

# **When Justice Leads, Does Politics Follow? The Realist Limits of Stigmatizing War Criminals through International Prosecution**

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## **Abstract**

Human rights advocates have called for ICC investigations in situations like Syria or North Korea regardless of the political strategies adopted by the international community toward those regimes. Part of the rationale for this advocacy is the presumed normative pull of international justice, which can stigmatize those indicted to both international and domestic audiences, leading to their marginalization. However, the examples most closely associated with this argument – Radovan Karadžić and Ratko Mladić (1995), Slobodan Milošević (1999), and Charles Taylor (2003) – are false positives since they correlated with a political commitment by powerful states to remove those actors from power. By contrast, when powerful third parties want to engage regimes whose leaders subjected to criminal scrutiny – either because of shared interests or a diplomatic approach to conflict management – the stigmatizing impact of criminalization is limited because states will ignore or reinterpret their international legal obligations. This is demonstrated by the ICTR’s failure to prosecute commanders of the Rwandan Patriotic Front and the problems the ICC has encountered in its Darfur and Kenyan investigations. The findings support a qualified realist view that the effectiveness of international criminal tribunals is dependent on the political strategies and capabilities of powerful states.

## **Introduction**

In 2014, the UN Security Council deliberated over referring the Syrian civil war to the International Criminal Court and a UN Commission of Inquiry has recommended it do the same for North Korea.<sup>1</sup> While Russia and China vetoed the Syrian resolution – and would likely do the same for one on North Korea – the prospects for accountability in either case would appear to be dim even if referrals were authorized. That is because Bashar al-Assad and Kim Jong-un are the leaders

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<sup>1</sup> Somini Sengupta, “China and Russia Block Syrian Referral to Court” *New York Times*, May 22, 2014; UN General Assembly, *Report of the Commission of Inquiry on Human Rights in the Democratic Republic of North Korea*, Report of the UN Human Rights Council, 25<sup>th</sup> Session, 7 February 2014, p. 16.

of entrenched regimes with no transition in sight, without which they are unlikely to be vulnerable to international prosecution. Moreover, the Western powers most critical of war crimes and human rights abuses in both countries have been reluctant to pursue a more aggressive strategy of removing those regimes from power – in Syria, because of the fear of empowering radical Islamists, and in North Korea, because it is a nuclear power. When pressure has been employed, it has been on behalf of changing regime behavior – a political settlement in Damascus, a nuclear deal with Pyongyang – strategies that require the cooperation of those most likely to be criminalized. Given this political context, how could international judicial intervention make a difference?

To the activists and lawyers most supportive of international criminal justice, allowing the ICC to take the lead, even in what seems like a politically unsupportive environment, can change the political context by stigmatizing those indicted by the Court. This can lead to their progressive marginalization by reducing their internal legitimacy and galvanizing stronger international opposition to them as unacceptable partners in diplomatic negotiations. The three cases most often associated with this argument are the 1995 indictments of Bosnian Serb leaders Radovan Karadžić and Ratko Mladić, the 1999 indictment of Serbian President Slobodan Milošević, and the unsealing of the 2003 arrest warrant for Liberian President Charles Taylor. In each case, judicial intervention was initially opposed by diplomats for complicating negotiations. The end result, however, was to expedite progress in peace processes by sidelining criminal spoilers and contributing to their eventual removal from power. In other words, justice can lead

and politics is likely to follow due to the mainstreaming of international criminal law into the culture of world politics.

The case analysis that follows raises questions about this narrative, which is implicitly based upon a constructivist view that the normative power of international criminal law has the potential to shape and constrain politics. The first part of the case analysis demonstrates that the three episodes most associated with the power of legal stigma are false positives since the arrest warrants coincided with a commitment by powerful states to remove those actors from power that was independent of the legal process. In other words, justice was reinforcing rather than driving politics. The second part examines three cases where international judicial intervention has not moved politics – the plan by the International Criminal Tribunal for Rwanda (ICTR) to indict commanders of the victorious Rwandan Patriotic Front (RPF), and the ICC investigations of atrocity crimes in the Darfur region of western Sudan and of the political violence that followed the December 2007 Kenyan presidential elections. In each case, prosecutors took actions consistent with their formal mandates, but were unable to generate sufficient international pressure to overcome domestic political resistance to their plans. These outcomes demonstrate that when powerful third parties prefer to engage regimes whose leaders are subjected to criminal scrutiny – either because of shared interests or a consent-based approach to conflict management – states will ignore or reinterpret their obligations under international law regardless of the normative pull of international justice. These findings support a qualified realist view that the

effectiveness of international criminal tribunals is dependent on whether their legal agendas coincide with the political strategies and capabilities of powerful states.

### **Realism, Constructivism and the Normative Pull of International Justice**

In their pragmatic analysis of human rights trials, Jack Snyder and Leslie Vinjamuri write: “Justice does not lead, it follows.”<sup>2</sup> They argue that establishing the rule of law in the aftermath of war or dictatorship depends on the consolidation of domestic political institutions, which may require expedient bargaining with rather than the prosecution of those actors complicit in criminal violence when they are strong enough to disrupt the transition. The conflict resolution literature applies a similar logic to introducing demands for retributive justice during ongoing violence. It maintains that the political strategy for ending the violence comes first and prosecution can only follow a commitment to achieve that objective by defeating or marginalizing the perpetrators to a point where their cooperation is unnecessary to negotiate and maintain a peace agreement. When such outcomes are unfeasible, insisting on prosecution jeopardizes the alternative of negotiating a political settlement since “some of the parties may fear the consequences of postwar judgments more than those of continued fighting.”<sup>3</sup> As a result, one scholar warns, “the price of maintaining the moral and rhetorical high ground will be paid in additional lives lost from the continuation of the conflict.”<sup>4</sup> One lesson some

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<sup>2</sup> Jack Snyder and Leslie Vinjamuri, “Trials and Errors: Principle and Pragmatism in Strategies of International Justice” *International Security* (2003), p. 6.

<sup>3</sup> I. William Zartman, “Negotiating Forward- and Backward-Looking Outcomes,” in I. William Zartman and Victor Kremenyuk, eds., *Peace versus Justice: Negotiating Forward- and Backward Looking Outcomes* (Rowman & Littlefield, 2005), p. 6.

<sup>4</sup> Tonya Putnam, “Human Rights and Sustainable Peace” in Stephen John Stedman, Donald Rothchild and Elizabeth M. Cousens, eds., *Ending Civil Wars: The Implementation of Peace Agreements* (Boulder, Colorado: Lynne Rienner, 2002), pp. 240-241.

analysts have drawn from this argument is that international prosecutors need to be sensitive to political context in their discretion.<sup>5</sup>

The notion that prosecutors should exercise political prudence is contrary to the dominant advocacy discourse of those human rights organizations, international lawyers and scholars most supportive of international trials. They argue that a prosecutor has a legal duty to focus only on the law and the evidence independently of all political considerations. An official policy paper from the ICC's Office of the Prosecutor (OTP) endorses this view, asserting that this "duty of independence" means that the "selection [of situations and cases] is not influenced by the presumed wishes of any external source, nor the importance of cooperation of any party, nor the quality of cooperation provided."<sup>6</sup> Moreover, acting on this duty with legal rectitude will maximize the law's impact on politics in terms of human rights and accountability. Contrary to the views of pragmatists, accountability mechanisms are not viewed simply as reflections of underlying of power realities, but rather as "tools that can change the power dynamics among actors on the ground."<sup>7</sup>

Implicit in this argument is the constructivist view that international law can influence state behavior through transnational advocacy networks acting as norm

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<sup>5</sup> See e.g., Allen S. Weiner, "Prudent Politics: The International Criminal Court, International Relations and Prosecutorial Independence" *Washington University Global Studies Law Review* 12 (2013); Matthew Brubacher, "Prosecutorial Discretion within the International Criminal Court," *Journal of International Criminal Justice* 2 (2004), pp. 71-95; Frédéric Mégret, "Three Dangers for the International Criminal Court: A Critical Look at a Consensual Project" *Finnish Yearbook of International Law* 12 (2001), pp. 201-207; Luc Côté, "Reflections on the Exercise of Prosecutorial Discretion in International Criminal Law" *Journal of International Criminal Justice*, 3:1 (2005), pp. 170-171; Richard Steinberg, "Politics and the ICC," Lecture, ICC Forum, <http://iccforum.com/forum/politics-lecture>; For my contributions to this literature, see "Is Peace in the Interests of Justice? The Case for Broad Prosecutorial Discretion at the International Criminal Court" *Leiden Journal of International Law* (2009), pp. 99-126; and "Justice as a Dialogue between Law and Politics: Embedding the International Criminal Court in Conflict Management and Peacebuilding" *Journal of International Criminal Justice* (2014), pp. 437-469.

<sup>6</sup> OTP Draft Policy Paper, "Criteria for Selections of Situations and Cases," June 2006, p. 1.

<sup>7</sup> Kathryn Sikkink and Carrie Booth-Walling, "Errors about Trials: The Emergence and Impact of the Justice Cascade," Paper Presented to New York University Law School, April 2, 2007. <http://www.iilj.org/courses/documents/Session11.Sikkink.pdf>

entrepreneurs disseminating new ideas that can change standards of appropriate behavior. In the area of international criminal justice, constructivist scholarship has focused on the emergence of a “justice cascade” in which a coalition of NGOs and international lawyers has persuaded states and international institutions that prosecution is the only appropriate response to the perpetrators of the gravest human rights abuses and war crimes.<sup>8</sup> International tribunals are both the product of this norm mobilization and part of the transnational coalition, catalyzing its further entrenchment.<sup>9</sup> As a result, a principled and apolitical approach toward prosecutorial discretion – rather than bending to law to accommodate politics – will enhance the moral authority and compliance pull of these norms. As one senior analyst at the ICC put it: “To abandon the law to political process resulting in an institution that proceeds only when there is widespread external backing, would overlook the influence that the legal process has been shown to exercise in shaping domestic compliance.”<sup>10</sup> Gareth Evans, when he was president of the International Crisis Group, expressed a similar view when he argued against the adapting prosecution to political negotiations: “The Prosecutor’s job is to prosecute and he should get on with it with bulldog intensity.”<sup>11</sup>

Realists, by contrast, would predict that international criminal law has no independent influence on politics, at least insofar as it affects significant state

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<sup>8</sup> The most prominent work in this area is Kathryn Sikkink, *The Justice Cascade: How Human Rights Prosecutions are Changing World Politics* (New York: W.W. Norton, 2011).

<sup>9</sup> Antonio Franeschet, “Four Cosmopolitan Projects: The International Criminal Court in Context,” in Steven C. Roach, ed., *Governance, Order and the International Criminal Court: Between Realpolitik and a Cosmopolitan Court* (University Press, 2009), p. 196.

<sup>10</sup> Rod Rastan, “Comment on Victor’s Justice and the Violability of *Ex Ante* Standards,” *John Marshall Law Review* 43 (2010), p. 602.

<sup>11</sup> Gareth Evans, “Justice, Peace and the International Criminal Court,” International Crisis Group, 25 September 2006. <http://www.crisisgroup.org/en/publication-type/speeches/2006/justice-peace-and-the-international-criminal-court.aspx>

interests. The reason lies in the absence of independent enforcement powers, which makes prosecutors dependent on the voluntary cooperation of sovereign states. States, moreover, are likely to look at international justice instrumentally, supporting it only to the extent to which it reinforces their security, political and economic interests. As a consequence, international tribunals are likely to be successful only when their legal mandates reinforce the political agendas of powerful states, for which the norms associated with the “justice cascade” will be subordinate to more traditional national interests.

Given this dependence of law on politics, realism suggests three hypotheses as to the relationship between international prosecutors and powerful states. First, official policy notwithstanding, international prosecutors are likely to construe their discretion pragmatically, moving carefully within political parameters set by major powers in order to avoid alienating those on whom they depend for their effectiveness.<sup>12</sup> Second, prosecutors may try to defy those constraints and act as “bulldogs” – to borrow Evans’ modifier – stubbornly “tugging at the leash” in order to drag politics in the direction of justice in ways that challenge strongly-held political preferences. If so, those states negatively affected by that decision could employ “control mechanisms” by withholding resources on which the tribunal is dependent in order to rein in its agenda.<sup>13</sup> Finally, if prosecutors succeed in initiating cases that are politically inconvenient, states may ignore or reinterpret their international legal obligations to preserve political relationships they deem to be important. In all three scenarios, law has no independent causal impact on state

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<sup>12</sup> See David Bosco, *Rough Justice: The International Criminal Court in a World of Power Politics* (Oxford University Press, 2014) on how the ICC has so far operated within a “major-power comfort zone.” (p. 173).

<sup>13</sup> See Darren Hawkins and Chad Losee, “States and International Courts: The Politics of Prosecution in Sierra Leone” *Journal of Human Rights* 12 (2004), pp. 50-53; Also see Bosco, *Rough Justice*, pp. 180-183.

behavior regardless of whether a prosecutor pushes beyond the boundaries of what is politically acceptable.

By contrast, the constructivist premises that inform international justice advocacy suggest that realists underestimate the impact of norm mobilization on state behavior. One of the ways in which it can do this is through the power of stigma, which can delegitimize criminal spoilers to both internal and external audiences, contributing to their marginalization and eventual removal from power.<sup>14</sup> International prosecutors can bring this about through criminal indictments or, as the ICC's first chief prosecutor, Luis Moreno-Ocampo, put it: "I police the borderline and say if you cross this line you are no longer of the political side, you are on the criminal side."<sup>15</sup> As with naming and shaming campaigns against human rights abusers, this kind of "border control" can isolate those indicted by the court by delegitimizing normal political and economic relationships with those states and institutions that have internalized international justice norms. The impact of this kind of legal stigma on third party relationships is likely to be most pronounced in liberal democracies in which governments face pressure from civil society activism, media coverage and public opinion, and are likely to incur political costs if they do not distance themselves from criminal actors.<sup>16</sup>

An illustration of this can be seen in what has been referred to as the "Pinochet effect."<sup>17</sup> After democratic transitions in Chile, and elsewhere in Latin

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<sup>14</sup> Human Rights Watch, *Selling Justice Short: Why Accountability Matters for Peace*, July 2009, p. 4.

<sup>15</sup> Cited in Sarah M.H. Nouwen and Wouter G. Werner, "Doing Justice to the Political: The International Criminal Court in Uganda and Sudan," *European Journal of International Law* 21:4 (2010), p. 962.

<sup>16</sup> For an exposition of this argument, see Eric Wiebelhaus-Brahm, "Promoting Accountability, Undermining Peace? Naming and Shaming in Transitional Justice Processes," in H. Richard Friman, *The Politics of Leverage in International Relations: Name, Shame and Sanction* (New York: Palgrave, 2015), pp. 87-88.

<sup>17</sup> Naomi Roht-Arriaza, *The Pinochet Effect: Transnational Justice in an Age of Human Rights* (University of Pennsylvania Press, 2010).



