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PEACE THROUGH JUSTICE?
Evaluating the International Criminal Court

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Honors Thesis
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ABSTRACT

This thesis looks at the recently created International Criminal Court (ICC) and its early cases in Uganda, the Democratic Republic of Congo, and Sudan. The central questions are: how does the Court impact peace building in the war-torn countries whose cases it handles? And is there a tension between peace and justice in these cases? The case studies demonstrate that while rhetoric linking peace and justice dominates the Court, the ICC is ill equipped to address the complex interaction of the two in specific countries. The Court's narrow mandate and powers mean that practical and political concerns dominate its decision-making to the extent that there is little space to give priority to local peace building.

The man is a former schoolteacher and civil servant. I will call him Jacques Ngabu; because of threats he has received since telling his story, he does not want his real name used. Ngabu is a Lendu but was married to a Hema woman. In 2006 he, his wife, and their three children were traveling to Bunia when they were stopped at a roadblock by militiamen under a notorious Lendu warlord, Peter Karim. "They asked me why I had married a dirty Hema woman. They said they would exterminate us." Karim then ordered his soldiers to rape Ngabu's wife and two daughters, ages 10 and 13. Ngabu heard his daughters' screams, then saw them with blood running down their legs. He himself was whipped—165 times, with a soldier stamping on his head each time, counting the strokes. In front of him, his wife and children were all killed, by machete blows to the back of the neck. Ngabu was then held, along with some Nepalese UN peacekeeping troops Karim's men had captured, in an underground dugout for 18 days. One of his guards had been a student of his when he was a teacher. Finally, a merchant he knew was able to bargain for his release in return for a truckload of wood. Ngabu has been too traumatized to work since. Of his wife, Maria, he says to van Woudenberg later, "She loved me so much. She loved me so much."

Soon after this experience, the government struck a peace deal with Karim's militia, and Karim was made a colonel in the Congolese army. Today, "whenever I see him on television, I tremble again. Why is he a colonel?" Ngabu asks the roomful of people, in anguish. "Why the impunity? Why is he not at The Hague?"[1]

[1] Hochschild, "The Trial of Thomas Lubanga," 30.

Chapter One: Introduction

"This is the biggest what we call puzzle for humanity – how to stop human beings fighting human beings and human beings killing fellow human beings. How to stop this. ICC is trying to do that." – Ugandan Archbishop John Baptist Odama[2]

The International Criminal Court (ICC) began its work in 2002, with a mandate to prosecute war crimes, genocide, and crimes against humanity on an international scale. The ICC is a young institution with impressive goals, and it represents something entirely new – a permanent international court with a mandate to deliver justice that transcends national borders.

Unlike many of the other international tribunals, which have generally been set up after the crimes have already taken place, most of the ICC's cases require it to prosecute individuals involved in ongoing conflicts. The philosophy that underpins the Court is that having an international institution that promises accountability regardless of nationality will help to prevent and resolve conflicts, aid transitions, bring justice to victims, and, most importantly, deter future crimes. In essence, as Archbishop Odama observed, it is about stopping "human beings killing fellow human beings"[3] on a massive scale. This is certainly a lofty and expansive goal. So, is the ICC really the answer, or at least part of the answer, to this puzzle?

The question is much debated. The Court and its supporters argue that sustainable peace can only come about through justice, and that the ICC's activities will make the world a safer place. As the ICC's Chief Prosecutor Luis Moreno-Ocampo put it: "International justice, national justice, the search for the truth, and peace negotiations can and must work together; they are not alternative ways to achieve a goal; they can be

[2] John Baptist Odama (Catholic Archbishop of Gulu), in discussion with the author, May 8, 2011.
[3] Ibid.

integrated into one comprehensive solution."[4] Critics, on the other hand, claim that the ICC is at best ineffective and at worst an obstacle to peace negotiations.

The Court's ability to address this critical issue, however, is determined by its ability to carry out its mandate in the first place. The Court acts within the constraints of its founding treaty – a treaty designed to negotiate between state sovereignty and cosmopolitan goals. It is this tension that animates the Court, to the exclusion of other concerns. It is in this context that the peace versus justice debate takes marginal place in the ICC's activities.

Rejecting the oversimplification of the supposed dichotomy between peace and justice, paper will argue that although the issue is frequently brought up around these cases, the ICC has not been responsible for the failure of a peace process in any of them. This is not because of any efforts on the part of the Court, but rather because there have been few meaningful peace negotiations. The Court has not fostered such efforts or even made way for them, but neither has it actively obstructed them. The absence of any impact is largely due to the ICC's preoccupation with its biggest challenge: limitations that working with or around the national government place on an international judicial process.

