased banditry. While the Sudanese government agreed in principle to allow the deployment of a hybrid AU-UN peacekeeping force, troops have been slow to arrive, in part due to obstacles imposed by Khartoum, as well as

---

<sup>33</sup> "A dilemma Over Darfur." *The Economist*. 15 July 2008.

<sup>34</sup> Rodman, Kenneth. "Darfur and the Limits of Legal Deterrence." *Human Rights Quarterly*. Volume 30, no. 3. August 2008.

<sup>35</sup> Reuters. "Sudan's Bashir could escape ICC indictments-diplomats." 16 July 2008.

funding shortages by member states. Under these circumstances, many wonder what, if any, impact an ICC indictment could possibly have.

Proponents of an indictment, particularly those in the human rights community, initially argued that the case against Bashir dramatically changed the dynamics of stalled peace talks and a disastrous status quo in Darfur. Most crucially, they stated, the indictment would give the international community much-needed leverage to ensure the full deployment of UNAMID and halt government support to counter-insurgency groups in Darfur.<sup>36</sup> The key factor in this equation is the Security Council's ability to suspend prosecution under Article 16, thereby creating a powerful incentive for Bashir and the NCP to halt the violence and re-engage in peace negotiations. However, in the intervening months since Ocampo filed his charges, divisions within the international community over the wisdom of an indictment have prevented concerted action to leverage the Council's Article 16 power to halt the violence. China and Russia—Sudan's most prominent backers among the Security Council's five permanent members, have publicly voiced opposition to an indictment, the US government is hamstrung by its opposition to the existence of the ICC, while African states and members of the Arab League have viewed the move with increasing suspicion, arguing that the court is biased against African states and infringes on national sovereignty.

In a worst-case scenario, Khartoum could suspend the deployment of UNAMID and disrupt aid to Darfur. "Ultimately, they could throw everyone out," says UN Emergency Relief Coordinator, John Holmes, adding "they will feel obliged to lash out in some way."<sup>37</sup> Some rights groups contend that Bashir's position within the ruling National Congress Party is increasingly tenuous and he could be sacrificed to the Court if the ruling party was faced with a credible threat to its own survival. More likely, say aid workers, is the continued contraction of humanitarian space within Darfur, sporadic harassment by government officials and a continuation of the status quo. Alex De Waal tends to agree, noting that "the most likely outcome is that the government—either because they can't agree internally or because they think it's the best course of action—actually does nothing, and continues as before."<sup>38</sup>

Whatever leverage could be derived from an indictment has likely been lost, as the divisions within the international community have only increased since Ocampo filed his charges in July 2008. African states and members of the Arab League have lined up firmly behind Bashir in condemning the indictment, and much of Sudan's political class, even opponents of the president, feel that Bashir has been unfairly charged. Whether or not the Security Council votes to suspend an indictment under Chapter XVI, the ICC has little political space in which to operate and arguably has more at stake than Bashir. As one observer notes, "if the ICC does not succeed in bringing President Bashir to account,

---

<sup>36</sup> Prendergast, John and Thomas-Jensen, Colin. "Sudan: Opportunity in the Midst of Crisis." Project Enough. September 2008.

<sup>37</sup> Bloomfield, Steve. "Waiting for the Court" *Newsweek*. 22 January 2009.

<sup>38</sup> "Sudan: 'Anything is possible' if ICC indicts President. IRIN. 22 January 2009.

the institution will be weakened and lose credibility. This is the likely outcome and Mr. Bashir knows it.”<sup>39</sup>

## **Analysis**

The four cases presented in this study illustrate the growing pains of a relatively young institution as it seeks to establish itself as a force to deter atrocities and promote accountability. At the same time, the Prosecutor has sometimes struggled to balance larger and sometimes shifting geopolitical goals, particularly the need to maintain the support of the nations that created it. Although the ICC was established as an impartial arbiter of international justice, both the timing and nature of its indictments issued to date suggest that the intervention of the ICC in situations of ongoing conflict is influenced by broader external factors.