America, local victims and human rights activists, whose access to justice was blocked by amnesties or the residual power of the old regime, found allies in transnational advocacy networks. Together, they brought cases before European courts using universal jurisdiction laws which empowered investigating magistrates to prosecute individuals accused of international crimes regardless of nationality or of where the crimes took place. The most notable and influential of these cases was the Spanish arrest warrant for former Chilean President, Augusto Pinochet, and the 16-month extradition controversy in the UK, which led to a ruling by the British Law Lords that Pinochet, as a former head of state, could be surrendered by Britain for trial in Spain for international crimes defined in treaties that both Britain and Spain had ratified. This was done despite the opposition of the Chilean government, which feared a threat to the democratic transition, and serious concerns by both the British and Spanish governments about the diplomatic repercussions of the legal process. Despite these reservations, London and Madrid did not interfere with the legal process because doing so would have associated them with a former dictator who had come to personify impunity.<sup>18</sup> Allowing the legal process to run its course set an important precedent even though Pinochet was ultimately returned to Chile for medical reasons. And contrary to the fears of the Chilean government and of trial skeptics, the legal controversy resulted not in the predicted backlash, but rather, in continued democratic consolidation and significant steps for accountability for

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<sup>18</sup> Matt Lattimer and Philippe Sands, "Introduction" in Lattimer and Sands, eds., *Justice for Crimes Against Humanity* (Hart Publishing, 2003), p. 10.

crimes committed during the dictatorship, including legal proceedings against Pinochet himself.<sup>19</sup>

The same assumptions regarding the power of international justice norms are also implicit in NGO advocacy for a more aggressive prosecutorial strategy at the ICC. For example, some international justice supporters have been critical of the ICC's exclusive focus on rebels rather than state agents in those situations where states have referred investigations on their own territory. Their concern is that states with poor human rights records are using the Court to criminalize their enemies without assuming accountability for their own abuses of power. This was the conclusion of a Human Rights Watch report on the Ugandan and Congolese investigations, which recommended that the ICC should "investigate and prosecute crimes committed by all sides within its jurisdiction, even where doing so is politically inconvenient or otherwise difficult" and that its failure to do so "has given credence to the perception that the ICC is powerless to take on those on whom it must rely for its investigations."<sup>20</sup> A realist might counter that this perception is actually a reality since the Court lacks independent enforcement power and the sovereigns whose practices bear scrutiny still control entry into and exit from its territory. To many NGOs, this view underestimates the normative power of the Court. If the OTP develops a reputation for credibly investigating state agents as well as rebels, states will be more likely to impose accountability on

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<sup>19</sup> Contrast, e.g., Ricardo Lagos and Heraldo Munoz, "The Pinochet Dilemma" *Foreign Policy* 114 (Spring 1999), pp. 26-39, with Madeleine Davis, "Externalised Justice and Democratisation: Lessons from the Pinochet Case," *Political Studies* 54:6 (2006), pp. 249-251, and Ellen Lutz and Kathryn Sikkink, "The Justice Cascade: The Evolution and Impact of Foreign Human Rights Trials in Latin America," *Chicago Journal of International Law* 2:1 (2001), pp. 1-33.

<sup>20</sup> Human Rights Watch, *Unfinished Business: Closing Gaps in the Selection of ICC Cases*, September 15, 2011, pp. 5, 16.

their security forces to avoid the stigma associated with criminal indictments. And should arrest warrants be issued for powerful state actors, this can either weaken their standing domestically or lead Western donor states – spurred on by negative publicity and NGO pressure – to question their aid programs to rights-abusive governments and push an international justice agenda.<sup>21</sup>

The three precedents most frequently deployed on behalf of this argument are the indictments of Karadžić and Mladić, Milošević, and Taylor, each of which contributed to their marginalization and loss of power despite initial opposition from diplomats. The first part of the analysis that follows demonstrates that these cases are false positives since the most powerful external political actors in each case were committed to removing those leaders from power independently from the judicial process. This does not mean that the prosecutors did not use their agency to influence politics nor that they were simply acting as instruments of politics – though there is a circumstantial case that each chief prosecutor made some adjustments to political strategies of conflict resolution. Rather, it is to argue that what gave the indictments their normative impact was a pre-existing commitment from the most significant political actors to remove from power leaders who were viewed as total spoilers.<sup>22</sup> In other words, justice was pushing on a door that had been unlatched by politics.

The second part of the case analysis focuses on three cases (Rwanda, Darfur, and Kenya) where international prosecutors were in theory pushing on an open door since their initiatives were consistent with mandates that had been accepted by the

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<sup>21</sup> Fieldwork interview, Brussels, 2011.

<sup>22</sup> See Stephen John Stedman, “Spoiler Problems in Peace Processes,” *International Security* 22:2 (Fall 1997), pp. 10-11.

most influential states and intergovernmental organizations. In each case, however, taking prosecution seriously would have complicated relations between Western governments and client states (Rwanda and Kenya) or the conflict management strategies adopted by the international community (Sudan). Despite efforts by ICTR Prosecutor Carla del Ponte and ICC Prosecutors Luis Moreno-Ocampo and Fatou Bensouda to use their bully pulpits to put normative pressure on powerful states and the Security Council, political actors resisted – either exercising control mechanisms to steer prosecution in a different direction, as in the Rwandan case, or defining their international legal obligations narrowly, as in the Darfur and Kenyan cases. In each case, it was the stigmatizing role of prosecution that had been marginalized because it was pushing against a door that had been closed by politics.

### **III. CASE STUDIES**

#### **A. The False Positives: Justice Leads on a Path Paved by Politics**

##### *1. Richard Goldstone and the Indictments of Karadžić and Mladić*

Richard Goldstone, the first Chief Prosecutor of the International Criminal Tribunal for the former Yugoslavia (ICTY) obtained the Karadžić and Mladić arrest warrants on 25 July 1995, two weeks after the massacre of over 7000 Bosnian Muslims in Srebrenica. In his memoirs, Goldstone notes that his decision was made despite objections from diplomats, most notably UN Secretary General Boutros Boutros-Ghali, that indicting leaders during an ongoing war could undermine peace negotiations.<sup>23</sup> Nonetheless, Goldstone and other international criminal justice advocates contend that the indictments contributed to the peace process even though

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<sup>23</sup> Richard J. Goldstone, *For Humanity: Reflections of a War Crimes Investigator*. (New Haven: Yale University Press, 2000), p. 103.

Karadžić and Mladić were not taken into custody until 2008 and 2011, respectively. They did so by stigmatizing, and thereby incapacitating, the two most virulent ethnic extremists during the Bosnian war. This enabled mediators to exclude Karadžić and Mladić from the Dayton peace talks where they could have continued to play the role of spoilers, and where their presence only a few months after Srebrenica would have been unacceptable to the Bosnian government.<sup>24</sup> It also contributed to the decision at Dayton to exclude those indicted by the tribunal from any official role in postwar Bosnia, leading Karadžić to relinquish power in July 1996, thereby strengthening the prospects for the peace process by removing him from postwar politics.<sup>25</sup> “The real lesson I learned from the Karadžić indictment,” Goldstone subsequently noted, “is that prosecutors should not take account of any political considerations in issuing their charges.”<sup>26</sup>

What this narrative misses is how the change in the political strategy of conflict resolution initiated after Srebrenica gave the indictments their stigmatizing power. Prior to Srebrenica, the international community pursued an impartial conflict management approach that was incompatible with international prosecution. This involved a neutral UN-NATO peacekeeping force (UNPROFOR) whose operational mandate was not to take enforcement actions against ethnic cleansing, but to provide humanitarian relief while multilateral actors (the Contact Group, the International Conference for the Former Yugoslavia) attempted impartially to mediate an end to the war. During this period, there were strong differences between the US, which supported airstrikes and the lifting of the arms embargo to

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<sup>24</sup> Richard J. Goldstone, “Bringing War Criminals to Justice in an Ongoing War” in Jonathan Moore, ed., *Hard Choices: Moral Dilemmas in Humanitarian Intervention* (Boulder: Rowman & Littlefield, 1998), p. 205.

<sup>25</sup> Human Rights Watch, *Selling Justice Short*, p.26.

<sup>26</sup> Cited in Côté, “Reflections on the Exercise of Prosecutorial Discretion,” p. 170.

enable the Bosnian government to defend itself, and the rest of NATO, which opposed enforcement measures since, unlike the US, they had troops on the ground that could be put at risk by such a strategy. A transatlantic compromise endorsed by the UN Security Council authorized enforcement of six “safe areas” – i.e., humanitarian corridors around major cities – through NATO ground forces and airstrikes. However, a decision in May 1995 to respond to the shelling of Tuzla with airstrikes against ammunition dumps in Pale provoked the Bosnian Serbs to take 400 peacekeepers hostage, who were chained to other military sites as human shields in order to deter further NATO strikes. The crisis was resolved with the UN agreeing to “abide strictly by peacekeeping principles until further notice” – in other words, to refrain from any enforcement actions in response to attacks on civilians.<sup>27</sup> Goldstone would later write that the problem in the early years of the tribunal was the “lack of political will on the part of the leading Western states to support and enforce the orders of the tribunal.”<sup>28</sup> A prerequisite to taking that commitment seriously, however, was a political decision to move from pacific to coercive conflict resolution in which the use or threat of force would be used to protect civilians and punish or reverse ethnic cleansing.

Srebrenica was the turning point in moving the US and its NATO allies toward a political strategy compatible with international criminal justice. First, it triggered direct and indirect military coercion designed to change the power dynamics on the ground. On July 21 – four days before the Karadžić and Mladić indictments – high-level officials from NATO, the UN, and the Contact Group met

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<sup>27</sup> Steven L. Burg and Paul S. Shoup. *The War in Bosnia-Herzegovina: Ethnic Conflict and International Intervention* (M.E. Sharpe, 1999), p. 329.

<sup>28</sup> Goldstone, “Bringing War Criminals to Justice,” p. 202.

in London, where they decided to respond decisively with airpower against future attacks against the remaining “safe areas.”<sup>29</sup> After Bosnian Serb forces shelled the Markale marketplace in Sarajevo on 28 August, killing 34 civilians, NATO initiated Operation Deliberate Force – a 17-day bombing campaign designed not only to suppress the attacks on Sarajevo, but also to weaken the Bosnian Serbs’ military position during the war.<sup>30</sup> The US placed additional military pressure on the Bosnian Serbs by encouraging Operation Storm, the Croatian offensive to retake the Krajina region that had been occupied by the Serbian army since 1991, and by facilitating the transfer of arms to Croatian and Bosnian forces that reversed Serb gains through major offensives in western Bosnia.<sup>31</sup>

Second, the arrest warrants operated on parallel tracks with the political strategy of coercive diplomacy designed to end the war. While Boutros Ghali and some Western diplomats viewed the Karadžić and Mladić indictments as obstacles to peace, the Clinton administration’s envoy to the negotiations, Richard Holbrooke, viewed them as an asset since they helped him sideline criminal spoilers who had reneged on every commitment they had made to the mediators. Holbrooke’s views were the ones that mattered because after Srebrenica, the US assumed unilateral control over the mediation process, replacing the Contact Group and keeping EU, UN and Russian diplomats at arms length.<sup>32</sup> Holbrooke’s strategy was to concentrate pressure on Milošević, using the carrot of sanctions relief and the stick

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<sup>29</sup> Derek H. Chollet, *The Road to the Dayton Accords: A Study of American Statecraft* (Palgrave Macmillan 2005), pp. 29-30; Ivo Daalder, *Getting to Dayton: The Making of America’s Bosnia Policy* (Brookings 2000), pp. 73-79.

<sup>30</sup> Chollet, *The Road to the Dayton Accords*, p. 60.

<sup>31</sup> Burg and Shoup, *The War in Bosnia-Herzegovina* p 327; Daalder, *Getting to Dayton*, p. 123.

<sup>32</sup> Saadia Touval, *Mediation in the Yugoslav Wars: The Critical Years, 1990-1995* (Palgrave 2002) pp. 135-136; Elizabeth Pond, *Endgame in the Balkans: Regime Change, European Style* (Brookings, 2006), p. 32.

of military coercion against his allies in Bosnia. The goal was to persuade him that it was in his interest to end the war, which would require him to speak for and rein in Karadžić and Mladić.<sup>33</sup> By late August, Milošević was eager to play this role because of Serbia's deteriorating economy and the reversal of his allies' position on the battlefield. As a result, he presented Holbrooke a paper signed by the Serbian Orthodox Patriarch and the Bosnian Serb leadership that authorized him to negotiate on behalf of Pale.<sup>34</sup> In early September, Milošević accepted NATO's conditions for ending Operation Deliberate Force.<sup>35</sup> At Dayton, he negotiated the end of the war on behalf of the Bosnian Serbs and in their absence. One State Department official consequently noted that the ICTY "accidentally served a political purpose. It isolated Karadžić and gave us Slobo."<sup>36</sup>

The coincidence of prosecutorial and diplomatic strategies – i.e., indicting Karadžić and Mladić, but not Milošević – raises the question of whether the former had accommodated the latter. Goldstone denied that diplomatic considerations played any role in his decision-making and that he did not indict Milošević because he lacked the evidence to do so, which he attributed to Serb obstruction and the unwillingness of Western governments to share intelligence information. In fact, he argued that considering political factors, such as peace processes, would have been contrary to a prosecutor's legal duties, and if anyone had pressed him to refrain from indicting Milošević, he would "instantaneously have made it public."<sup>37</sup>

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<sup>33</sup> Gary Jonathan Bass, *Stay the Hand of Vengeance: The Politics of War Crimes Tribunals* (Princeton University Press, 2000) p.

<sup>34</sup> Daalder, *Getting to Dayton*, p. 127.

<sup>35</sup> Chollet, *The Road to the Dayton Accords*, p. 88.

<sup>36</sup> Bass, *Stay the Hand of Vengeance*, p. 239.

<sup>37</sup> Goldstone, *For Humanity*, p. 107; Also see Victor Peskin, *International Justice in Rwanda and the Balkans: Virtual Trials and the Struggle for State Cooperation* (New York: Cambridge University Press, 2008), p. 42.



The British diplomat, Lord David Owen, who met regularly with Goldstone, expressed a more nuanced view of the interplay between law and diplomacy. In Owen's account, he never recommended for or against any particular indictment, but kept Goldstone informed of the status of negotiations so "the conclusion that [he] could easily draw is that it would not be very wise to indict leaders if we wanted to arrive at a negotiated peace between them and with them."<sup>38</sup> A number of international criminal law scholars, such as Cherif Bassiouni, Michael Scharf, and Paul Williams, also concluded that Goldstone had adapted – or in their view, acquiesced – to the logic of diplomacy by not moving against Milošević.<sup>39</sup> In fact, they argue that the same logic of not foreclosing negotiations with political leaders led Goldstone to focus his earliest indictments on lower-level perpetrators rather than those, like Karadžić and Mladić, who were most responsible for the violence – a policy that led to a revolt on the part of the judges at the ICTY.<sup>40</sup> Unlike Owen, who commends Goldstone for his pragmatism, these commentators fault him for not using the moral authority of the tribunal to challenge the politicians to take justice more seriously.

There is a circumstantial case that Goldstone did adapt his discretion to politics in not moving against Milošević in 1995. In theory, Goldstone could have used the doctrines of command responsibility or joint criminal enterprise, to connect Milošević to Karadžić and Mladić, though he asserted that a higher

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<sup>38</sup> Pierre Hazan, *Justice in a Time of War: The True Story Behind the International Criminal Tribunal for the Former Yugoslavia* (College Station: Texas A & M Press, 2004), p. 61.

<sup>39</sup> See e.g., Cherif Bassiouni, "Real Justice or Realpolitik? The Delayed Indictment of Milošević," in Timothy Waters, ed., *The Milošević Trial: An Autopsy* (Oxford: Oxford University Press, 2014), pp. 93-105; Paul R. Williams and Michael P. Scharf, *Peace with Justice? War Crimes and Accountability in the Former Yugoslavia* (Boulder: Rowman & Littlefield, 2002).

<sup>40</sup> Hazan, *Justice in a Time of War*, pp. 58-60.

evidentiary threshold ought to be used when indicting a head of state.<sup>41</sup> While there is a defensible legal justification for this position, it is also consistent with the institutional interests of the tribunal, whose future was not guaranteed at the outset of the negotiations in Dayton. Had the prosecutor issued an indictment that had criminalized the person who was the linchpin of Holbrooke's negotiating strategy, the tribunal may have been negotiated away or stripped of some of its authority. One Goldstone staffer interviewed in Gary Jonathan Bass's, *Stay the Hand of Vengeance* acknowledged as much: "You have two options . . . A, you can indict Milošević and be shut down, or B, or you can do low-level [indictments] and do a few trials, like Mladić and Karadžić."<sup>42</sup>

Those international criminal justice advocates who accept this explanation argue that Goldstone should have indicted not only Milošević, but also Croatian President Franjo Tuđman for ethnic cleansing campaigns against Muslims in the early part of the Bosnian war and Serb civilians during Operation Storm.<sup>43</sup> By not pursuing a more aggressive prosecutorial strategy, they argue, the ICTY had failed "in its proper role in influencing the peace process by precluding negotiations with those responsible for international crimes."<sup>44</sup> Yet that argument presumes that there was an alternative to the political strategy of ending the war through using Tuđman's forces to put pressure on Milošević and then using Milošević to deliver the Bosnian Serbs. None of those critiques lays out what that alternative was. The closest any of them come is Scharf and Williams' suggestion that allowing the

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<sup>41</sup> See Bassiouni, "Real Justice or Realpolitik?" p. 103.