Case Studies

This paper will examine the influence of the ICC using the evidence available for three case studies that provide useful examples – Uganda, the Democratic Republic of Congo (DRC), and Sudan. These are all early and groundbreaking cases for the ICC – its first case; its first arrest, trial, and conviction; and its first warrant for a sitting head of

[4] Moreno-Ocampo, "Address by Luis Moreno-Ocampo".

state. In Uganda, the ICC has issued warrants for five members of the Lord's Resistance Army, a rebel group accused of attacking, killing, and abducting civilians during its two decade war with the Ugandan government. In the DRC, the Court has issued warrants and begun trial proceedings against the leaders of several militia groups accused of using child soldiers and attacking civilians during the civil war in eastern Congo. Finally, in Sudan, the Court has issued warrants for militia leaders and government officials (including President Omar al Bashir) accused of organizing attacks against the civilian population in the Darfur region. In all these cases, both comprehensive justice and lasting peace remain elusive, and the search for justice for past atrocities is also connected to the necessity to prevent future ones.

Central Questions

The central questions of this project are: what impact do the International Criminal Court's actions have on these conflicts? In particular, how does the Court influence the prospects for ending these ongoing conflicts? Is there a tension between peace and justice in these three situations? And finally: does the ICC's structure shape its ability to address the complexities of conflict-affected countries?

Preparation

Between my freshman and sophomore years, I participated in a summer study abroad program in Cambodia. As part of my coursework there, I attended several sessions of the Extraordinary Chambers in the Courts of Cambodia, the tribunal with jurisdiction over the crimes committed by the Khmer Rouge in the 1970s. This experience not only sparked my interest in international justice, but also gave me a good perspective on what it can look like in practice.

Then, during my junior year, I spent a semester studying in Uganda, where I conducted an independent study project on the ICC's impact on the peace process there between the Lord's Resistance Army and the Ugandan government. I conducted the majority of this research in northern Uganda, the region most affected by the conflict. I was able to speak to government officials, religious and cultural leaders, NGO workers, victims, and representatives of the ICC. With this thesis, I have built on my findings from Uganda and put them in better context by examining further case studies. Since, the ICC is meant to be a global institution, it is essential to look at multiple situations in order to get a full picture.

Research Methods and Sources

I will examine the ICC's record within the context of three distinct case studies, using conclusions gained from these examples to answer the questions identified earlier. These case studies are the best way to examine the ICC's actual impact outside in the very places it matters most. Examining its success in bringing peace, justice, and accountability in these cases should give a picture of how capable the Court is of achieving its aims.

For my information, I will rely on a variety of sources. These will include scholarly books and articles, the ICC's founding and governing Rome Statute, statements from ICC officials, reports from UN agencies and nongovernmental organizations, population studies conducted in the Democratic Republic of Congo and Uganda, and personal interviews conducted in northern Uganda during my semester abroad. This should provide a wide array of perspectives on the issue.

Organization and Structure

The rest of this work is divided into three main sections. The first outlines the key concepts of Justice, Conflict Resolution, and International Law, which that form theoretical basis for the research. It also gives an introduction to the International Criminal Court, as well as the main challenges it faces. Finally, it addresses the idea that the ICC is a court exclusively for the African continent.

The second chapter gives an overview of the historical background to the three case studies. The third delves into these case studies. This section is organized according to the stages of the judicial process – first, referral and investigation, and then arrest (or lack thereof) and possible trial.[5] The focus will be on the impact of the ICC's involvement on the potential for peace at each point.

The last section examines the insights of the case studies to extrapolate key themes and conclusions about the ICC's impact on the situations into which it intervenes and its potential to achieve its goals.

[5] The ICC has convicted one person thus far, Thomas Lubanga Dyilo on March 14, 2012. This paper, however, does not consider the impact of this conviction, because it is so recent.

Chapter Two: Main Concepts

Conflict Resolution

Peace is self-evidently more than a lack of conflict. It is, as Monica Duffy Toft points out, "a tricky concept, much like power. One knows it when one sees it, but it is difficult to define generally or theoretically."[6] Such an expansive and aspirational state is difficult if not impossible to measure or define. This project, therefore, will focus on the goal of conflict resolution. This is not the same as peace, but it is certainly an improvement over conflict and is a necessary precondition for peace.