### *Timing of Interventions*

The issue of what impact the timing of indictments has on a conflict situation comes into sharpest relief in the debate over whether justice and peace can be pursued simultaneously. Many in the human rights community argue that peace and justice are mutually reinforcing, promoting reconciliation and ensuring the sustainability of peace by deterring future abuses and addressing abuses already committed in a non-violent manner. However, the four case studies presented here suggest that such logic oversimplifies the reality of peacemaking. There is an inherent tension in simultaneously pursuing a strategy that assigns criminal scrutiny and/or blame to a party in the midst of peace negotiations that depend on the full cooperation of those accused. Ocampo himself has conceded that his mandate may at times be in tension with the efforts of those seeking peace. A more pragmatic approach, some argue, is to recognize that tensions often exist between peace and justice and that pragmatism demands that justice sometimes take a backseat to achieving peace.<sup>40</sup> The Ugandan Refugee Law Center and Acholi civil society organizations have advocated strongly for this “peace then justice” approach in the northern Uganda conflict, as have some members of the humanitarian community with respect to the situation in Darfur. Recent statements from the DRC government have alluded to favoring a similar sequencing with regard to the current situation in North Kivu.<sup>41</sup>

The Rome Statute goes further than its predecessors in recognizing the tensions between peace and justice, providing several options for stakeholders to take peace prospects into consideration. The UN Security Council, for example, can defer ICC investigations for a renewable 12 month period pursuant to Article 16. Article 53, provides the ICC Prosecutor limited discretion to apply to the pre-trial chamber to halt a prosecution or

---

<sup>39</sup> Langar, Nancy. “ICC Indictment of Sudan’s al-Bashir Will Test Court’s Relevancy.” Henry L. Stimson Center. Washington DC. 14 August 2008

<sup>40</sup> Grono, Nick and O’Brien, Adam. “Justice in Conflict? The ICC and Peace Processes.” Royal African Society. March 2008.

<sup>41</sup> “ICC Urges Congo to Hand Over Ntaganda,” 29 January 2009,  
<http://allAfrica.com/stories/200902030776.html>.

investigation “in the interests of justice.” States can also apply admissibility challenges under Article 19 should peace processes change the State’s ability to investigate or prosecute the crimes committed during the conflict.<sup>42</sup>

The case of Liberia, while not under the jurisdiction of the ICC, is perhaps the only case where sufficient time has passed to analyze the impact of the indictment on peacemaking with any clarity. It is also the case, together with the indictment of Milosevic by the International Criminal Tribunal for Yugoslavia, that is most often cited by scholars and practitioners as illustrative of transitional justice’s potential to foster peace while holding those most responsible for war crimes and crimes against humanity accountable. While the indictment of Charles Taylor did hasten a lasting ceasefire and pave the way for a transitional government, it did not provide, contrary to what some observers suggest, clear-cut proof that peace and justice could be pursued simultaneously. A closer examination of the course of events illustrates that although justice was pursued in the midst of peace negotiations, it was deferred until long after the peace agreement was signed. The warrant was only executed after regional states and the US had determined that Taylor had violated the terms of his exile through continued meddling in sub-regional politics.

The terms of Taylor’s exile explicitly favored peace at the cost of justice, allowing his exit to Nigeria in exchange for a lack of interference in sub-regional politics. That he eventually violated the terms of his exile and was subsequently handed over to the Special Court two years later had no effect on the situation on the ground at the time. Contrary to public sentiment in 2003, Crane has said that he would have delayed unsealing the indictment, had he not been confident that it would support the peace process in the long run.<sup>43</sup> With five years hindsight, it appears that Crane’s calculated gamble to delegitimize and isolate Taylor through an indictment for war crimes furthered the cause of peace in Liberia by creating an incentive for Charles Taylor to peacefully step aside in exchange for a temporary pledge from Nigeria not to execute the arrest warrant. As Pricilla Hayner writes, there is broad agreement today among those present at the talks, regardless of their opinion at the time, that the indictment had a largely positive effect on the outcome of negotiations.<sup>44</sup>