<sup>42</sup> Bass, *Stay the Hand of Vengeance*, p. 229.

<sup>43</sup> Bassiouni, "Real Justice or Realpolitik?" p. 99; Williams and Scharf, *Peace with Justice?*, pp. 120-121.

<sup>44</sup> Paul R. Williams and Patricia Taft, "The Role of Justice in the Former Yugoslavia: Antidote or Placebo for Coercive Appeasement," *Case Western Journal of International Law* (2003), p. 232.

Croatians and Bosnians to continue their offensive could have led them “to defeat Serb forces and thereby reunify Bosnia” rather than accept Milošević as a partner with whom one would have to compromise at Dayton.<sup>45</sup> This strategy – which would have aligned NATO more strongly with Tuđman – was unacceptable to the United States and Europe who feared that continued fighting could trigger direct Serbian intervention in Bosnia and a wider war.<sup>46</sup> As a result, had Goldstone indicted Milošević and Tuđman, he would have been challenging the US and NATO’s core negotiating strategy for which there was no acceptable alternative. The end result would likely have been the marginalization of the tribunal rather than a more justice-oriented approach to conflict resolution.

There were nonetheless circumstances where Goldstone did try to use the moral authority of the court to push politics. During the Dayton negotiations, Goldstone was concerned that the ICTY might be bargained away or that Karadžić and Mladić would be provided amnesties. As a result, he used his bully pulpit to speak out forcefully against such moves and lobbied the US State Department to insist on strong enforcement mechanisms to ensure compliance with the tribunal’s rulings.<sup>47</sup> He also issued a number of high-profile indictments during the negotiations – most notably, a second indictment of Karadžić and Mladić on the charge of genocide for the massacre at Srebrenica.<sup>48</sup> Goldstone denied that the warrants were designed to send a message to the negotiators though he did acknowledge that he tried to hasten the indictments once peace talks were on the

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<sup>45</sup> Williams and Scharf, *Peace with Justice*, p. 156.

<sup>46</sup> Chollet, *The Road to the Dayton Accords*, pp. 97-98.

<sup>47</sup> Peskin, *International Justice in Rwanda and the Balkans*, p. 42.

<sup>48</sup> Bass, *Stay the Hand of Vengeance*, p. 244.

horizon.<sup>49</sup> His Deputy Prosecutor, Graham Blewitt, also noted the coincidence of the indictments and the negotiations, but added that “[w]e wanted to make sure we were part of the Dayton solution.”<sup>50</sup>

How influential this public diplomacy was is unclear. There were rumors reported in the press that the US had considered bartering the ICTY in a peace deal.<sup>51</sup> While it is possible that Goldstone’s strategy made this option politically unpalatable, there is no evidence in the accounts of the participants that it was ever seriously considered.<sup>52</sup> In fact, Holbrooke’s memoir indicates that he told Milošević that the tribunal and its arrest warrants were non-negotiable. That was because Holbrooke viewed the tribunal as a useful tool in marginalizing indicted war criminals, whom Dayton barred from playing any official role in postwar Bosnia, and as an incentive for good behavior on the part of those, like Milošević, who had not yet been indicted by the court. Yet Holbrooke’s instrumental view of the tribunal also led him to resist Goldstone’s demands when they complicated the political process. For example, he viewed Goldstone’s insistence that compliance with the tribunal’s orders should be a prerequisite for Dayton was viewed as a deal-breaker and, as a result, there were no automatic enforcement triggers. In addition, the NATO forces deployed in postwar Bosnia were not given a mandate to enforce

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<sup>49</sup> Goldstone, *For Humanity*, pp. 107-108.

<sup>50</sup> John Hagan, *Justice in the Balkans: Prosecuting War Crimes in The Hague* (Chicago: University of Chicago Press, 2003), p. 134.

<sup>51</sup> See Hazan, *Justice in a time of War*, p. 67.

<sup>52</sup> See Scheffer, *All The Missing Souls*, p. 130; and Peskin, *International Justice in Rwanda and the Balkans*, p. 44.

arrest warrants because of the risk of violent backlash against peacekeepers and the consequent priority given to force protection as a result of the lessons of Somalia.<sup>53</sup>

Goldstone's decision to indict Karadžić and Mladić also appears to have been taken independently even though it aligned the ICTY with Holbrooke's "Milošević Strategy." In fact, Goldstone announced his intention to indict Karadžić in April 1995 – several months before NATO's shift toward a more enforcement-oriented strategy and at a time when Western diplomats were still negotiating directly with the Bosnian Serb leaders. Had he issued the indictments before that change, it would have provided an interesting test case of the power of criminal stigma to alter conflict resolution and negotiating strategies. There is reason to be skeptical as to whether that test would have been passed since some US diplomats still considered negotiating with the Bosnian Serb leaders after the indictments and Holbrooke himself planned to establish a back channel to them should the "Milošević Strategy," have failed.<sup>54</sup> The fact that the strategy worked was the underlying reason for the ICTY's contribution to sidelining criminal spoilers.

## 2. *Louise Arbour and the Milošević Indictment*

On 27 May 1999, the ICTY unsealed arrest warrants for Milošević and four other top Serb officials for war crimes and crimes against humanity for the murder, persecution and forced deportation of Albanian civilians during the Kosovo War. Since the indictments were issued during an ongoing war, some diplomats were concerned that their timing would complicate peace negotiations. These fears proved to be unfounded when three weeks later, Milošević acceded to NATO's

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<sup>53</sup> Matjaz Klemencic, "The international community and the FRY/belligerents (1989-95)" in Charles Ingrao and Thomas A. Emmert, eds., *Confronting the Yugoslav Controversies: A Scholars' Initiative* (West Lafayette: Purdue University Press, 2009), p. 186.

<sup>54</sup> Bass, *Stay the Hand of Vengeance*, p. 237

terms for ending the war and withdrew his army from Kosovo, allowing the refugees to return to their homes. The Serb President would subsequently lose power when he was defeated in the 24 September 2000 elections and his attempt to hold on to power was thwarted by popular demonstrations and the unwillingness of the security forces to back him up. In less than a year he was surrendered to the ICTY to stand trial. To Human Rights Watch, this was an object lesson on the power of international criminal law to incapacitate war criminals who are likely to act as spoilers if they remain at large.<sup>55</sup>

The sociologist John Hagan credits these outcomes to Goldstone's successor as Chief Prosecutor, Louise Arbour, whose "explicit acts of agency . . . advanced the tribunal's normative goals."<sup>56</sup> In an analysis that dovetails with constructivism, Hagan argues that Arbour used the moral authority of her office to engage in an "esteem competition" with third parties (NATO member states, the UN Security Council) to shame them into enforcing international criminal law or at least into elevating it in their policy priorities. Hagan illustrates this through a number of episodes that preceded Milošević indictment. For example, Arbour called out NATO for its unwillingness to implement arrest operations in Bosnia, contributing to a change in operational policy in 1997.<sup>57</sup> When France resisted and its Minister of Defense barred French officers from testifying at the ICTY, Arbour, who is French-Canadian, responded by doing an interview in *Le Monde* in her native French, chastising Paris and alleging that all of the indicted war criminals were in the French sector of Bosnia. Despite initial political pushback, the French

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<sup>55</sup> See e.g., Human Rights Watch, *Selling Justice Short*, pp. 18-20.

<sup>56</sup> Hagan, *Justice in the Balkans*, p. 130.

<sup>57</sup> *Ibid.*, p. 108.

eventually conducted their own arrest operations and reversed their position on cooperating with the tribunal.<sup>58</sup> Arbour adopted a comparable approach during the escalating violence in Kosovo prior to the NATO air campaign. After reports of atrocity crimes by Serb forces against Albanian civilians – particularly the massacre of 45 civilians at Račak on 15 January 1999 – she made a number of high profile attempts to enter Kosovo from Macedonia in order to investigate the crime scenes. International media coverage of Arbour dressed in a flak jacket as she was turned away at the border enabled her to dramatize Serb obstruction and attempt to shame Western governments and the Security Council to put pressure on Milošević to allow her investigators unfettered access.<sup>59</sup>

According to Hagan, the Milošević indictment was cut from the same cloth.<sup>60</sup> Far from acting as a tool of NATO, as some alleged, Arbour took action despite opposition from several Western diplomats who feared that the indictment would discourage Milošević from negotiating a political settlement.<sup>61</sup> Her strategy was to act as quickly as possible because she viewed herself as racing against the clock in order to prevent an immunity-for-peace deal. As one legal scholar put it, Arbour was “openly wielding indictment as a means of mobilizing pressure against any peace deal that included immunity, even if immunity . . . was the price of securing a deal at all.”<sup>62</sup> David Scheffer, who was the US Ambassador for War Crimes at the time, saw the policy as a vindication of the view of those within the administration who believed that indicting Milošević would expedite the end of the

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<sup>58</sup> Ibid, pp. 110-112.

<sup>59</sup> Ibid, pp. 114-119.

<sup>60</sup> Ibid, pp. 119-122.

<sup>61</sup> Clint Williamson, “Real Justice, in Time,” in Waters, ed., *The Milošević Trial*, pp. 90-91.

<sup>62</sup> Alexander K.A. Greenwalt, “Milošević and the Justice of Peace” in Waters, ed., *The Milošević Trial*, p. 383.

war because it “would shame him before the Serbian people, sap him of some of his authority, humble him, and force him to minimize the damage of the indictment by agreeing to a cease-fire and withdrawal.”<sup>63</sup> To some observers, this outcome raises questions about the logic of Holbrooke’s belief at Dayton that there was no way to negotiate a peace without Milošević.

There is, however, an important distinction between the conflict resolution strategies used in Bosnia and Kosovo that explains why a Milošević indictment was compatible with the latter but not the former. In Bosnia, Holbrooke was using coercive diplomacy to persuade Milošević that it was in his interest to negotiate and maintain a peace agreement. This was also NATO’s strategy in the crisis leading up to the Kosovo War in which the threat of airstrikes was used to coerce Belgrade in October 1998 to accept a cease-fire and monitors from the Organization of Security and Cooperation in Europe, and after the Rambouillet negotiations in March 1999, NATO peacekeepers. However, once the war began and Milošević did not capitulate in the first few days, the US-led NATO strategy shifted from coercive diplomacy to pure coercion designed to get Milošević to withdraw his army from Kosovo without anticipating the kind of continuing relationship NATO had with the Serb leader in Bosnia.<sup>64</sup> That is because the Kosovo War persuaded the US and other Western governments that Milošević was no longer the key to the peace process, but rather, the main source of instability in the region. As a result,

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<sup>63</sup> Davis Scheffer, *All The Missing Souls: A Personal History of the War Crimes Tribunals* (Princeton: Princeton University Press, 2012), p. 286.

<sup>64</sup> See Steven L. Burg, “Coercive Diplomacy in the Balkans: The U.S. Use of Force in Bosnia and Kosovo,” in Robert J. Art and Patrick M. Cronin, eds., *The United States and Coercive Diplomacy* (Washington, D.C.: United States Institute of Peace, 2003), pp. 94–96.



the Clinton administration moved toward a strategy of regime change, a political objective more conducive to prosecution than coercive diplomacy.

As in the Bosnian case, the compatibility of justice with politics raises the question of whether the former was influenced by the latter. In the same interview in which he discussed his relationship with Goldstone, Owen argued that Arbour was also a pragmatist who “only indicted Milošević when [she] understood he was no longer an obstacle politically [since] . . . after Kosovo, there were no means to negotiate with Milošević.”<sup>65</sup> Pierre Hazan suggests these considerations may have dissuaded Arbour from indicting Milošević during the crisis leading up to the war since the goal of NATO and the UN at the time was to change Milošević’s behavior in Kosovo, not remove him from power. While he acknowledges a defensible legal basis for her caution, he also notes that her prudence at that time “suits the politicians,” which raises the question of whether she was “responding implicitly to the fact that the West does not want to indict Milošević.”<sup>66</sup>

Arbour has taken issue with these allegations. Prior to the Milošević indictment, she received mixed signals from Western diplomats, some of whom pushed her to expedite her investigation while others wanted to delay it for fear of prolonging the war.<sup>67</sup> In an interview with journalists following the indictment, she asserted her independence from these pressures in a way that embodied the ethic of the anti-impunity movement:<sup>68</sup>

I don’t think it’s appropriate for politicians – before or after the fact – to reflect on whether they think the indictment came at a good or bad time;

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<sup>65</sup> Hazan, *Justice in a Time of War*, p. 62.

<sup>66</sup> *Ibid.*, p. 117.

<sup>67</sup> Williamson, “Real Justice, in Time,” p. 90.

<sup>68</sup> “Arbour, Milošević, and ‘Yesterday’s Men’” *Institute of War & Peace Reporting*, Tribunal Update No. 128, 5 June 1999.

whether it's helpful to the peace process. This is a legal, judicial process. The appropriate course of action is for politicians to take this indictment into account. It was not for me to take their efforts into account in deciding whether to bring an indictment, and at what particular time.

In other words, it was the diplomats that would have to adapt to the tribunal and those who objected were “yesterday’s men” beholden “to an old notion of peace that has now been rejected.”<sup>69</sup> Arbour maintains that her indictments of the Serb leadership clarified the nature of the conflict by “raising serious questions about their suitability to be the guarantors of any deal, let alone a peace agreement.”<sup>70</sup>

Whether or not Arbour adapted to politics, the US and its allies were able to align prosecution with peacemaking through their control over the confidential information she needed to support a solid indictment. When Arbour replaced Goldstone in 1996, Milošević was still a guarantor of the Bosnian peace process and Western governments did not share with her the intelligence necessary to link him to war crimes in Bosnia and Croatia. During the crisis in Kosovo prior to the war, Western governments urged Arbour to investigate Milošević. Their commitment to justice, however, was instrumental since they viewed the ICTY as a tool complementing the threat of force to intimidate Milošević into compliance. An actual indictment, by contrast, would defeat that purpose by suggesting that their goal was regime change rather than changing regime behavior. As a result, they neither shared with Arbour the intelligence information needed to build a solid criminal case, nor did they put serious pressure on Serbia to allow her investigators to enter Kosovo in order to get that evidence on their own.<sup>71</sup>

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<sup>69</sup> Ibid.

<sup>70</sup> Charles Trueheart, “Indictment Details Case Against Milošević,” *Washington Post*, May 28, 1999, p. A1.

<sup>71</sup> Peskin, *International Justice in Rwanda and the Balkans*, pp. 54-55.

Once the war in Kosovo started, politics began to move in the direction of prosecution since Western governments abandoned their previous efforts to secure Milošević's cooperation. As the war dragged on longer than had been anticipated, some US government officials viewed a Milošević indictment as a means of countering increased public opposition to the war – particularly in Europe – and Russian mediation efforts that compromised NATO's war aims. As a result, some State Department officials approached Arbour to encourage her to expedite the arrest warrant. In addition, the US and other Western governments released to the Prosecutor confidential satellite imagery and radio intercepts that had been withheld when they viewed Milošević as the key to the peace process. This provided a stronger evidentiary basis for a criminal indictment and signaled a more supportive political environment as well.<sup>72</sup>

ICTY officials have claimed that the decision to indict Milošević was taken independently of these political factors. Arbour rebuffed US overtures to expedite the indictment as inappropriate and did not consult with the US – whose officials were actually divided on the desirability of the indictment – on the timing of her application for an arrest warrant. As a result, Hagan notes that her prioritizing of justice over politics clarified the situation and strengthened the hand of those who recognized that Milošević could not be part of any peace settlement.<sup>73</sup> This demonstrates the potential for prosecutors to use the normative power of their office to influence politics when policy-makers within the most influential states are

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<sup>72</sup> Williams and Scharf, *Peace with Justice*, pp. 206-208.

<sup>73</sup> Hagan, pp. 130-131.

divided. Yet none of this would have been possible had there not first been a fundamental change in Milošević's role in US-led strategies of conflict resolution.