This paper will use the word 'peace' to refer to the cessation of conflict, while understanding that the concept also entails something greater. It will also use the terms 'peace processes' and 'peace negotiations' and 'conflict resolution', to refer to negotiations or other efforts (other than military initiatives) aimed at bring about the cessation of conflict.

Traditionally, there are two possible ways of resolving a conflict – through victory or through negotiation. With internal conflicts, which comprise all of the ICC's conflicts to date, negotiation has historically been less prevalent. "Prior to World War II, most civil wars ended when one side decisively defeated its rival, which surrendered, was destroyed, or, more rarely, fled." [7]

This trend, however, has shifted in recent years, and with the end of World War II and the Cold War, "negotiations aimed at preventing the defeat or destruction of a given party have become increasingly common to the extent that … they constitute a new

[6] Toft, *Securing the Peace*, 11.
[7] Ibid. 19.

norm."[8] In either case, however, justice has not been much of a concern, and legal proceedings have rarely played any role. Generally, it is either a matter of might makes right or compromise makes right.

Neither situation lends itself to comprehensive justice. Victors are likely to be more interested in revenge or expulsion than justice, and none of the negotiating parties are likely to voluntarily submit themselves to a trial as part of a peace agreement. Toft writes, "If we look at most negotiated settlements, we find that their chief strength lies in the promise of … direct benefit to former combatants."[9] The promise of trial and punishment, in such cases, is counterproductive when the point is to give all parties as much of what they want as possible. 'Victor's justice' after a military triumph on the other hand is generally highly political, lacking the impartiality associated with true justice. This means that it is difficult for justice to play a constructive role in conflict resolution.

International law, then, at least prior to the late twentieth century, has not played a substantial role in conflict resolution. That said, Chirot and McCauley argue that norms do play a role in mitigating conflict. They write, "international law should not be dismissed as long as we remember that "codes of honor" are most likely to be effective if they are applied for a long time to a set of actors who regularly interact with each other, and as long as we are reminded that such codes are supposed to limit the ravages of violent conflict, not eliminate it."[10] Thus, as the international community becomes more closely linked through globalization, international laws may have a new role to play.

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[8] Toft, *Securing the Peace*, 19.
[9] Ibid. 2.
[10] Chirot and McCauley, *Why Not Kill Them All?*, 119.

Justice

What is justice?

> No other question has been discussed so passionately; no other question has caused so much precious blood and so many bitter tears to be shed; no other question has been the object of so much intensive thinking by the most illustrious thinkers from Plato to Kant; and yet, this question is today as unanswered as it ever was. It seems that it is one of those questions to which the resigned wisdom applies that man cannot find a definitive answer, but can only try to improve the question.[11]

Many different definitions have been offered. Justice Jackson, the chief prosecutor at the Nuremburg trials, described it as the tribute that power pays to reason.[12] Aristotle writes, "The just is equal, as all men suppose it to be."[13] Philosophical thinkers from Plato to Rawls have offered definitions of justice, and many have offered reflections on the subject, although these have little to do with the law or with accountability.

Often these philosophical enquiries are concerned with a just political system. When Plato writes about justice, for example, he speaks of a just system, the comprehensive organization of society, with rules and regulations.[14] Of course, none of us would view *any* organization or system of rules as a just one. A just system has often seen as one in which the rules keep things in their proper or right order. In our time, human rights might be seen as the baseline by which we evaluate the justice of a system. Wolterstroff writes "Once upon a time…everybody who thought about justice thought of it in terms of right order. Individualistic modes of thought then gave birth to the idea of

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[11] Kelsen, *What is Justice?,* 1.
[12] Jackson, Robert H. "Opening Statement before the International Military Tribunal."
[13] Aristotle, *Nichomachian Ethics,* 77.
[14] Plato, *Republic.*

inherent natural rights. … the old way of thinking about justice gradually lost its appeal and was displaced by the conception of justice as grounded on inherent rights."[15]

The enforcement of the law is the way in which this order, or more recently a system of rights, is maintained. Kelsen writes,

> The term 'law' "refers to that specific social technique of coercive order, which, despite the vast differences between the law of ancient Babylon and that of the United States today, between the law of the Ashantis of West Africa and that of the Swiss in Europe, is yet essentially the same for all these peoples differing so vastly in time, place, and culture - the social technique which consists of bringing about the desired social conduct of men through threat of coercion for contrary conduct.[16]

The approach to enforcing this system, however, varies greatly, even within the 'West.' For example, in the British and American common law or adversarial system, justice is about giving freedom of expression to both sides of an argument. Justice requires that everyone be heard. Everyone voices their grievances, and then a judge or jury adjudicates between the two claims. The idea is that in an impartial system, the truth will emerge from the debate and argument. The Civil law system, which prevails in most of continental Europe, on the other hand, is an inquisitorial system. Justice here is a search for truth. Judges do not simply moderate between two opposing claims, but investigate and search out the truth. In this system, then, all voices are not given equal consideration. The system is not meant to be impartial, but to seek out the truth, to the partial in favor of the truth. Differences between these and non-Western systems, such as Islamic law or traditional justice mechanisms in Africa, are even greater.