Like Liberia, examining the ongoing peace process in northern Uganda also provides some insight into how ICC interventions and indictments can affect negotiations at various stages of negotiations. The unsealing of the five high-level LRA indictments by the ICC is widely recognized as motivating the LRA to come to the negotiating table initially and helping to set the Juba Process in motion<sup>45</sup>. With the arrest of Taylor having set a strong precedent for the potential reach of international justice, the ICC indictment and the prospect of negotiating its suspension likely played a role in Kony’s calculations. Like Charles Taylor, Joseph Kony was also finding that the changed regional dynamics,

---

<sup>42</sup> International Center for Transitional Justice. “Pursuing Justice in Ongoing Conflict – A Discussion of Current Practice,” 2008.

<sup>43</sup> Hayner, Pricilla. Op cit. 2007

<sup>44</sup> Ibid.

<sup>45</sup> International Crisis Group, 11 January 2006 Policy Briefing, Op. Cit.

particularly the loss of his primary supply base in Sudan as a result of the Comprehensive Peace Agreement, had considerably reduced his options and ability to wage war. .

There are indications that the ICC has taken the ongoing peace process into account when determining its course of action in Uganda. ICC officials have indicated that they delayed the unsealing of the five indictments to provide additional time to peace negotiators, who in fall 2005 were floating an extensive draft peace proposal to both the government and the LRA. While the ICC did delay the indictments, logistical problems prevented negotiators from presenting the proposal to Kony before the indictments were unsealed.<sup>46</sup> In addition, the OTP has attempted to encourage greater participation by the LRA in the peace process and LRA defections by providing assurances that there are no remaining sealed indictments against the LRA and no plans to issue new indictments on past atrocities.

The most drastic version of the “peace then justice” argument is peace at all costs. In each of the four cases examined in this study, atrocities were committed by all sides of the conflicts. Unless one party has been completely vanquished—which was essentially the case with Charles Taylor’s forces in Liberia—achieving lasting peace will likely involve a deal to cease hostilities among all parties to the conflict. Because few would agree to peace terms that would subject them to prosecutions in The Hague, amnesties are often used as incentives to reach agreements. This widespread tendency of politicians to link peace talks with amnesty pledges as a matter of course has been condemned by some supporters of the court, who argue that political decision-making should be guided by the principle that international criminal law trumps reconciliation and peace.<sup>47</sup>

That amnesty agreements are increasingly used as leverage to broker a final peace agreement illustrates both the potential and the limitations of criminal prosecutions in complex civil conflicts. On the one hand, the simple fact that fears of criminal prosecutions for war crimes and crimes against humanity have evolved into such a palpable concern for warring parties suggests that the mere existence of the ICC is a force for peace and deterrence of future crimes. But time and again, it appears that while not mutually exclusive, peace considerations trump international justice. In the case of northern Uganda, the initial offer of amnesty in 2000 was an insufficient motivating force toward peace in the absence of ICC indictments. After the indictments were formally issued, however, having them withdrawn and being granted amnesty from international and national prosecution became a central goal of the rebels’ negotiating strategy. In Liberia, a comfortable exile for Charles Taylor in Nigeria proved more conducive to peace than a cell at the Special Court in Freetown. In Congo, factors of peace and stability, rather than a pursuit of comprehensive justice for all perpetrators, guided the

---

<sup>46</sup> Ibid.