### 3. *David Crane and the Unsealing of the Arrest Warrant for Charles Taylor*

The arrest warrant issued by the Special Court for Sierra Leone (SCSL) for Liberian President Charles Taylor has been cited alongside the Karadžić, Mladić, and Milošević indictments as examples of the stigmatizing impact of international criminal law. The fact that Taylor left power shortly after publication of the warrant – and was excluded from any role in postwar Liberia – demonstrates the potential of prosecution to assist peace processes through incapacitating criminal spoilers. As with the ICTY indictees, however, what made the normative impact of the arrest warrant potent was that it complemented international and regional strategies of economic and military coercion aimed at removing Taylor from power.

On 7 March 2003, the SCSL's first Chief Prosecutor, David Crane, obtained an indictment of Taylor on 17 counts of war crimes and crimes against humanity for his support of a Sierra Leonean rebel group, the Revolutionary United Front (RUF), which had used child soldiers to mutilate and terrorize civilians to control that country's diamond resources. Unlike the Sierra Leonean indictees, however, Taylor was outside the enforcement jurisdiction of the court. As a result, Crane persuaded the judges to keep the indictment under seal while he devised Operation Rope – a plan to unveil the warrant after Taylor left Liberia in order to maximize the social pressure on third parties to arrest and surrender him for trial.<sup>74</sup> That opportunity availed itself on 4 June 2003 when Taylor arrived in Accra for peace talks

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<sup>74</sup> David Crane, "The Take Down: Case Studies Regarding 'Lawfare' in International Criminal Justice: The West African Experience." *Case Western Reserve Journal of International Law* 43:1-2 (2010), p. 209.

sponsored by the Economic Community of West African States (ECOWAS) to end Liberia's civil war by persuading Taylor to step down and accept asylum abroad.

The response from diplomats and mediators to the timing of Crane's actions was uniformly negative. The ECOWAS member states that sponsored the talks condemned what they viewed as interference in a regional effort to end the war at a time when two rebel groups were advancing on Monrovia. In their view, negotiating with Taylor and arranging for him to step down and accept sanctuary in a third country was the only alternative to the humanitarian catastrophe likely to emerge from a final battle for the capital. As a result, Ghana allowed Taylor to fly back to Liberia rather than arresting him and surrendering him for trial.<sup>75</sup>

Crane's decision also provoked strong opposition from the US, which was a strong supporter of the Accra negotiations and the largest donor to the SCSL. Crane did give the US government (and other concerned parties) advanced notice of his intention to unseal the indictment, but State Department officials believed that if the dock was the only alternative to relinquishing power, Taylor would fight to the bitter end. As a result, they placed strong pressure on Crane to reconsider. When Crane refused, the US used control mechanisms to punish the prosecutor, cutting off contacts with the State Department and the US Embassy in Freetown and withholding \$10 million that had been appropriated for the court by Congress.<sup>76</sup>

Many anti-impunity advocates have defended Crane from the charge that his intervention undercut the peace process. While his ploy may not have succeeded in

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<sup>75</sup> Kingsley Moghalu, *Global Justice: The Politics of War Crimes Trials*. (Stanford: Stanford University Press, 2008), p. 110.

<sup>76</sup> John Cerone, "Dynamic Equilibrium: The Evolution of US Attitudes toward International Criminal Courts and Tribunals." *European Journal of International Law* 18:2 (2007), p. 309; Hawkins and Losee, "States and International Courts," pp. 59-61.

gaining custody of Taylor, it did play a role in reducing his international and domestic legitimacy, hastening his removal from power and making it clear to other stakeholders that he could not play any role in postwar Liberia.<sup>77</sup> In interviews conducted after he stepped down as Chief Prosecutor, Crane acknowledged that this was precisely his intention – i.e., that the timing of the indictment was designed to shame Taylor in front of his peers because “the peace process could only legitimately take place with the full knowledge of Taylor’s indictment and his removal . . . from the political scene.”<sup>78</sup>

What is striking about Crane’s *post hoc* explanation is his frank acknowledgment of the political dimensions of his decisions. Yet unlike Goldstone and Arbour, for whom there is a circumstantial case that they held back from indictments that could have torpedoed negotiations, Crane took a more aggressive stand than diplomats thought prudent because of his judgment that Taylor was using the negotiations to buy time to remain in power.<sup>79</sup> Crane did expect retaliation from the Bush administration for undercutting its preferred strategy, but sought to maintain his freedom of action through cultivating a relationship with Congress where there was strong bipartisan support for the court and against Taylor. Congress was consequently willing to relieve the pressure the administration had placed on the SCSL by linking the authorization of funds for a new embassy in Freetown to the release of the \$10 million that had been withheld in order to punish the court. Hawkins and Losee conclude that this episode is an illustration of

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<sup>77</sup> See International Crisis Group, *The Special Court for Sierra Leone: Promises and Pitfalls of a New Model* (2003), p. 9; and Human Rights Watch, *Selling Justice Short*, pp. 21-24;

<sup>78</sup> Priscilla Hayner, *Negotiating Peace in Liberia: Preserving the Possibility for Justice*. Center for Humanitarian Dialogue, Geneva, 2007, pp. 8-11; For more on Crane’s view of the role of politics in prosecutorial discretion, see “The Take Down,” pp. 212-213.

<sup>79</sup> Hayner, “Negotiating Peace in Liberia,” pp. 8-9.

constructivism in which Crane was able to overcome the opposition of the most powerful state by using arguments and social interactions to activate sympathetic audiences within that state to maintain his freedom of action and eventually change administration preferences in favor of Taylor's prosecution.<sup>80</sup>

This is not to argue that Crane was able to pursue his preferred approach to justice without reference to powerful states. He had considered indicting two other heads of state – i.e., Libyan leader Mu' ammar Qaddafi, for his support for Taylor and RUF leader Foday Sankoh, and Blaise Compaoré of Burkina Faso, a Taylor ally who assisted the diamonds-for arms relationship between Liberia and Sierra Leone. Crane decided not to move forward with indictments because of the likelihood of sovereign backlash. First, he thought the international community would react negatively to the precedent of an international tribunal indicting three heads of state. Second, an indictment of Qaddafi would have been opposed by the US and the UK, which had been successfully pressuring the Libyan government to change its policies on terrorism and weapons of mass destruction. Third, diplomats were wary of targeting Compaoré for fear of destabilizing West Africa. Crane consequently acknowledged that “I was about to indict, I didn't for political reasons . . . I didn't want to see the entire Special Court ended by an angry U.S. and UK and others because I indicted another head of state.”<sup>81</sup>

There was, however, another important difference in the political context surrounding potential indictments of Qaddafi and Compaoré, on the one hand, and Taylor, on the other. In the former cases, Crane would have been targeting the

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<sup>80</sup> Hawkins and Losee, “States and International Courts,” pp. 49, 59-61.

<sup>81</sup> Ibid, pp. 61-63.

leaders of what were at the time, stable regimes – though Qaddafi would be overthrown and killed following a rebellion in 2011 and Compaoré was ousted in a coup in 2015. As a result, Western powers and regional actors pursued policies aimed at changing regime behavior rather than regime change, meaning that there was no imminent prospect of their being dislodged from power in a way that would make them vulnerable to prosecution.

By contrast, the Taylor indictment coincided with an international and regional push for regime change and the capacity to back that up with military and economic coercion. Just prior to the Accra negotiations, the US persuaded Nigerian President Olesgun Obasanjo to abandon his “avuncular” approach toward Taylor in favor of “a concrete international and sub-regional push . . . to close the book on Taylor’s depraved leadership.”<sup>82</sup> Nigeria was also persuaded to offer sanctuary to Taylor if he stepped down – which the US Ambassador referred to as “the most important single step in injecting the peace process with some momentum”<sup>83</sup> – and a commitment of Nigerian troops as part of an ECOWAS mission which, once deployed, would give Taylor a “48-hour ultimatum to go into exile or face arrest.”<sup>84</sup>

This strategy was complemented by international and regional policies designed to increase Taylor’s isolation while strengthening those trying to overthrow him. UN Security Council Resolution 1478 (6 May 2003) added timber to the sanctions against diamonds and arms even though the RUF insurgency, whose support from Taylor led to the imposition of sanctions, had been defeated. Meanwhile, Guinea and Côte D’Ivoire armed and supported the two major rebel

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<sup>82</sup> Jeter, Nigeria: President Obasanjo Believes Taylor Must Go. Confidential Cable, 5 June 2003.

<sup>83</sup> Jeter, President Obasanjo Confirms Taylor’s Asylum Offer and a Commitment to Deploy. Confidential Cable, 9 July 2003.

<sup>84</sup> Jeter, Two Battalions Can Deploy Quickly to Liberia – But Needs Help. Confidential Cable, 25 July 2003.



groups despite a UN arms embargo on all the parties. While a UN Panel of Experts report identified those violations, no sanctions were threatened or imposed since these rebels were viewed by the US and other major powers as sources of pressure for Taylor's ouster.<sup>85</sup> Nigeria's intervention was another source of pressure, particularly after it assumed control over Roberts International Airport, which was the last remaining conduit for fuel and weapons for Liberia's armed forces.<sup>86</sup> Finally, President George W. Bush called on Taylor to step down and ordered the deployment of three warships with 2300 marines off the coast of Liberia.<sup>87</sup> The combination of these policies made it clear to Taylor that he could remain in power. On 11 August 2003, he resigned and accepted asylum in Nigeria.

In sum, the difference between Crane and his major power and regional critics was not one of ends – all wanted to see Taylor removed from power – but one of means – i.e., whether the arrest warrant would loosen his grip on power or make a negotiated exit impossible. And what made the social coercion of criminalization influential in marginalizing Taylor was its alignment with the deployment of military, political and economic coercion to achieve the same end.

## **B. The Negatives: Justice Leads and Politics Resists**

### *1. Carla Del Ponte and the Failure of Impartial Justice in Rwanda*

During her tenure as Chief Prosecutor of the International Criminal Tribunal for Rwanda (ICTR), Carla Del Ponte initiated an investigation of military commanders from the victorious Rwandan Patriotic Front (RPF) for three massacres of Hutu civilians that took place during the civil war that ousted the

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<sup>85</sup> Hazen, *What Rebels Want*, pp. 112, 130.

<sup>86</sup> *Ibid.*, p. 135.

<sup>87</sup> International Crisis Group, "Liberia: Security Challenges," Africa Report No. 71, 3 November 3 2003, pp. 13-14.

regime responsible for the Rwandan genocide. Her plans were consistent with the tribunal's statute, which gave it authority not only over genocide, but over war crimes as well. They were also consistent with the findings and conclusions of the UN-appointed Commission of Experts that had recommended the creation of the tribunal. While Del Ponte was careful not to suggest a moral equivalence between war crimes and genocide, she wanted to prevent the ICTR from becoming an instrument of victor's justice, particularly since the RPF had been implicated in killing at least 20,000 civilians. Nonetheless, when the Rwandan government obstructed the investigations, the UN and major powers successfully exercised control mechanisms to prevent the work of the tribunal from interfering with political cooperation with Kigali.<sup>88</sup>

When Del Ponte assumed office, the ICTR had only investigated those responsible for the genocide. Goldstone, the tribunal's first chief prosecutor (the Yugoslav and Rwanda tribunals shared the same chief prosecutor until 2003), justified this by noting: "We didn't have enough resources to investigate all the nines and tens . . . And the RPF, who acted in revenge, were at ones and twos, and maybe even fours and fives."<sup>89</sup> Arbour was also reluctant to move forward since she believed that investigating those within the RPF power structure could put her genocide trials at risk given the tribunal's dependence on Rwandan cooperation. In 1999, however, she discreetly collected information on RPF atrocities and initiated a dialogue with RPF leader and then Vice President Paul Kagame to persuade him

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<sup>88</sup> See Kingsley Moghalu, *Rwanda's Genocide* (Palgrave, 2005), ch. 6; Peskin, *International Justice in Rwanda and the Balkans*, ch. 9; Thierry Cruvellier, *Court of Remorse: Inside the International Criminal Tribunal for Rwanda* (University of Wisconsin Press, 2010), pp. 160-165; and Carla Del Ponte and Check Sudetic, *Madame Prosecutor: Confrontations with Humanity's Worst Criminals and the Culture of Impunity* (Other Press, 2008).

<sup>89</sup> Peskin, *International Justice in Rwanda and the Balkans*, p. 189.

that it was in his interest to cooperate with the probe.<sup>90</sup> Given the absence of visible movement toward prosecution of RPF crimes, Human Rights Watch and Amnesty International lobbied the ICTR to prosecute both sides of Rwanda's civil war.<sup>91</sup>

On 13 December 2000, Del Ponte announced her plans to investigate and prosecute RPF war crimes, which she entrusted to a newly created Special Investigations Team.<sup>92</sup> This was done in consultation with Kagame, who assumed the presidency in March 2000, and whose cooperation in permitting access to military files was deemed essential to building a criminal case. In order to secure that cooperation, Del Ponte made clear that this was not the first step in a full-fledged examination of RPF war crimes, but rather, a focus on a small number of well-documented cases that the RPF itself had acknowledged.<sup>93</sup>

Kagame initially pledged to cooperate, but refused to intercede when Rwanda's chief military prosecutor denied tribunal investigators access to confidential material.<sup>94</sup> When Del Ponte pressed the issue, Kagame's response changed to one of outright opposition, arguing that RPF trials could destabilize Rwanda and provide support for the "double genocide" theory that equated Hutu and Tutsi violence.<sup>95</sup> Shortly thereafter, the Rwandan government blocked witnesses from traveling to the ICTR in Arusha, Tanzania, triggering the suspension of several trials. While the government justified this measure as a response to the tribunal's lax witness protection and mistreatment of survivors, it was in reality a

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<sup>90</sup> Ibid, p. 190; Moghalu, *Rwanda's Genocide*, p. 138.

<sup>91</sup> See e.g., Alison Desforges, *Leave None to Tell the Story: Genocide in Rwanda*, Human Rights Watch, 1999, pp. 535-588; and Amnesty International, "International Criminal Tribunal for Rwanda: Trials and Tribulations" March 31, 1998. <https://www.amnesty.org/en/documents/ior40/003/1998/en/>

<sup>92</sup> Del Ponte and Sudetic, *Madame Prosecutor*, pp. 182-188.

<sup>93</sup> Gerald Gahima, *Transitional Justice in Rwanda: Accountability for Atrocity* (Routledge, 2013), p. 109.

<sup>94</sup> Del Ponte and Sudetic, *Madame Prosecutor*, p. 225.

<sup>95</sup> Moghalu, *Rwanda's Genocide*, p. 139.

thinly disguised control mechanism designed to use the tribunal's dependence on its cooperation to persuade Del Ponte to back off.<sup>96</sup>

Del Ponte responded by using the moral authority of her office to generate third party pressure on Kigali. One approach was to publicize the conflict with Rwanda, starting with a press conference in April 2002 when she revealed that Kagame's obstruction had forced her to conduct investigations outside Rwanda and announced plans to issue indictments by the end of the year.<sup>97</sup> Del Ponte also approached the UN Security Council, which had authorized the tribunal under Chapter VII, making compliance a binding legal obligation. On 23 July 2002, she sought enforcement of that obligation when she testified before a closed session of the Security Council that Rwanda had intentionally withheld cooperation in order to blackmail her to back off from the special investigations. This was followed by a formal complaint from ICTR President Navi Pillay that Rwanda had abrogated its obligation to comply with the tribunal's orders.<sup>98</sup>

In theory, Del Ponte was asking the UN and its member states to support a justice mandate that they had endorsed. In practice, enforcing her agenda would have complicated other interests that the most significant political actors viewed as more important than even-handed justice. For example, the Security Council backed a US-led strategy to push the ICTR toward a "completion strategy" designed to wind down its docket and transfer cases to the Rwandan courts. Initiating a new set of investigations would have pushed the tribunal in the opposite

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<sup>96</sup> Peskin, *International Justice in Rwanda and the Balkans*, pp. 212-213.

<sup>97</sup> Chris McGreal, "Genocide Tribunal Ready to Indict First Tutsis" *Guardian*, 4 April 2002.

<sup>98</sup> Del Ponte and Sudetic, *Madame Prosecutor*, p. 227.

direction.<sup>99</sup> In addition, the United States had developed a strong patron-client relationship with Rwanda shortly after the genocide, and at the time of the controversy, it had ended an embargo on arms sales to Rwanda anticipating counter-terrorism cooperation in central and eastern Africa.<sup>100</sup> Other Western donors objected to Kagame's increasing authoritarianism and his intervention in eastern Congo, but saw a coincidence of interest with his development policies.<sup>101</sup> As a result, the UN and the major powers not only failed to back Del Ponte's demands; they used control mechanisms to put pressure on her to withdraw them.