In spite of differences amongst perceptions of justice around the world, Kelsen argues that a longing for justice is part of the human condition. He writes, "Justice is

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[15] Wolterstorff, *Justice: Rights and Wrongs,*11.
[16] Kelsen, *What is Justice?* 236.

primarily a possible, but not a necessary, quality of social order regulating the mutual relations of men."[17] Justice is the possible, and this is why the lack of justice is such a painful experience. Justice may be difficult to define, but we all know *injustice* when we see it. At the same time, perfect justice is manifestly impossible. "We must admit that nature is not just; it makes the one healthy, and the other sick, the one intelligent, the other stupid. No social order can compensate completely for the injustice of nature."[18] The greater the injustice the more difficult it can be to correct it – a stolen object can be returned, but no court can bring back a murder victim. This begs the question, is there such a thing as an injustice that is too big for the courts?

The answer implied by the struggle for international justice, might be 'perhaps, but we still have to try.' An important element of the idea of justice, one that is cited as the imperative of international justice in particular, is that injustice must not be left in peace, that the scales must be balanced. "Justice Robert Jackson, Chief Prosecutor at Nuremburg … famously said that letting major war criminals live undisturbed to write their 'memoirs' in peace 'would mock the dead and make cynics of the living.'"[19] In this vein, calls for justice are generally understood as calls to right the wrongs of the past, albeit imperfectly, because the idea of *not* doing so is simply too distasteful. Although tyrants and criminals from Stalin to Pol Pot to Idi Amin died without ever facing justice, this is seen as regrettable and the hope of international criminal justice is to prevent it from happening again.

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[17] Kelsen, *What is Justice?* 1.
[18] Ibi. 3.
[19] Booth, "Prospects and Issues for the International Criminal Court," 177-178.

Thus, justice and punishment are important as alternatives to impunity, to allowing perpetrators to simply 'get away with it.' Many advocates of such an approach also argue that ending impunity is valuable as a preventative measure. Booth writes, "The act of punishing particular individuals … becomes an instrument through which individual accountability for massive human rights violations is increasingly internalized as part of the fabric of our international society."[20] Theoretically, consistent punishment of wrongdoers will serve as a warning to potential perpetrators.

This hoped-for international system of criminal justice promises protection regardless of nationality. The permanent court, as the ultimate expression of the universality of human rights, is based on "the idea that there is an international social system ... The fact that delegates at Rome were able to come together and finalize the ICC statute is evidence of the existence of a social system built on universal respect for the idea of human rights."[21] In this sense, international justice is associated with ideas of a 'liberal peace': the understanding that democracy and rule of law are essential for a peaceful world, the idea that, "For peace to exist justice and liberty are required, and the liberal political arrangements that make this possible are seen as inherently peaceful."[22] This thesis was first proposed by Immanuel Kant in the eighteenth century and is still influential. It underpins the argument that human rights and dignity must be respected, not only because of their inherent value, but also because this is the foundation for lasting domestic and international peace. The ICC's Rome Statute "not only developed the idea" of human rights "further by outlining a consensus on universal human values, but also

[20] Booth, "Prospects and Issues for the International Criminal Court," 179.
[21] Ibid. 186.
[22] Jackson, "Negotiating with Ghosts," 321.

created an international legal mechanism for independent enforcement of those values – the ICC."[23]

This understanding of the importance of rights and justice places them at the center of achieving the lofty goal of a more peaceful world. Can international justice create peace and stop atrocities? The Rome Statute seems to postulate that it can, drawing "from a line of though that has its roots in the Western Enlightenment political philosophy"[24] to argue that the universal rule of law will guarantee peace.