<sup>47</sup> Darnstadt, Richard. “A Dangerous Luxury: The International Criminal Court’s Dream of Global Justice. *Der Spiegel*. 14 January 2008. “Cologne-based law professor Claus Kress, who works as an adviser to the ICC, conducted a study on whether the widespread tendency of politicians to link peace talks with amnesty pledges has created a new “lex pacificatoria” (“law of the peacemakers”) in international law -- a new let-bygones-be-bygones principle that puts reconciliation before justice. “Political decision-makers must work according to the assumption that international criminal law takes priority,” says Kress. “This rules out automatic amnesties, at least for those who are chiefly responsible.”

Prosecutor's strategy. And in Sudan, the potential indictment of Bashir is viewed by many as dooming any chance for restarting peace talks on Darfur.

#### *Leverage: Deterrence and Compellence*

Several scholars have argued that international criminal justice cannot end impunity in an ongoing conflict in the absence of states and/or the international community to enforce criminal indictments. In this regard, it is necessary to draw distinctions between deterrence, which is aimed at dissuading a party from initiating proscribed behavior, and compellence, the act of preventing a party of continuing their actions.<sup>48</sup> In the case of the latter, Schelling argues that compellence can take two forms: (1) either defeat of perpetrators through brute force; or (2) raising the costs of a course of action through the credible threat or actual infliction of punishment to change the behavior, but not totally defeat, a perpetrator.<sup>49</sup>

The deterrent potential of ICC indictments to end impunity for gross violations of human rights is dependent on the successful prosecution of cases, the continued support of the international community for the Court, and the willingness of international actors to compel compliance with court decisions. In short, the threat of prosecution has to be credible. While the arrest and trial of Charles Taylor is often cited as a milestone victory for accountability and a warning to regional heads of state engaged in civil conflict, its deterrent effect on conflict elsewhere is unclear, due, at least in part, to the limited jurisdiction of the Special Court. There is no doubt, however, that the establishment of the permanent ICC and the threat of potential indictments are increasingly affecting the political and strategic considerations of all parties to conflict. Several diplomats have cited the "Charles Taylor factor" as an element of Robert Mugabe's refusal to relinquish power in Zimbabwe.<sup>50</sup> It has not, however, moderated his iron fist in dealing with political dissent. Slightly more encouraging is anecdotal evidence in the DRC suggesting that possible ICC indictments were a factor into rebel politics, possibly even playing a role in moderating behavior. In 2003 interviews, regional leaders Thomas Lubanga Dyilo and Xavier Ciribanya noted the increased pressure on political and military actors involved in ongoing conflict. Ciribanya said, "Many here in the East are afraid the Court will come. . . . We are all now thinking twice."<sup>51</sup> While this "fear factor" is an encouraging development and illustrates the court's potential, it has not yet translated into a measurable deterrent force in conflict.

The court's deterrent potential is directly related to the more immediate challenge of compelling states to comply with its indictments and in this, the track record is equally mixed. In the cases of Liberia and Uganda, prosecutorial strategies harnessed changes in context and circumstance to elicit compliance with the indictments. In the case of northern Uganda, changes in regional geopolitics—namely the signing of the comprehensive peace agreement in Sudan and renewed prospects for peace in the DRC—provided an opening for the prosecutor. The ICC indictments increased the political and

---

<sup>48</sup> Rodman, Kenneth. Op cit. 2008

<sup>49</sup> Schelling, Thomas. Arms and Influence. 1966

<sup>50</sup> Sudan Tribune."Former US Special Envoy to Sudan warns against ICC Indictments," 27 June 2008.

<sup>51</sup> Schiff,Benjamin. Op Cit., 213.

economic costs of doing business with the LRA, giving supporters pause and disrupting supply lines as peace and more legitimate political processes in southern Sudan and the DRC took root. These higher costs called the LRA's long-term viability into question and motivated the LRA to come to the negotiating table. Similarly in Liberia, Crane's decision to unseal the indictment as a calculated move "to embarrass Taylor in front of his West African colleagues" significantly weakened his ability to play a substantive role in the peace talks and paved the way for an agreement excluding Taylor from a future role in Liberian politics. In both of these cases, the public "naming and shaming" of suspected war criminals at critical junctures in the respective conflict introduced significant political costs for continued support and significantly altered the status quo. In neither case, however, did the indictments result in the immediate arrest of the suspects.