First, the Council waited six months before responding to the tribunal's notification of noncompliance. That came in a presidential statement stressing the importance of "full cooperation by all States" without any accompanying enforcement actions to make those words meaningful. Moreover, the statement contained a mixed message when it called for "constructive dialogue" between the Tribunal and states over what should have been a binding legal obligation.<sup>102</sup>

Second, the US tried to broker an agreement that undercut the prosecutor's position. In May 2003, US Ambassador-at-Large for War Crimes, Pierre-Richard Prosper, set up a meeting in Washington between Del Ponte and high-level Rwandan officials. His goal was to defuse the crisis by persuading her to delegate the RPF trials to the Rwandan courts, which the ICTR would monitor with the possibility of reasserting jurisdiction if they were not conducted in good faith. Del

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<sup>99</sup> International Crisis Group, "ICTR: Time for Pragmatism," September 26, 2003, p. 7.

<sup>100</sup> See *ibid.*, pp. 8-9, and Luc Reydam, "Let's Be Friends: The United States, Post-Genocide Rwanda, and Victor's Justice in Arusha," Institute of Development Policy and Management (IOB) of the University of Antwerp Discussion Paper. [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2197823](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2197823)

<sup>101</sup> See e.g., Eugenia Zorbas, "Aid Dependence and Policy Independence: Explaining the Rwandan Paradox," in Scott Straus and Lars Waldorf, eds., *Remaking Rwanda: State Building and Human Rights after Mass Violence* (University of Wisconsin Press, 2011), pp. 105-106.

<sup>102</sup> Decision of 18 December 2002 (4674th meeting), statement by the President. S/PRST/2002/39 [http://www.un.org/en/sc/repertoire/2000-2003/Chapter%208/Thematic/00-03\\_8 ICTY-ICTR.pdf](http://www.un.org/en/sc/repertoire/2000-2003/Chapter%208/Thematic/00-03_8 ICTY-ICTR.pdf)

Ponte rejected this proposal as undermining the authority of the tribunal – first, because the UN had given it primacy over national courts, and second, because of the RPF’s poor record of holding its forces accountable.<sup>103</sup> Prosper claims that his goal was not, as one critic put it, to “bury the investigations,” but rather to strengthen the rule of law in Rwanda by giving it ownership over the legal process the same way the Rome Statute’s principle of complementarity seeks to encourage national trials.<sup>104</sup> Whatever Prosper’s intentions, Rwanda viewed his proposal as a sign that its strategy of circumscribing the tribunal’s docket was working. As one of the participants in the mediation effort subsequently wrote, the US “conveyed the message that the exercise of the powers of the Prosecutor was negotiable.”<sup>105</sup>

Finally, Rwanda launched a campaign to have Del Ponte removed as chief prosecutor of the ICTR and persuaded the US and the UK to join that effort in July 2003. The result was Security Council Resolution 1503 (28 August 2003), which stripped Del Ponte of the Rwandan portfolio and made her responsible only for the ICTY while assigning a separate chief prosecutor for the ICTR.<sup>106</sup> Del Ponte interpreted this decision as retaliation for not ceding the tribunal’s authority.<sup>107</sup> Prosper rejects that interpretation arguing that the US decision to vote for the resolution had to do with management issues associated with a prosecutor in The Hague running a courtroom in central Africa. Moreover, the resolution called for Rwanda to “intensify cooperation and render all necessary assistance to the ICTR,

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<sup>103</sup> Del Ponte and Sudetic, *Madame Prosecutor*, pp. 232-234.

<sup>104</sup> See Prosper’s response to Filip Reyntjens in International Criminal Tribunal for Rwanda (ICTR), *Model or Counter Model for International Criminal Justice? The Perspectives of the Stakeholders: Session 2: The Prosecutions*, 9 July 2009, pp. 28-29.

<http://41.220.139.198/Portals/0/English/News/events/july2009/SESSION2.pdf>

<sup>105</sup> Gahima, *Transitional Justice in Rwanda*, p. 111.

<sup>106</sup> Moghalu, *Rwanda’s Genocide*, p. 130

<sup>107</sup> Del Ponte and Sudetic, *Madame Prosecutor*, p. 233

including on investigations of the Rwandan Patriotic Army.”<sup>108</sup> Nonetheless, the timing of the decision with Rwanda’s campaign against Del Ponte and its prior obstruction of her investigations sent a signal to both the Office of the Prosecutor and Kigali that there would be no international support for RPF investigations.<sup>109</sup>

That this signal was received – even before the Security Council had acted – can be seen in Del Ponte’s suspension of her investigation in September 2002 despite the fact that some of her trial attorneys believed there was enough evidence to make good on her original promise to issue indictments by the end of the year.<sup>110</sup> It can also be seen in the actions of her successor, Hassan Bubicar Jallow. While Jallow’s reports to the Security Council indicated that the special investigations were ongoing, he made other statements suggesting that RPF trials were not a priority.<sup>111</sup> The meaning of those statements became clear when, on 4 June 2008, he announced his acceptance of the deal Del Ponte had rejected in 2003 in which RPF trials would be transferred to the Rwandan courts with the ICTR asserting jurisdiction only if it determined them not to be genuine.<sup>112</sup> The Rwandans conducted one trial of a massacre of 13 clergy and two civilians in Kabgayi in which two captains pleaded guilty and were sentenced to eight years (reduced to five years on appeal) and a general and a major were acquitted. Human Rights Watch and other outside observers viewed the trial as a whitewash since the prosecution case was weak, the sentences did not reflect the gravity of the crime,

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<sup>108</sup> See Prosper’s statements in Moghalu, *Rwanda’s Genocide*, pp. 145-146; and ICTR, *Model or Counter Model*, pp. 25-26.

<sup>109</sup> See Luc Reydam, “The ICTR Tens Years On: Back to the Nuremberg Paradigm,” *Journal of International Criminal Justice* (2005), p. 981.

<sup>110</sup> Leslie Haskell and Lars Waldorf, “Impunity Gap of the International Criminal Tribunal for Rwanda: Causes and Consequences,” *Hastings International & Comparative Law Review* (2011), p. 58.

<sup>111</sup> See Reydam, “The ICTR Ten Years On,” pp. 982-983.

<sup>112</sup> Haskell and Waldorf, “Impunity Gap,” p. 60.

and the trial was framed to portray the massacre as an isolated act of revenge rather than as part of a broader pattern of behavior. Jallow nonetheless reported to the Security Council that Rwanda had met its obligations.<sup>113</sup>

There is a circumstantial case that this pattern of adapting prosecution to the prospects for political support has continued with the ICC and its investigations in eastern Congo where Rwanda has played a major role in supporting militias responsible for criminal violence, both to control the region's resources and to weaken the Hutu-led *Forces Démocratiques de Libération du Rwanda* (FDLR), whose leaders were part of the Rwandan genocide.<sup>114</sup> The most recent controversy involved M23, a militia that was the strongest armed group in eastern Congo from the spring of 2012 until the fall of 2013, and whose leader, Bosco Ntaganda, was subject to an ICC warrant for his arrest. According to a UN study, this militia was not only supported by Kigali, but also directed by its Ministry of Defense.<sup>115</sup>

Many NGOs have been critical of the ICC's case selection in eastern Congo, which has focused exclusively on militia leaders rather than their patrons in Kigali and elsewhere. As a result, they have called on the ICC to expand its investigations to more powerful political actors, including high-level Rwandan officials.<sup>116</sup> That position was given some tentative public support in July 2012 when US Ambassador-at-Large for War Crimes Issues – and former SCSL Prosecutor –

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<sup>113</sup> Lars Waldorf, "Mere Pretense of Justice: Complementarity, Sham Trials, and Victor's Justice at the Rwanda Tribunal, A." *Fordham International Law Journal* 33 (2009), p. 1221.

<sup>114</sup> See Filip Reyntjens, "Waging (Civil) War Abroad: Rwanda and the DRC," in Straus and Waldorf, eds., *Remaking Rwanda*, pp. 132-151.

<sup>115</sup> Final report of the Group of Experts on the DRC submitted in accordance with paragraph 4 of Security Council resolution 2021 (2011), 15 November 2012, S/2012/843, pp. 11-13.

<sup>116</sup> See e.g., Human Rights Watch, *Unfinished Business*, pp. 12-16; Pascale Kambale, "Justice Denied? The ICC's Record in the DRC," Open Democracy, 3 December 2014 <https://www.opendemocracy.net/openglobalrights/pascal-kambale/justice-denied-icc%E2%80%99s-record-in-drc>



Stephen Rapp, suggested that assistance to M23 left the Rwandan leadership open to the charge of “aiding and abetting” criminal violence in a neighboring country – the same charge for which Taylor was convicted only a few months earlier.<sup>117</sup>

Should the ICC Prosecutor follow the NGOs’ advice, she would likely face political difficulties comparable to those that confronted Del Ponte even though there has been strong Western opposition to Rwanda’s intervention in eastern Congo. That is because the US and the EU have responded to Rwanda’s transgressions not through pursuing regime change, as was done with Taylor, but through coercive diplomacy – i.e., suspending aid as a source of leverage to convince Rwanda to recalculate its interests and cut its ties to M23 – a strategy that successfully isolated the rebels, contributing to their eventual defeat by a UN intervention brigade.<sup>118</sup> Prosecution, by contrast, would complicate this strategy, as noted by a diplomat involved in negotiations involving Rwanda and M23:<sup>119</sup>

All of the progress we made [in neutralizing M23] came from our pressure on the Rwandan government to cut its ties to the rebels. We consider Rwanda to be a legitimate government and we are trying to change its behavior. If the ICC starts investigating Kagame or members of his inner circle, then it looks like we are trying to change the regime and all of that cooperation dries up.

In other words, Rapp’s implied threat that Kagame could meet the fate of Taylor is belied by the difference in the political strategies outsiders adopted to end each leader’s support for cross-border violence.<sup>120</sup>

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<sup>117</sup> Chris McGreal, “Rwanda’s Paul Kagame Warned He May be Charged with Aiding War Crimes,” *Guardian*, 25 July 2012.

<sup>118</sup> Ben Shepherd, “The Fall of M23: African Geopolitics and the DRC,” Chatham House: The Royal Institute of International Affairs, 14 November 2013 <https://www.chathamhouse.org/media/comment/view/195557#>

<sup>119</sup> Fieldwork interview, European External Action Service, Brussels, Belgium.

<sup>120</sup> In a subsequent press conference in Kigali, Rapp partially walked his statement back by noting that the crimes attributed to M23 were not at that point of sufficient gravity to merit ICC prosecution. See James Munyaneza, “Rwanda Responds to New DRC Rebel Support Claims,” *New Times* (Rwanda), 15 August 2012.

A Congo analyst at the OTP acknowledged that he was aware of these negotiations and of the priorities of mediators, but stated that “while we keep ourselves informed, it doesn’t drive our decision-making.”<sup>121</sup> Nonetheless, these political realities shape the boundaries within which international courts can operate and the pragmatics of prosecution often requires adapting to them. This is probably why Moreno-Ocampo sent then-Deputy Prosecutor Bensouda to attend Kagame’s inauguration even though it took place one week after leaked release of the UN Mapping Report documenting RPF war crimes on Congolese territory that may have reached the level of genocide.<sup>122</sup> While Kagame had not been indicted and most of the allegations in the UN report took place before the Rome Statute came into force, some NGOs were critical of the visible association with someone accused of the very kinds of crimes the ICC is mandated to punish.<sup>123</sup> An OTP official defended the visit arguing that evidence in a UN mapping report falls short of what is needed for a conviction in a court of law, and moreover, no immunity was provided to Kagame, who could be prosecuted at some point in the future.<sup>124</sup> While these are defensible arguments, they are also consistent with a pragmatic construction of prosecutorial discretion that avoids investigations that are likely to lack international support or complicate relations with states like Rwanda, whose cooperation could assist the OTP – e.g., through cutting its ties with the indicted former M23 leader, Bosco Ntaganda, who has since been transferred to The Hague,

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<sup>121</sup> Fieldwork interview, Office of the Prosecutor, International Criminal Court.

<sup>122</sup> Colum Lynch, “What’s a War Crimes Prosecutor Doing at Kagame’s Presidential Inauguration,” *Turtle Bay: Reporting Inside the United Nations*, September 3, 2010. <http://foreignpolicy.com/2010/09/03/whats-a-war-crimes-prosecutor-doing-at-kagames-presidential-inauguration/> and Colum Lynch, “UN: Rwandan Troops May Have Committed War Crimes in Efforts to End ’94 Genocide,” *Washington Post*, August 28, 2010.

<sup>123</sup> See the comments of Richard Dicker of Human Rights Watch in *Ibid*.

<sup>124</sup> Fieldwork interview, Office of the Prosecutor, International Criminal Court.

or because of shared interests in its investigation in North Kivu where its first indictment is for Sylvestre Mudacumura, the commander of the military wing of the FDLR.<sup>125</sup> If this were the case, it would be a tacit admission that international criminal law adapts to power and politics more than its norms transform them.

## 2. *Luis Moreno-Ocampo and the Bashir Arrest Warrant*

On 12 December 2014, the ICC's Chief Prosecutor, Fatou Bensouda, reported to the Security Council that she was putting her Darfur investigation in "hibernation." Her predecessor, Luis Moreno-Ocampo, had obtained warrants for the arrest of three Sudanese officials and one militia leader, including one for Sudan's President Omar Hassan al-Bashir, who was indicted on ten counts of genocide, war crimes and crimes against humanity for an ethnic cleansing campaign against the Fur, Zaghawa, and Masalit ethnic groups. None of the warrants has been executed and Sudan's military and the militias they support have continued to attack civilians in Darfur and elsewhere in Sudan. Bensouda's statement was designed to place the onus for this state of affairs on the Security Council, calling for a "dramatic shift in this Council's approach to arresting Darfur suspects."<sup>126</sup>

The UN had formally committed itself to supporting the arrest warrants. Acting on the recommendation of a UN Commission of Inquiry, Security Council Resolution 1593 (31 March 2005), authorized an ICC investigation of international crimes in Darfur. The referral, which was necessary since Sudan is a nonparty to the Rome Statute, was the product of transnational mobilization by human rights NGOs and ICC supporters within the UN, who were able to overcome the potential

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<sup>125</sup> See Koert Linijer, "End of the FDLR in Europe?" *International Justice Tribune*, October 20, 2010, 3.

<sup>126</sup> *Statement to the United Nations Security Council on the Situation in Darfur, pursuant to UNSCR 1593 (2005)*, 12 December 2014, p. 4.

opposition of two veto-wielding members of the Security Council (the United States and China).<sup>127</sup> The ICC's involvement was touted by international justice advocates as something that could make a difference in ending impunity for atrocity crimes in the region – in part through deterrence, but also through stigmatization. Kenneth Roth, the Executive Director of Human Rights Watch, supported this argument with an analogy to the ICTY by noting that “as in Bosnia, when an international tribunal launched its own prosecutions, abusive leaders would be marginalised as they tried to evade arrest.”<sup>128</sup>

The reason why these predictions have not materialized in the decade following the referral lies in the difference in the political strategies the international community used to address the conflicts in Bosnia and Darfur. In the former case, the ICTY was ineffective when NATO and the UN adopted an impartial approach to conflict management. It only contributed to incapacitating extremist leaders after the US and NATO used force and other coercive instruments to change the internal balance of forces against the Bosnia Serbs. In Darfur, by contrast, the UN has adopted a strategy similar to that in Bosnia during the first three years of the civil war, eschewing enforcement in favor of impartial mediation, consensual peacekeeping, and humanitarian relief – all of which depend on the cooperation of the very government officials subjected to criminal scrutiny.<sup>129</sup> The fact that none of those policies changed after the Security Council referral meant

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<sup>127</sup> Benjamin N. Schiff, *Building the International Criminal Court* (New York: Cambridge University Press, 2008), pp. 229-233.