With the acceptance Rome Statute, the global consensus seems to have adopted, in rhetoric if not in practice, this human rights and international justice approach. As Philippe Sands writes,

> Criminal law in general – and international law in particular – will never be a panacea for the ills of the world. And there are other means for dealing with the gravest crimes… But, for better of worse, … the international community has determined that the gravest crimes are properly the subject of international justice systems.[25]

This paper will use the term 'justice' as it is used in international law – to mean accountability for crimes. At the same time, it will also question this definition. Justice itself is a more aspirational concept that is beyond the scope of this paper, but from the legal perspective accountability is the best that can be provided.

International Law

The concept of 'international law' has a more concrete, if contentious, meaning. It usually refers

[23] Jackson, "Negotiating with Ghosts," 321.
[24] Clarke, *Fictions of Justice,* xii.
[25] Sands, 71.

> to a body of rules laid out in agreements between states. These rules have rhetorical significance in diplomacy, but they are not impartially applied and may at times be ignored by a government… The rules suggest that states are bound to behave in appropriate ways.[26]

These laws are much more difficult to enforce than national laws, and it is not unusual for governments to flout them. At the same, they are not completely ineffective. "There are in fact a large number of regulations that are widely observed… Such regulations make, for example, international investments, trade and air travel possible."[27] Until quite recently, however, these norms were only concerned with states, never with individuals or criminal matters.

The first instance in which international law was applied to individuals was at the Nuremburg trials of Nazi war criminals in 1945 and '46. Many scholars argue that the push to universalize a conception of universal human rights was conceived of by their obvious violation, and that Nuremburg represents the beginning of an attempt to use international law to prevent future abuses. The crimes of the Nazi regime were seen as so grave that "civilization" could not "tolerate their being ignored, because it" could not "survive their being repeated."[28] This conviction would help to form the basis for the global human rights regime.

The first step of this process was to create an internationally recognized code of conduct concerning human rights. These agreed rules developed haphazardly, both to be used at Nuremburg and in the wake of the trials. While the trials at Nuremburg were in some sense inventing precedent,

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[26] Allen, *Trial Justice,* 4-5.
[27] Ibid. 4-5
[28] Jackson, Opening Statement.

> What is striking about the summer of 1945 is not that the trails were in some sense arbitrary and in defiance of legal convention, but that so much was achieved in the chaos of post-war Europe in building the foundation for contemporary international law on war crimes, and contemporary conventions on human rights.[29]

It is this foundation that has been the basis for later international trials.

The response to wartime atrocities also led to the Universal Declaration of Human Rights, a document that holds only symbolic and moral (not legal) weight, and which, "The Soviet ambassador to the UN dismissed it as 'just a collection of pious phrases.'"[30] This type of criticism has since been applied to many calls for international justice, and the gap between "pious phrases" and reality is often staggering. It is abundantly clear that the aspirations articulated at Nuremburg are far from realized. Despite post-war hopes, in the aftermath of World War II, no permanent criminal court was established, and human rights, especially during the Cold War, were given second priority, at best.

The end of cold war, despite hopes, saw eruption of yet more violence in the form of internal conflicts. With these conflicts, however, came demands for justice, and the global political environment was now more receptive. "While ending the cold war did not lead to an era of peace and tranquility, however, it did have the desirable effect of reducing incentives to cover up atrocities and keep mass murders in power for strategic purposes," and activism and media attention encouraged a "return to the precedent of Nuremburg and the notion of international criminal prosecution."[31] In the 1990s, international criminal justice again became a tool for addressing the human rights violations of the recent past.

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[29] Overy, 28.
[30] Allen, *Trial Justice,* 5.
[31] Ibid. 9.

The first instance of such a return was the creation of the UN-backed International Criminal Tribunal for Yugoslavia. The tribunal was established by a Security Council resolution in 1993, and the International Criminal Tribunal for Rwanda followed it in 1994. These developments set the stage for the establishment of the International Criminal Court.

The ICC

The negotiating process to create a new and permanent international criminal court began with a request from the UN General Assembly in 1989. The process moved slowly, however, and it was not until the summer of 1998 that delegates finally met in Rome to discuss and adopt the Rome Statute of the International Criminal Court. This treaty entered into force in 2002, and the ICC has jurisdiction only over crimes committed from this point forward. It began its first investigation, the situation in northern Uganda, in 2003. Six other investigations, all in Africa, have followed: the situations in Democratic Republic of Congo, Central African Republic, Kenya, Libya, and Cote d'Ivoire.