The indictment of President Bashir represents the ultimate high-stakes gamble to compel a sitting head of state to submit to the jurisdiction of the court. However, in the absence of any credible threat of force against the regime in Khartoum or the imposition of costs for non-compliance, it is doubtful that the ICC will apprehend Bashir, at least in the short-term. Furthermore, the growing fractures within the international community over the wisdom and propriety of the indictment have effectively nullified any leverage that could have been derived from the indictment, i.e. through linking a Chapter XIV suspension with re-engagement in the peace process, to remedy the situation on the ground in Darfur. Rather, the indictment against Bashir illustrates an unfortunate truism confronting the court: in the absence of concerted political will and the threat of coercive action, international criminal justice has little deterrent power. The oft-cited comparison of the Bashir indictment with that of the Milosevic indictment by the ICTY illustrates the point: the indictments against Milosevic and others only had an impact after NATO had taken coercive action that ended attacks on civilians and the ICTY was therefore able to prosecute those who bore greatest responsibility for crimes committed.<sup>52</sup>

#### *Prosecutorial Strategy*

The indictments issued in Uganda and later in the DRC show the shifting tactics of the Prosecutor, and his ongoing struggle to find the appropriate role for justice in situations of ongoing conflict. In pursuing the LRA in northern Uganda, Ocampo attempted to make the case that the ICC could help bring the longstanding conflict to a rapid conclusion – that justice can assist in bringing peace. He targeted those most responsible for the atrocities, the top leadership of the LRA, immediately. However, as the cases against Joseph Kony and the four other LRA commanders dragged on and prospects for peace dimmed, Ocampo recalibrated his approach in the DRC investigation. Rather than position itself as an arbiter of peace in the Congo, the OTP took a more cautious approach, breaking the larger situation into more manageable and narrowly focused investigations that targeted lower-level rebel operators.<sup>53</sup>

The indictments in Darfur are distinct from those in Uganda and the DRC in that they were referred by the Security Council rather than by states party to the Rome Statute. Still, viewed in sequence, the actions of the Prosecutor reflect lessons learned in the

---

<sup>52</sup> Rodman, Kenneth. Op cit. 2008

<sup>53</sup> Phil Clark, Op. Cit, 44.

earlier cases and the continuing pressure on the Court to make its mark. The Security Council's referral of the Darfur crisis to the Court followed several years of failed diplomacy and peace negotiations, the imposition of sanctions, and an inability among the permanent five to find agreement over how and whether to effectively pressure the Sudanese government to curb the violence. By effectively outsourcing the role of "bad cop" to the ICC, the Council in effect made the Court a proxy for its own inaction and indecision—an unenviable position for a nascent institution attempting to establish its authority and credibility. Ocampo was thrust into the unappealing role of obtaining the cooperation of a state that had not signed the Rome statute, had proven impervious to all other forms of diplomatic pressure, and most importantly, one that had played a well-documented role in creating one of the world's worst humanitarian catastrophes.

Ocampo's "small-steps" approach to the Darfur investigations, in which he started with lesser figures with the intention of working his way up, was perhaps the only feasible strategy given Khartoum's intransigence, despite the criticisms from the human rights community. Moreover, his initial indictments of one janjaweed commander and one government official could be construed as an attempt to redress concerns over the perception of deference to state power. However, the government's adamant refusal to cooperate with the court, coupled with its establishment of a sham national court to try perpetrators of crimes in Darfur, put the prosecutor in the untenable position of either total impotence or having to take bolder action and upping the stakes. By charging a sitting head of state with genocide, war crimes and crimes against humanity, Ocampo effectively threw the matter back to the Security Council and gambled the future of the court. In the absence of concerted international will to enforce an indictment if confirmed by the judges, the credibility and future of the ICC is in jeopardy. Western diplomats fear that a suspension of the charges would render the court impotent and possibly force the resignation of the Prosecutor. A decision to go ahead, however, may permanently alienate many African and Arab League signatories to the Rome statute, many of which strongly oppose an indictment, leaving the court with a narrow, largely European base of support.<sup>54</sup>