<sup>128</sup> Kenneth Roth, “Bring the Darfur Killers to the World Court,” *Financial Times*, 18 November 2004.

<sup>129</sup> Bruno Stagno Ugarte, “Sudan (Darfur),” in Jared Genser and Bruno Stagno Ugarte, eds., *The United Nations Security Council in the Age of Human Rights* (New York: Cambridge University Press, 2014), p. 351.

that Moreno-Ocampo faced a less hospitable political environment for prosecution than did Goldstone when he indicted the Bosnian Serb leadership.

The Prosecutor tried to adapt his legal duties to political context by attempting, at least initially, to establish a cooperative relationship with Sudan. Khartoum rejected the legitimacy of ICC involvement, but it did initially provide *pro forma* cooperation – both in making officials available to OTP investigators and in establishing the Special Criminal Court for Events in Darfur in order to demonstrate that national courts could investigate and prosecute, thereby challenging the admissibility of any case.<sup>130</sup> Critics alleged that this was little more than a “calculated attempt to pre-empt the ICC on technical grounds.”<sup>131</sup> Moreno-Ocampo nonetheless sent five missions to Khartoum to evaluate the Sudanese courts.<sup>132</sup> His cooperative approach continued even after he made a negative determination and identified his first suspects – Ahmed Harun, a former Interior Minister and head of the “Darfur Security Desk”, and Ali Kushayb, a militia leader. Instead of asking the Pre-Trial Chamber (PTC) to issue arrest warrants, he persuaded them to issue summonses, thereby inviting the accused to appear voluntarily and encouraging the government to cooperate with the probe.<sup>133</sup> Even when Sudan responded by denouncing the court and cutting off all cooperation – leading the PTC for arrest warrants – the Prosecutor’s public statements remained

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<sup>130</sup> Schiff, *Building the International Criminal Court*, p. 233; Bosco, *Rough Justice*, p. 126

<sup>131</sup> Suliman Baldo, “The Impact of the ICC in the Sudan and DR Congo,” International Conference, Building a Future of Peace and Justice, Nuremberg, Germany, 25-27 June 2007, p. 1.

<sup>132</sup> Nouwen, *Complementarity in the Line of Fire*, p. 249.

<sup>133</sup> Victor Peskin, “Caution and Confrontation in the International Criminal Court’s Pursuit of Accountability in Uganda and Sudan,” *Human Rights Quarterly* 31:3 (2009), pp. 669-670.

conciliatory, avoiding overt criticism of Khartoum until his report to the Security Council in December 2007.<sup>134</sup>

Moreno-Ocampo's focus on lower-level perpetrators rather than Bashir and his inner circle disappointed many of the human rights activists and international lawyers who had lobbied for the referral.<sup>135</sup> It also was also at odds with the findings of the UN Commission of Inquiry that had attributed responsibility for criminal violence to senior political and military officials from Sudan's ruling National Congress Party (NCP) and had sent to the OTP a confidential list with the names of 51 individuals who should be prosecuted. Moreno-Ocampo had made a number of statements that seemed to contradict these calls for high-level prosecutions, declining to start with Commission of Inquiry's list and suggesting that were Sudan to prosecute Harun and Kushayb or surrender them to The Hague, there would be no need for additional cases.<sup>136</sup> The same message can be inferred from his June 2008 report to the Security Council when he said that in not prosecuting Harun and Kushayb, Sudan had lost "an opportunity to break the criminal system unveiled by the Court, to surrender the indictees, to start proceedings against lesser perpetrators."<sup>137</sup>

On the surface, this statement is at odds with the charges the Prosecutor's filed five weeks later that Bashir was ultimately responsibility for the crimes – which would have been the case whether or not he had surrendered Harun and

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<sup>134</sup> *Statement to the United Nations Security Council on the Situation in Darfur, pursuant to UNSCR 1593 (2005)*, 5 December 2007.

<sup>135</sup> See e.g., Antonio Cassese, "Is the ICC Still Having Teething Problems," *Journal of International Criminal Justice* 4:3 (2006), p. 439; also see the interview with Cassese in "The 'Small Step' Strategy of the ICC in Darfur," *International Justice Tribune*, March 5, 2007.

<sup>136</sup> International Crisis Group (ICG), "Sudan: Justice, Peace, and the ICC," Africa Report No.152, 17 July 2009, p. 26n191.

<sup>137</sup> ICC-OTP, Statement by Mr. Luis Moreno-Ocampo, Prosecutor of the International Criminal Court, Statement to the United Nations Security Council pursuant to UNSCR 1593 (2005), 5 June 2008, p. 2.

Kushayb. There was, nonetheless, a strategic logic behind the apparent inconsistencies in the Prosecutor's public diplomacy. Had he followed the lead of the Commission of Inquiry in targeting senior officials, it would have suggested that his goal was regime change – an outcome supported neither by internal political conditions nor by the character of external involvement. Moreover, attempts to achieve that end through prosecution would have made Sudan's cooperation impossible. By contrast, Harun and Kushayb were mid-level perpetrators. Alex de Waal, who would later become one of Moreno-Ocampo's harshest critics, praised the decision as "politically astute" since the suspects were "individuals who can be sacrificed by the Sudanese government, but who at the same time have a significant degree of culpability."<sup>138</sup> Some OTP officials acknowledged that the strategy was to persuade Sudan that if it wanted to end its isolation and keep the ICC at bay, it would have to surrender the indictees and change course in Darfur, taking decisive steps to end the crimes and hold the worst perpetrators accountable.<sup>139</sup>

That strategy failed. First, it generated political backlash within Sudan and from regional organizations – the African Union (AU) and the Arab League – rather than pressure to comply with the Court. Second, it did not lead to enforcement actions from either the Security Council or those Western governments most supportive of the referral, thereby rendering the costs of Sudanese recalcitrance negligible. Finally, the episode illustrates the difficulty of using justice as an instrument of politics. For the Prosecutor's offer to be credible to Khartoum, he

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<sup>138</sup> See Alex De Waal, 'Darfur the Court and Khartoum: The Politics of State Non-Cooperation', in Nicholas Waddell and Phil Clark, eds., *Courting Conflict? Justice, Peace and the ICC in Africa* (London: Royal African Society, 2008) pp. 31-32, and the interview with De Waal in Robert Marquand, "World Court's Big Move on Darfur" *Christian Science Monitor* 28 February 2007.

<sup>139</sup> Fieldwork Interview. Also see Jean-Marie Guéhenno, *The Fog of Peace: A Memoir of International Peacekeeping in the 21<sup>st</sup> Century* (Washington, D.C.: Brookings, 2015), p. 208.

would have to guarantee that he would not use the extradited suspects to implicate their superiors. The difficulty in making such a commitment became evident when Sudanese officials approached the OTP to ask whether surrendering Harun and Kushayb would eliminate the need for additional trials. Moreno-Ocampo denied that such assurances were possible – statements that he repeated publicly.<sup>140</sup> Nonetheless, it was implied that should Sudan comply and take decisive steps to end the violence, Darfur would no longer be among the gravest crimes of concern to the international community meriting ICC prosecution. For the Prosecutor to go beyond that and guarantee that he would not indict senior officials would have been contrary to his mandate to prosecute those most responsible for atrocity crimes, though without such a promise, his commitments lacked credibility.

As a result of Sudan's defiance and the international community's inaction, Moreno-Ocampo adopted a more aggressive approach that would challenge rather than adapt to the political context. This began in his December 2007 report to the Security Council where he attributed the violence to Khartoum, and called out its obstruction of his investigation as well as the inadequate support he had received from the Security Council.<sup>141</sup> On 14 July 2008, he applied for the Bashir arrest warrant – the first by the ICC for a sitting head of state – on ten counts of war crimes, crimes against humanity and genocide. On 4 March 2009, the Pre-Trial Chamber confirmed the charges, though not initially for genocide – a charge that was added on appeal on 12 July 2010.<sup>142</sup>

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<sup>140</sup> Wasil Ali, "Sudan President 'Most Responsible' Official for Darfur War Crimes: ICC Prosecutor," *Sudan Tribune*, September 2008.

<sup>141</sup> Peskin, "Caution and Confrontation," p. 671.

<sup>142</sup> William A. Schabas, *An Introduction to the International Criminal Court*, 4<sup>th</sup> ed. (New York: Cambridge University Press, 2011), p. 53.



In making his decision, Moreno-Ocampo consulted with diplomats and UN officials. Most expressed skepticism – and in the case of the US envoy to Sudan, Richard Williamson, blunt opposition – regarding the prudence of going to the top since it would complicate efforts to influence Sudanese behavior on peace and humanitarian issues.<sup>143</sup> Other diplomats believed that an arrest warrant for the sitting head of state was tantamount to a demand for regime change, which in turn would require a foreign intervention that they viewed either as unrealistic or counterproductive to efforts to address the violence.<sup>144</sup>

One of the ways in which Moreno-Ocampo responded to these concerns was by asserting that he was not a party to any political process and as a legal actor, was guided only by the evidence and the law.<sup>145</sup> He also challenged diplomats with a counter-narrative in which prosecution contributes to peace – an argument deployed by many of the ICC’s supporters in transnational activist networks. Among those arguments was the arrest warrant’s role in stigmatizing and eventually marginalizing Bashir, thereby contributing to the end of the government’s impunity to sanction criminal violence. Former ICTY Prosecutor, Richard Goldstone, wrote that the arrest warrants “would reveal to the world what type of regime holds power in Khartoum” and “push the Security Council to apply real pressure on the Sudanese government.”<sup>146</sup> Moreno-Ocampo used similar reasoning in reassuring skeptical diplomats that other members of the Sudanese government would come to

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<sup>143</sup> Bosco, *Rough Justice*, pp. 142-144.

<sup>144</sup> See e.g., Guéhenno, *The Fog of Peace*, p. 209; John Holmes, *The Politics of Humanity: The Politics of Relief Aid* (London: Head of Zeus, 2013), p. 56.

<sup>145</sup> Bosco, *Rough Justice*, p. 143.

<sup>146</sup> Richard Goldstone, “Catching a War Criminal in the Act,” *New York Times*, 15 June 2008.

see Bashir as a liability and remove him from power.<sup>147</sup> Reasoning along similar lines, some NGOs suggested that the indictment could create incentives for reformist elements of the NCP to replace Bashir with more pragmatic leadership that might take constructive steps toward a political solution in Darfur. In making the case that prosecution could weaken a criminal spoiler's hold on power, several advocates explicitly analogized the Bashir indictment with those for Karadžić, Milošević and Taylor.<sup>148</sup>

There is, however, a crucial difference between the political context surrounding the Bashir indictment and those for Karadžić, Milošević and Taylor. The latter cases were successful because stigmatization was empowered by coercive political strategies designed to remove those leaders from power. While the US and EU might prefer to see the same outcome for Bashir and the NCP, they recognize they are dealing with an entrenched regime that is not about to disappear.<sup>149</sup> As a result, they worked with the UN and the AU in what amounts to a non-coercive and consent-based approach to conflict management. In Darfur, this involved full deployment of a UN-AU peacekeeping mission, humanitarian relief efforts, and impartial attempts to mediate a political solution. Beyond Darfur, the priority was implementation of the Comprehensive Peace Agreement (CPA), which ended a twenty-year civil war between the north and the south, and provided for national elections and a referendum in the south that paved the way for the independence of

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<sup>147</sup> Fieldwork interviews at the Office of the Prosecutor, International Criminal Court, and with a former senior UN official.

<sup>148</sup> See e.g., Enough, 'What the Warrant Means: Justice, Peace and Key Actors in Sudan', 12 February 2009, p. 1; Payam Akhavan, "Are International Criminal Tribunals a Disincentive to Peace? Reconciling Judicial Romanticism with Political Realism," *Human Rights Quarterly* 31:3 (2009), pp. 648-651; Human Rights Watch, "Selling Justice Short," pp. 18-27; Alex De Waal and Gregory H. Stanton, "Should President Omar al-Bashir of Sudan be Charged and Arrested by the International Criminal Court? An Exchange of Views," *Genocide Studies and Prevention* 4:3 (2009), pp. 335-337.

<sup>149</sup> Bosco, *Rough Justice*, p. 126.

South Sudan.<sup>150</sup> Each of these efforts required engagement with Sudan in ways that were incompatible with taking the arrest warrants seriously.

This is not to argue that international criminal justice norms had no impact on stigmatizing business as usual with Sudan. Diplomats did not overtly ignore their legal obligations and ICC Prosecutors and their allies in transnational advocacy networks tried to use the moral authority of the Court to shame states into stronger compliance. While these efforts did lead to instances of norm-governed behavior, they were limited by the fact that international prosecution had almost no impact on the political strategy of conflict management the international community had adopted in dealing with Sudan.

First, the AU failed in trying to persuade the Security Council to defer the Darfur investigation through a resolution based on Article 16 of the Rome Statute, which enables the Council to suspend ICC proceedings for renewable 12-month periods when it determines that prosecution jeopardizes its Chapter VII mandate to maintain international peace and security.<sup>151</sup> Shortly after the Bashir application, however, Britain and France – the only two Rome Statute parties among the five permanent members – quietly lent their support to the AU effort in order to use the promise of a Security Council deferral as leverage for Sudanese concessions on peacekeeping. The Anglo-French plan was aborted after it was leaked to the press and generated strong negative publicity. The normative pressure against the plan did not come from the Prosecutor, since Article 16 is part of the Rome Statute and a Security Council deferral is a political judgment outside his legal mandate.

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<sup>150</sup> See Ugarte “Sudan (Darfur),” p. 353.

<sup>151</sup> Bosco, *Rough Justice*, pp. 145-148.

Nonetheless, there was strong pushback from anti-impunity activists, who framed the proposal as a repudiation of international justice norms, and from the United States, which was a nonparty to the Rome Statute, but was also among the strongest supporters of accountability for Darfur.<sup>152</sup> David Bosco consequently cited this episode as an illustration of how “diplomats, activists and the media could deploy the institution’s formidable normative power.”<sup>153</sup> Nonetheless, this victory for international justice merely meant maintaining a status quo in which the arrest warrant was not complemented by other actions that could dissuade Sudan from the belief that it could intentionally target civilians without consequence.

Second, the OTP established a policy of insisting that Rome Statute state parties should avoid all but essential contacts with those subject to an arrest warrant so as to contribute to their marginalization.<sup>154</sup> The UN and the EU have adopted this position as official policy. Nonetheless, to maintain engagement, they continued to have direct negotiations with other Sudanese government officials, even if they were directly answerable to Bashir or had been implicated in atrocity crimes by UN and NGO reports. And since there was discretion in terms of defining what constituted “essential contacts,” UN officials met with Bashir on several occasions and address problems with peacekeeping or humanitarian operations.<sup>155</sup> ICC Prosecutors have been critical of these meetings because of “the potential of these individuals to take advantage of the United Nations’ goodwill to legitimise their

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<sup>152</sup> This led to a rare laudatory opinion piece on the Bush administration from Human Rights Watch. See Kenneth Roth, “Bush Does the Right Thing for Darfur,” *Wall Street Journal*, 24 November 2008.

<sup>153</sup> Bosco, *Rough Justice*, p. 147.

<sup>154</sup> ICC-OTP, “Prosecution Strategy, 2009 – 2012,” p. 12.

<sup>155</sup> See European Parliament, *Mainstreaming Support for the ICC in the EU’s Policies*, Directorate-General for External Policies, Policy Division, March 2014, p. 54; UN General Assembly, Note by the Secretary General, *Report of the International Criminal Court on its Activities 2013/14*, 18 September 2014, p. 18.

own actions.”<sup>156</sup> A Special Adviser to the Prosecutor defended the policy through an analogy to the Karadžić and Mladić indictments and the role they played in excluding them from Dayton.<sup>157</sup> Unlike the situation prior to Dayton, however, international judicial intervention was not complemented with political actions designed reduce the power of those indicted by the court. Hence, these contacts were necessitated by a political strategy designed to influence the regime’s behavior rather than remove it from power.

A final illustration of the influence and limits of international criminal justice norms involves the impact of the arrest warrant on Bashir’s ability to travel abroad, particularly to Rome Statute state parties. Outside of Africa, compliance has been universal and Bashir was barred from attending, for example, the Copenhagen Climate Summit and the UN General Assembly.<sup>158</sup> Within Africa, the record has been mixed. On the one hand, several state parties have prevented or discouraged Bashir from attending conferences on their territory, sometimes under pressure from Western donors. On the other hand, a July 2009 resolution by the AU called on member states not to honor the arrest warrant.<sup>159</sup> Shortly thereafter, Bashir visited a number of African state parties starting with Chad in July 2010 as part of a summit with President Idris Deby in which each agreed to end their support for rebels on the other’s territory.<sup>160</sup> More recently, Bashir attended an AU summit in Johannesburg, South Africa, though he was forced to leave the country

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<sup>156</sup> Statement of Mrs. Fatou Bensouda, Prosecutor of the International Criminal Court to the United Nations Security Council pursuant to UNSCR 1593 (2005), 17 June 2014, p. 4.

<sup>157</sup> Juan Mendez, “The Importance of Justice in Securing Peace,” A Paper Submitted to the First Review Conference of the Rome Statute for an ICC, Kampala, Uganda, May-June 2010, p. 6.

<sup>158</sup> Marlise Simons, “Wanted, Sudan’s President Can’t Escape Isolation,” *New York Times*, 1 May 2010; Colum Lynch, “Sudan’s Omar al-Bashir Cancels U.N. Trip,” *Foreign Policy*, 25 September 2013.

<http://foreignpolicy.com/2013/09/25/sudans-omar-al-bashir-cancels-u-n-trip-2/>

<sup>159</sup> See Bosco, *Rough Justice*, p. 157.

<sup>160</sup> Xan Rice, “Chad Refuses to Arrest Omar al-Bashir on Genocide Charges,” *Guardian*, 22 July 2010.

prematurely with the assistance of the government after a civil society group persuaded a court to issue an order for his arrest and South Africa's High Court ruled that Bashir could not leave the country while the matter was pending.<sup>161</sup>

In each case, the ICC submitted a notification of noncompliance to the Security Council. No enforcement actions followed other than demarches from European governments. While Bensouda was sharply critical of African state parties for flouting their Rome Statute obligations, she nonetheless lauded the role of civil society and the courts in the South African case on the ICC's stigmatizing "impact on Bashir's ability to function as a member of the international community. After all, he did not leave South Africa on his preferred terms."<sup>162</sup>

Nonetheless, even if Bashir were to miscalculate and travel to a state party that surrenders him to The Hague, this would end impunity only in the narrow sense that that an individual head of state would be held to account. It would not end impunity in the broader sense of ending Khartoum's belief that there would be no cost in continuing to target civilians since these policies are not the result of a single individual, but rather part of the NCP's standard operation procedure in responding to rebellions since it took power in 1989.<sup>163</sup> Therein lies the central difference between the ICTY indictments of Karadžić or Milošević and that of the ICC against Bashir. In the former cases, the stigma associated with criminalization was accompanied by coercive political strategies to punish and reverse ethnic cleansing. No such complementary policies are evident vis-à-vis Sudan. In fact, the UN has

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<sup>161</sup> Somini Sengupta, "Omar al-Bashir's Case Shows International Criminal Court's Limitations," *New York Times*, 15 June 2015.

<sup>162</sup> Ibid.

<sup>163</sup> See e.g., I.D.F. and Manzoul Assal, 'The National Congress Party and the Darfurian Armed Groups', in David R. Black and Paul D. Williams, eds., *The International Politics of Mass Atrocities: The Case of Darfur* (London: Routledge, 2010), p. 28.

maintained what amounts to a consent-based Chapter VI approach to peacekeeping even in the face of Khartoum's increasing assertiveness in restricting where peacekeepers can go – something highlighted earlier this year by a UN whistleblower who alleged that Sudan had prevented its peacekeeping mission from investigating credible allegations of the mass rape of 200 women and girls in the town of Tabit.<sup>164</sup> The Prosecutor cannot demand a more coercive approach to conflict resolution – as opposed to enforcing arrest warrants – since those are political choices outside of her legal mandate, though one might infer the need for such changes from the character of her indictments. The fact that these changes have not been forthcoming, even after the revelation of continuing atrocity crimes, illustrates the limits of legal norms in driving politics.

### 3. *Fatou Bensouda and the Trials of Uhuru Kenyatta and William Ruto*

On 5 December 2014 – just nine days before she announced the suspension of the Darfur investigation – Fatou Bensouda was compelled to withdraw the charges against Kenyan President Uhuru Kenyatta.<sup>165</sup> Kenyatta was one of three Kenyans put on trial for orchestrating the violence that took over 1100 lives and displaced more than 600,000 after the disputed presidential election in December 2007. The trial collapsed because Kenyatta and Deputy President William Ruto – the two most prominent indictees – joined forces in contesting and winning the 2013 presidential elections even though each had been on opposite sides of the post-election violence. Once in power, they used the authority of the state to delegitimize the ICC in international fora and sabotage the investigation within

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<sup>164</sup> Aisha Elbasri, "Stop the Conspiracy of Silence on Darfur," *Guardian*, 5 March 2015.

<sup>165</sup> Marlise Simons and Jeffrey Gettelman, "International Court Ends Case Against Kenyan President in Election Unrest," *New York Times*, 5 December 2014.

Kenya. Despite these actions, the international community, including those states most supportive of the ICC, applied almost no pressure on Kenya to stop obstructing the trials and supported interpretations of international law that prevented criminal indictments from aggravating normal bilateral relations.

While the Kenyatta and Ruto trials were denounced by Kenya as neo-imperial violations of its sovereignty, they grew out of commitments to which the government consented and for which there was strong international support. First, they were consistent with the Rome Statute, to which Kenya was a state party, giving the ICC jurisdiction over perpetrators regardless of official position as long as national courts were unwilling or unable to investigate or prosecute. Second, the trials grew out of recommendations of the Commission of Inquiry into Post-Election Violence (CIPEV), which was part of the internationally mediated agreement that had been brokered by former UN Secretary General Kofi Annan to end the violence through a power-sharing arrangement between President Mwai Kibaki and his challenger, Raila Odinga. CIPEV, better known as the Waki Commission after its chair, the Kenyan judge, Philip Waki, was a mixed body of Kenyan and international experts tasked to investigate the violence and recommend accountability. Its report called for the creation of a hybrid court, with an international prosecutor and mixed panels of three judges (two international and one Kenyan) to prosecute those most responsible for criminal acts. The report also included a novel self-enforcement mechanism: a sealed envelope with the names of those implicated in the violence was provided to Annan for delivery to the ICC should the Kenyan government not establish the tribunal within 105 days. In July



2009, after three failed attempts in the Kenyan Parliament to authorize the tribunal, Annan forwarded the commission's findings to Moreno-Ocampo.<sup>166</sup>

Moreno-Ocampo initially tried to establish a cooperative relationship with Kenya by encouraging it to refer the investigation voluntarily. After it refused, he applied for and received authorization to investigate on 31 March 2010. On 15 December 2010, he announced he was seeking summons for six Kenyans, who appeared voluntarily before the court to contest the charges after the pre-trial chamber approved the application. The most prominent indictees were on opposite sides of the political violence: Uhuru Kenyatta, a Kikuyu aligned with Kibaki, and William Ruto, a Kalenjin who joined with Odinga, a Luo, in contesting the 2007 election. The charges involved two situations – Kalenjin violence against Kikuyus in the Rift Valley and counterattacks against those seen as Odinga supporters by Kikuyu youth gangs and the police in Naivasha and Nakuru.<sup>167</sup>

The ICC's identification of actual suspects triggered a political backlash from both sides of the political divide despite a poll showing 73% of the public supported the ICC.<sup>168</sup> The National Assembly's response was to pass a nonbinding motion calling for Kenya's withdrawal from the Rome Statute. While the government did not act on that motion, it tried to delay the proceedings through jurisdictional and admissibility challenges.<sup>169</sup> The ICC's investigations were further

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<sup>166</sup> See Stephen Brown and Chandra Lekha Sriram, "The Big Fish Won't Fry Themselves: Criminal Accountability for Post-Election Violence in Kenya," *African Affairs* 111: 443 (2012), pp. 247-250.

<sup>167</sup> Gabrielle Lynch, "Non-Judicial Battles: Kenyan Politics and the International Criminal Court," Egmont: Royal Institute of International Relations, Africa Policy Brief, January 2014, pp. 1-2.

<sup>168</sup> "Will They Go Quietly? A Coalition of the Accused May Try to Block the International Court," *Economist*, 29 December 2010.

<sup>169</sup> Susanne Mueller, "Kenya and the International Criminal Court (ICC): Politics, the Election, and the Law" *Journal of East African Studies* 8:1 (2014), p. 32.

complicated when the two most prominent indictees – Kenyatta and Ruto – joined forces as the Jubilee Alliance and won the 2013 elections.

Once in office, the new government initiated a multi-pronged strategy to delegitimize and undermine the trials. Internationally, it tried to portray the ICC as a neocolonial instrument focusing on Africans – a campaign for which it ironically procured the services of the British public relations firm, BTP Advisers.<sup>170</sup> This was an argument that had strong resonance in the AU. In May 2013, Kenya succeeded in persuading the Assembly of the AU to pass a resolution calling for the transfer of the ICC cases to the Kenyan courts, after which the Chairman of the AU accused the ICC of “race hunting”<sup>171</sup> On 11-12 October 2013, Kenya used an Extraordinary Summit of the AU to lobby for a mass African pullout from the ICC and a resolution calling for noncooperation with its orders.<sup>172</sup> While the AU did not go that far, it did support the Kenyan position through a resolution that condemned “the politicization and misuse of indictments of African leaders by the ICC.” It went on to challenge international justice norms by demanding (a) amendments to the Rome Statute to immunize sitting heads of state, and (b) a Security Council resolution for an Article 16 deferral of the Kenyatta and Ruto trials.<sup>173</sup>

Second, within Kenya, the government tried to undermine the legal case against the suspects through getting insider witnesses to withdraw their testimony through bribery, intimidation, and murder. When the ICC issued an arrest warrant

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<sup>170</sup> Stephen Brown and Rosalind Raddatz, “Dire Consequences or Empty Threats: Western Pressure for Peace, Justice and Democracy in Kenya,” *Journal of East African Studies* 8:1 (2014), p. 52.

<sup>171</sup> “African Union Accuses ICC of ‘Hunting’ Africans” *BBC*, 27 May 2013. <http://www.bbc.com/news/world-africa-22681894>

<sup>172</sup> Adam Nossiter, “Court is Accused of Unfairly Targeting a Continent’s Leaders,” *New York Times*, 3 December 2013.

<sup>173</sup> *Decision on Africa’s Relationship with the International Criminal Court (ICC)*, Extraordinary Session of the Assembly of the African Union, 12 October 2013, Addis Ababa, Ethiopia, Declaration 1.

for Walter Barasa, a Kenyan journalist accused of bribing witnesses to recant their testimony, the government did not surrender him to stand trial, as is its obligation under the Rome Statute. Rather, it submitted the question of extradition to the Kenyan courts in a protracted legal process that some critics view as a means of delaying the proceedings until the trials collapse.<sup>174</sup>

In theory, there should have been strong pressure on Kenya to cooperate with the trials, not only from state parties to the Rome Statute, but also from nonparties like the US, which supported the transitional process. A number of statements made prior to the election suggested this might be the case, most notably from Assistant Secretary of State for African Affairs, Johnnie Carson who repeated the phrase “choices have consequences” five times in a conference call with journalists to suggest that the election of the Jubilee Coalition would have an adverse impact on bilateral relations.<sup>175</sup> Several European diplomats made comparable statements, noting that EU policy would forbid all but essential contacts with those indicted by the court.<sup>176</sup>

Once Kenyatta and Ruto were elected, however, these threats proved to be hollow as Western governments tried to insulate bilateral relations from controversies surrounding the indictments. First, despite the fact that Kenya is dependent on Western donors for 21% of its budget, there was never any effort to link foreign aid to compliance with the ICC.<sup>177</sup>

Second, there was no ban on “non-essential” contacts with Kenyatta and Ruto, as there was with Bashir. In fact, shortly after the election, Kenyatta was

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<sup>174</sup> Mueller, “Kenya and the International Criminal Court,” pp. 30, 33-35.

<sup>175</sup> Richard Lough, “Kenyatta’s Bid for Kenyan Presidency a Diplomatic Headache,” *Reuters*, 14 February 2013.

<sup>176</sup> Brown and Raddatz, “Dire Consequences or Empty Threats,” pp. 51-52.

<sup>177</sup> *Ibid.*

invited by British Prime Minister David Cameron to travel to London to attend an international conference on Somalia and upon arriving in the United Kingdom was given full diplomatic honors as a head of state.<sup>178</sup> More recently, President Obama shook hands with Ruto during his visit to Kenya despite the fact that his trial is still ongoing.<sup>179</sup> The official rationale for treating the Kenyan leaders differently was that Kenya, unlike Sudan, was cooperating with the ICC, and therefore, Kenyatta and Ruto enjoyed the presumption of innocence and were not subject to arrest warrants. This may have been true in a formal sense, though Kenya has been doing everything in its power to delegitimize the Court and undermine the trials.<sup>180</sup>

Finally, at the Assembly of States Parties (ASP) – the political body of ICC member states – the EU delegates who are most supportive of the Court joined with their AU counterparts to approve an amendment to the Rules of Procedure and Evidence that effectively excused Kenyatta and Ruto from physically presence at their own trials.<sup>181</sup> This was a response to AU objections to ICC prosecutions of African heads of state, a position given greater weight after the terrorist attack on the Westgate Mall in Nairobi on 21 September 2013. The Ruto Appeals Chamber had allowed for excusals on a case-by-case basis if related to duties of state in exceptional circumstances. *Rule 134quater*, approved by the ASP on 27 November 2013, went further by allowing those with “extraordinary public duties at the highest level” to request a blanket exemption from attending their own trials and

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<sup>178</sup> Thomas Obel Hansen, “Kenyatta in State House: what's next for Kenya and the ICC?”

19 April 2013. <https://www.opendemocracy.net/opensecurity/thomas-obel-hansen/kenyatta-in-state-house-whats-next-for-kenya-and-icc>

<sup>179</sup> “DP Ruto-President Obama Handshake Was Historic,” *The Star* (Nairobi), 1 August 2015.

<sup>180</sup> Brown and Raddatz, “Dire Consequences of Empty Threats,” pp. 54-55.

<sup>181</sup> Steven Arrigg Koh, “Presence and Politics at the International Criminal Court,” *ASIL Insights*, 19(1), 1 June 2015 <http://www.asil.org/insights/volume/19/issue/11/presence-and-politics-international-criminal-court>

instead maintain presence through videoconference (*Rule 134bis*). This transformed the Kenyatta and Ruto trials into what one critic called “trial by skype.”<sup>182</sup>

An EU report defended the rule as a principled compromise between its “commitment to international criminal justice” and its underlying goal of promoting “stability, the rule of law, democracy and human rights”:<sup>183</sup>

Where – in particular in the Kenyan situation – the individuals cooperating with the Court do have a democratic mandate to govern their country, there is a responsibility for State Parties to the Rome Statute to reconcile the integrity of the Statute with the wider objectives that the international criminal system seeks to promote.

However, this compromise violated the letter and spirit of the Rome Statute – Article 63(1), which requires the accused to be present at trial, and Article 27(1), which states that “this Statute should apply equally to all persons without any distinction based on official capacity.”<sup>184</sup> It was also made against the backdrop of growing support for an African pullout from the ICC and Kenya’s potential threat of explicit non-cooperation with Kenyatta and Ruto refusing to show up should they not be excused from physical presence at their trials. The latter eventuality – which some observers referred to as the “nuclear option” – would have led the judges to issue warrants for their arrest, rendering normal bilateral relations with Kenya nearly impossible without blatantly disregarding their Rome Statute obligations.<sup>185</sup>

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<sup>182</sup> Kevin Jon Heller, “Can the ASP Permit Trial by Skype,” *Opinio Juris* blog, 19 November 2013. <http://opiniojuris.org/2013/11/19/can-asp-permit-trial-skype/>

<sup>183</sup> *Mainstreaming Support for the ICC in the EU’s Policies*, European Parliament, Directorate-General for External Policies of the Union, March 2014, p. 87.