## **Conclusion**

The establishment of a permanent international criminal court in 2002 was widely hailed as a major milestone for international justice, putting the world's despots on notice that crimes against humanity and atrocity crimes would not go unpunished and that the threat of future prosecution would deter future abuses. Nearly seven years later, the picture is not nearly so clear-cut: the broad international consensus in favor of the Rome Statute has begun to fray as the court pursued justice in some of the world's most politically-charged and complex crises, all of which happened to fall within Africa. At the same time, other states, such as Burma or North Korea, have so far eluded potential ICC investigations, most likely for geopolitical reasons and/or deference to regional interests. Furthermore, there is little empirical evidence to suggest that the possibility of international criminal indictments for mass atrocity crimes serve as a deterrent or moderating force on government and rebel leaders. The fact that all of the cases under discussion are still

---

<sup>54</sup> Mail and Guardian Online. "Darfur's divisive influence." 21 February 2009.

pending, either before the court or with arrest warrants outstanding, complicates any effort to draw fixed conclusions.

ICC investigations and interventions in complex civil crises have generated much debate between peace negotiators and human rights activists, between those who favor a political solution to immediately end human suffering versus those who argue that peace cannot be sustained without addressing impunity. Rather than add new elements to an often emotionally-charged debate, this study instead examines what, if any, external factors aid ICC indictments as a force for peace in a given situation. The cases examined in this study suggest that two essential pre-conditions need to be in place for an indictment to have an impact on peace processes. First, all of the cases examined in this study illustrate the need for a degree of international cohesion and the subsequent will to impose real costs, either through force or sanctions, for non-compliance. With each instance of non-compliance, the court's deterrent power is whittled away. Second, the Court has to be seen as an impartial arbiter of international justice and enjoy the respect and legitimacy of the national populations in which it works, both to collect evidence as well as to address impunity in an evenhanded manner. With the referral of cases by states party to the violence—Uganda and DRC—the ICC has to carefully navigate national and international politics versus the imperative to pursue justice, irrespective of the political and/or humanitarian costs. In both cases, the impartiality of the prosecutor has been called into question by national observers, as has his perceived deference to state power. And, in the case of Northern Uganda, the actions of the Office of the Prosecutor are increasingly seen by the local population as prolonging the conflict and attempting to institute a form of justice at odds with local culture.

The timing of ICC interventions in complex humanitarian crises clearly matters, but not in a clear-cut and predictable way as a result of the often complex and unique political realities on the ground. At issue is whether an indictment makes peace more or less likely in the short term and whether peace and justice can or should be pursued simultaneously. All of the cases suggest an inherent tension between the exigencies of peace and those of justice. In Liberia, justice for Charles Taylor was deferred for over two years in the interests of securing a peace agreement and the orderly exile of the President. In Congo, justice was pursued in the aftermath of a peace agreement, but with a cautious, carefully-calculated approach designed to avoid derailing elections and plunging the country back into war. The threat of indictments against Joseph Kony and the LRA in northern Uganda at first drew the rebels to the negotiating table, but the suspension of indictments has since emerged as one of Kony's non-negotiable conditions for signing a peace agreement. And lastly, the indictment of President Bashir in Sudan represents perhaps the biggest question mark, both for peace on the ground in Darfur and for the future of the ICC. If history is any guide, Bashir will attempt to manipulate the situation to ensure his survival and long-term advantage, a task made infinitely easier by an international community increasingly divided over the wisdom of the ICC Prosecutor's approach to the Darfur conflict.