<sup>184</sup> A consequence of this decision is the Deputy President Ruto was excused from presence while his co-defendant, the journalist Joshua Arap Sang, was not. See Koh, “Presence and Politics.”

<sup>185</sup> Lynch, “Non-Judicial Battles,” p. 3.

The Western response to Kenyan obstruction demonstrates the priority given to traditional national interests over international justice norms. First, Kenya is a key partner in counter-terrorism – a relationship on which Western governments have placed a higher premium since the Westgate Mall attack – and it has troops in Somalia fighting Al-Shabab. Second, it is a hub of counter-piracy operations in the Horn of Africa and Nairobi hosts an internationally funded court to prosecute pirates interdicted in the Indian Ocean. Finally, Kenya is one of the most significant economies in sub-Saharan Africa. As one US diplomat put it: “When you consider Somalia, piracy, oil and drones, you realize what a huge strategic concern Kenya is . . . And that’s why no one really cared about the ICC.”<sup>186</sup>

This is not to argue that international criminal justice norms were completely abandoned. An AU-sponsored resolution to get an Article 16 deferral at the Security Council failed.<sup>187</sup> In addition, the ASP’s revisions of the Rules of Evidence and Procedure fell short of the AU’s preference for amending the Rome Statute to immunize sitting heads of state.<sup>188</sup> This demonstrates that law did set some limits on realpolitik, but it did not do so to the degree to which it prevented Kenya from undermining the trials. As a result, Kenya maintained nominal cooperation with the Court, enabling Western governments act within the letter of their formal legal obligations without complicating their national interests.

## **Conclusion**

The central thesis of this paper is that the stigma associated with investigation and indictment by international tribunals is influential only to the

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<sup>186</sup> Cited in Brown and Raddatz, “Dire Consequences or Empty Threats,” p. 50.

<sup>187</sup> Michelle Nichols, “Africa Fails to Get Kenya ICC Trials Deferred at United Nations,” *Reuters* 15 November 2013.

<sup>188</sup> *Mainstreaming Support for the ICC in the EU’s Policies*, p. 90.

extent to which it reinforces the pre-existing political strategies of powerful states to use coercive instruments to weaken a perpetrator's hold on power. This conclusion is consistent with a realist view of the relationship between international politics and international law with some caveats. For example, there is nothing in realism that would predict that powerful states prefer to deal with their adversaries through international trials and the decision to support the indictments of Karadžić, Mladić and Milošević was influenced by liberal ideas – namely, that ethnic extremists were a source of instability within the region and could be incapacitated by international prosecution. Nonetheless, those ideas were held by the states whose interests were most affected by the externalities of that criminal violence and most capable of using economic and military instruments to target the leaders most responsible for it. By contrast, prosecutorial agency was less effective when external power wielders preferred to engage rather than confront those countries whose leaders were subjected to investigation or indictment. While governments did modify some of their policies in response to the mobilization of international justice norms, they either used control mechanisms or interpreted their international legal obligations narrowly to prevent criminalization from altering their core political strategies.

For the most part, each of the cases studies conforms to at least one of the three realist hypotheses developed earlier in the paper. There is a circumstantial case for the first hypothesis that international prosecutors often adapted their discretion to the political environment – e.g., the ICTY Prosecutors' decision not to indict the Bosnian Serb leadership or Milošević when they were the chief interlocutors in political negotiations in Bosnia or Kosovo, the reluctance of ICTR

and ICC prosecutors to target Rwandan state agents, and Crane's decision not to apply for arrest warrants for Qaddafi and Compaoré despite his belief that they aided and abetted the rebels in Sierra Leone's civil war. With the exception of Crane, none of the prosecutors acknowledged publicly that political considerations dissuaded them from moving forward with diplomatically inconvenient indictments. Each presented a legally defensible, if rebuttable, reason why he or she lacked the evidence to apply for an arrest warrant, though using a higher evidentiary threshold to impute culpability coincided with a pragmatic adjustment of prosecution to the likelihood of state support or the risk of state backlash.

None of this is to argue that prosecutors took direction from governments; Goldstone rebuffed Boutros-Ghali. Arbour received mixed messages from NATO officials and rejected entreaties during the Kosovo war to indict Milošević sooner rather than later. Crane and Del Ponte objected to US efforts to persuade them to withdraw, respectively, the Taylor indictment and the RPF investigations. Moreno-Ocampo went forward with the Bashir indictment despite reservations from UN diplomats and the explicit opposition of the US envoy to Sudan.

Nor is to argue that prosecutors did not try to push against the boundaries of politics. Goldstone announced his decision to expedite the Karadžić investigation before Srebrenica triggered NATO's move toward coercive diplomacy and he issued new indictments during the Dayton negotiations while pre-emptively denouncing any prospective amnesty-for-peace deal. Arbour used similar language in unsealing the Milošević arrest warrant and also used her bully pulpit to shame Western governments into stronger cooperation with the tribunal. Crane unveiled



the Taylor arrest warrant just as the Liberian President arrived in Ghana for peace talks to which the UN, major powers and regional actors were strongly committed. Del Ponte publicly called out the Rwandan government for its obstruction of her special investigations. Both Moreno-Ocampo and Bensouda tried to use the moral authority of their office to shame the Security Council and the AU into stronger support for ICC prosecutions in Sudan and Kenya.

In some cases, prosecutorial agency influenced politics. For example, Arbour's "esteem competition" with Western governments was followed by NATO's willingness to conduct arrest operations in Bosnia and a reversal of France's non-cooperation with the ICTY. During the negotiations that ended the wars in Bosnia and Kosovo, ICTY indictments and the prosecutors' public statements may have delegitimized consideration of the amnesty option for Karadžić or Milošević, though there is no evidence from either the memoirs of the participants or the documentary record that such arrangements were seriously considered. Despite strong State Department opposition to the timing of the Taylor indictment, and Nigeria's request that it be rendered "inactive" if it granted the asylum to the Liberian president, the US ambassador told President Obasanjo that the warrant was "unassailable and should not be ignored and dismissed."<sup>189</sup> Finally, under pressure from the OTP and supporters of the court in the NGO community, the Security Council and state parties did resist some AU initiatives to limit the ICC's authority, refusing to invoke Article 16 over Darfur and Kenya, and rejecting proposals to amend the Rome Statute so as to immunize sitting heads of state.

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<sup>189</sup> Jeter to State Department, "Nigeria – President Obasanjo Confirms Taylor Asylum Offer," Confidential Cable, 9 July 2003.

These episodes demonstrate that the moral authority of the court can move or constrain politics when it involves non-vital interests or when governments are internally divided. That influence was less evident when prosecution challenged strategies to which the most significant third parties were strongly committed. One reason for that involves the second realist hypothesis – i.e., the ability of powerful states to employ control mechanisms as a means of both dissuading prosecutors from or punishing prosecutors for issuing politically inconvenient indictments. Preventive control mechanisms were evident when Western governments withheld confidential incriminating evidence from Goldstone and Arbour to discourage them from indicting Milošević when he was the key interlocutor at Dayton and during NATO's efforts at coercive diplomacy in the two crises in Kosovo prior to the war. This deprived both ICTY Prosecutors of the evidence they needed for an arrest warrant and perhaps also sent the signal that the political environment was not yet permissive for prosecution.

Punitive control mechanisms were applied against Del Ponte and Crane. In the former case, the lack of Security Council support and Prosper's proposal to transfer jurisdiction to Rwanda dissuaded her from moving forward with RPF arrest warrants and the Council's decision to strip her of the Rwandan portfolio appears to have sent the signal to her successor – and perhaps to the ICC prosecutors – not to indict state agents of a regime viewed by Western governments as a client. Crane, by contrast, was able to withstand the State Department's pressure to withdraw the Taylor indictment and its subsequent retaliation, in part due to the relationship he cultivated with the US Congress. Nonetheless, what gave the arrest warrant its

stigmatizing power was its alignment with commitment of the US and the most powerful regional actors to remove Taylor from power and exclude him from any role in postwar Liberia.

In the absence of effective control mechanisms, the third realist hypothesis – i.e., a narrow reading of international legal obligations – was evident. For example, the inability of the US to get Crane to withdraw the Taylor indictment did not dissuade it from cooperating with ECOWAS in facilitating an exile-for-peace deal to avert a final rebel onslaught on the capital.<sup>190</sup> The indictments of Bashir and Kenyatta were consistent with the ICC Prosecutor’s mandates, but created tensions with the diplomatic strategies the international community was pursuing with Sudan and Kenya. The UN and Western governments consequently elided those tensions by interpreting their international legal obligations narrowly to remain within the formal letter of the arrest warrants without altering political strategies that were inconsistent with taking international justice seriously.

These outcomes are at variance with studies of other international human rights bodies, which found that the naming and shaming of noncompliant states can alter their human rights practices by mobilizing transnational activist networks, empowering domestic stakeholders and delegitimizing normal political and economic relationships with influential states and international institutions.<sup>191</sup> To

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<sup>190</sup> As a result of pressure from transnational activists and the US Congress, the US was willing to put pressure on Liberia to request Taylor extradition to the Special Court and on Nigeria to surrender him for trial. See Hawkins and Losee, “States and International Courts,” and Jo Becker, *Campaigning for Justice: Human Rights Advocacy in Practice* (Stanford: Stanford University Press, 2013), pp. 113-130. These pressures tipped the balance within the State Department to those who viewed Taylor as a continuing threat, even in exile. However, the costs of enforcing the arrest warrant in this case – i.e., creating an irritant in US-Nigerian relations – were considerably less compelling than what they would have been during the endgame of the Liberian civil war.

<sup>191</sup> See e.g., Beth A. Simmons, *Mobilizing for Human Rights: International Law in Domestic Politics* (New York: Cambridge University Press, 2009); Margaret E. Keck and Kathryn Sikkink, *Activists Beyond Borders* (Ithaca: Cornell University Press, 1998); Matthew Krain. "J'accuse! Does Naming and Shaming Perpetrators

some international justice supporters in the activist and academic communities, the problem lies in the cautiousness of international prosecutors and their reluctance to use the moral authority of the court to challenge politics. Indeed, the case analysis does reveal areas where international prosecutors could have been more aggressive. For example, Goldstone could have used the principle of command responsibility to indict Milošević and Tuđman prior to Dayton and Arbour could have done the same for Milošević before the Kosovo War.<sup>192</sup> Del Ponte, despite her reputation as an aggressive prosecutor – all thirteen chapters of her memoir begin with the word “confronting” – did not follow through on her public commitment to issue RPF indictments by the end of 2002 and she did not use her office to expose UN and US obstruction of the special investigations until she stepped down as chief prosecutor.<sup>193</sup> Some international legal scholars believed that Moreno-Ocampo should have followed the lead of the ICTY in indicting the senior leadership of the Sudanese government, which would have barred the UN and EU from direct negotiations with a broader range of government officials.<sup>194</sup> Each of these actions would have created diplomatically inconvenient legal “facts on the ground” that would have provided a stronger test of the proposition that law can drive politics.

The evidence presented in the case studies on control mechanisms and the willingness of states to ignore or narrowly interpret international legal obligations raises questions about whether those tests would have been passed. It also suggests

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Reduce the Severity of Genocides or Politicides? 1." *International Studies Quarterly* 56.3 (2012): 574-589; Lebovic, James H., and Erik Voeten. "The Cost of Shame: International Organizations and Foreign Aid in the Punishing of Human Rights Violators." *Journal of Peace Research* 46.1 (2009): 79-97.

<sup>192</sup> See e.g., Bassiouni, "Real Justice or Realpolitik."

<sup>193</sup> See Peskin, *International Justice in Rwanda and the Balkans*

<sup>194</sup> See e.g., Antonio Cassese, "Flawed International Justice for Sudan," *Project-Syndicate*, July 15, 2008.

two broader reasons that have constrained the stigmatizing power of international criminal tribunals.

First, international criminal justice has confronted a powerful counter-narrative from African states, which characterize it as a neocolonial instrument that threatens their sovereignty as well as their autonomy to find regional or local solutions to civil violence. These objections have been most pronounced vis-à-vis the ICC's investigations in Sudan and Kenya, both of which have targeted heads of state and have complicated efforts to address the war in Darfur through peacekeeping and mediation and the post-election violence in Kenya through power-sharing. They were also evident in the near-universal ECOWAS condemnation of timing the Taylor arrest warrant and Kagame's success in mobilizing AU support for his campaign against Del Ponte. Internationally, this means that recalcitrant African states are more likely to receive regional support rather than isolation for resisting prosecution and the Western governments most supportive of international trials have needed to factor AU backlash into their calculations. Domestically, this means that the anti-colonial narrative can be used to marginalize victims' groups and local justice advocates. In Kenya, to illustrate, Kenyatta and Ruto were able to use the neocolonial discourse about the ICC as instruments of ethnic mobilization while stigmatizing those civil society groups most supportive of the court as agents of the West.<sup>195</sup>

Second, there is an important difference between what compliance entails vis-a-vis the shaming function of UN human rights bodies as opposed to that of

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<sup>195</sup> Gabrielle Lynch, "The International Criminal Court and the Making of a Kenyan President." *Current History* 114.772 (2015): 183-188.

international criminal tribunals. Whereas the former involves changing regime behavior, the latter requires the surrender of national leaders or influential state agents, whose removal can threaten the regime.<sup>196</sup> As a result, regimes whose top officials are under investigation or indictment have no incentive to provide meaningful cooperation. This means that the ability of international criminal justice to incapacitate indicted leaders is dependent upon the willingness and ability of powerful states to use coercive economic and military instruments to achieve the same ends. Absent such a commitment, either because third parties view the target of investigation either as a client or as an entrenched adversary whose behavior they are trying to influence, international prosecution is less likely to marginalize criminal actors than it is to be marginalized by politics. That, in large measure, explains why Western governments have been more supportive of the ICTY in the Balkans than the ICC in Darfur and why Taylor has been indicted while Kagame has not despite comparable support for cross-border rebellions complicit in criminal violence.

The broader policy conclusion that flows from this study is that debates about political strategies in addressing violent conflicts should come first and the prospects for transitional justice are dependent which choice is made. That position is opposed by anti-impunity advocates, who view the prosecution of international crimes as a universal duty that should be introduced into every international effort

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<sup>196</sup> In four of the six cases, prosecution was directed against perpetrators who were national leaders at the time of the indictment. Kenyatta and Ruto were elected two years after the indictment, but prior to that, they were powerful members of Kenya's political class, many of whom were vulnerable to prosecution and who closed ranks against the ICC investigation. In the Rwandan case, Rwanda's former Attorney General, Gerald Gahima, wrote that Kagame backed out of his arrangement with Del Ponte because of objections from his top military officers who suggested that RPF prosecutions could lead to a military backlash against the regime. See Gahima, *Transitional Justice in Rwanda*, p. 109.

to resolve violent conflicts. However, in intractable civil wars like the one in Syria, the prospects for prosecution are dependent on some kind of intervention, or as Dov Jacobs put it: “When someone is being beaten up on the street, you don’t send a judge. You send a policeman.”<sup>197</sup> And if the international equivalent of sending a policeman is either unfeasible or likely to make the humanitarian situation worse, that leaves the international community with no option other than trying to negotiate with leaders who ought to be beyond the pale, but whose continued power makes effective prosecution impossible. Part of the appeal of the stigmatization argument is that a principled commitment to prosecution, even in situations that are not initially supportive, can over time reduce the power of the perpetrators. Justice can lead and politics will eventually follow – a particularly attractive vision in the Syrian context where allowing politics to lead has not prevented the Syrian civil war from descending in the world’s worst humanitarian crisis. This view, however, inverts the relationship between law and politics and the former cannot rescue us when the latter is unwilling or unable to provide an answer. As a result, the international community should be wary of introducing international criminal justice when negotiation is the primary vehicle for conflict resolution and international prosecutors should be mindful of the political context in which the law would have to be enforced.

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<sup>197</sup> Dov Jacobs, “Why a Syria UNSC Referral to the ICC is not necessarily a good idea (and why we should be allowed to say that)” *Spreading the Jam*, 22 May 2014. <http://dovjacobs.com/2014/05/22/why-a-syria-uns-referral-to-the-icc-is-not-necessarily-a-good-idea-and-why-we-should-be-allowed-to-say-that/>