The Rome Statute established an unprecedented *permanent* international criminal court. While temporary international tribunals such as the Nuremburg and Tokyo Tribunals, the International Criminal Tribunal for Yugoslavia, and the International Criminal Tribunal for Rwanda paved the way, this new court differed from its predecessors because it was not established to deal with a particular case of violations of international law, but instead has a more universalizing goal. Its preamble asserts, "the most serious crimes of concern to the international community as a whole must not go unpunished" and resolves "to guarantee lasting respect for and the enforcement of

international justice".[32] Thus, the Court states as its mission to create not only a permanent precedent, but also an institution enforce it. The Rome Statute clearly articulates that the "international community as a whole" as a duty to act in the interests of justice, and the Court is conceived as a way for the international community to live up to this responsibility.

The statute lays out the structure and jurisdiction of the Court. The body of the Court itself is made up of four 'organs': the Presidency; the Appeals, Trial, and Pre-trial Divisions; the Office of the Prosecutor; and the Registry.[33] There is also an Assembly of States Parties, which is responsible for funding and overseeing the Court, as well enforcing the Court's decisions and currently has 119 member states.

From the beginning, the drafters of the document felt that "that the statute should, to the extent possible, remain within the realm of customary international law."[34] Therefore, the crimes within the Court's jurisdiction reflect a longstanding consensus dating back to Nuremburg: genocide, war crimes, and crimes against humanity.[35] The Court has jurisdiction over these crimes, only if the case is referred to it by the state party that would normally have jurisdiction or by the UN Security Council, or if the Pre-trial Chamber gives the Prosecutor approval to pursue a case which occurred within a state that is a member of the court or involves a citizen of a member state.

The laws that the Court applies are, according to the Rome Statute, to be based firstly on the Statute itself and the ICC's Rules of Procedure and Evidence. If these are unclear or insufficient, the Court may apply "applicable treaties and the principles and rules of

[32] Rome Statute, Preamble.
[33] Ibid. Article 34.
[34] Arsanjani, "The Rome Statute of the International Criminal Court," 25.
[35] Crimes of aggression are also included, but these have yet to be defined and enter into force.

international law"[36], and finally "general principles of law derived by the Court from national laws of legal systems of the world".[37]

Despite its hopeful goal and idealistic language, the statute was also designed with an eye to pragmatism and states' interests. For example, one of the Court's essential characteristics is the Principle of Complementarity, which states that the Court will only intervene when the state within whose jurisdiction the crime occurred is unable or unwilling to investigate and prosecute the crime. In addition, unless called upon by the UN Security Council, the Court may only try cases that would normally be under the jurisdiction of states that are members of the Court. Thus, states must voluntarily agree to the Court's authority in order for it to have any jurisdiction over cases there. As the Rome Statute lays out, "The Court may exercise its functions and powers, as provided in this Statute, on the territory of any State Party and, by special agreement, on the territory of any other State."[38] This setup ensures that the Court will, for the most part, respect the sovereignty of nation states and the right of states to accept or reject its jurisdiction.[39]

The framers of the Statute also restricted the Court's jurisdiction to a limited scope of crimes, endeavoring to "remain within the realm of customary international law"[40] as much as possible. Further, there is an Assembly of State Parties that oversees the Court and may propose changes. Perhaps most significantly from pragmatic point of view, the Rome Statute does *not* provide the Court with any mechanism for ensuring the

[36] Rome Statute, Article 21.
[37] Ibid.
[38] Ibid. Article 4.
[39] A UN Security Council referral can go around this provision, as in the case of Sudan.
[40] Arsanjani, "The Rome Statute of the International Criminal Court," 25.

execution of its warrants and it must, therefore, rely on national authorities to carry out its decisions.

Thus, the Rome Statute, the framework for the ICC, is primarily set up to provide for the ideals of universal justice, while simultaneously adapting to the realities of nation states. These two primary concerns are clearly laid out in the document. The Statute, however, only refers to 'peace'[41] once, and does not address it as a fundamental aspect of the Court's mission. The Rome Conference delegates designed a judicial institution committed to the aspiration of international justice and accountability, but adapted to the political realities of state interests. It is not, however, designed to adapt to the realities of conflict resolution and peace building.

Idealism and Realpolitik

The ICC is in a sense founded on two contradictory ideas. The first is that the rule of law and accountability for 'crimes of concern to the international community' should be truly international and transcend the state. The other is the old but still salient idea of state sovereignty. Both of these are written into the Rome Statute, the Court's founding and governing document. On the one hand, the ICC is "fueled by the seduction of human rights rhetoric and its link to the 'rule of law' as the new mechanism by which world peace could finally be achieved."[42] While on the other, this rhetoric cannot enforce itself and has been put into an institution by a group of nation states. Whatever the intentions when the Rome Statute was drafted, these lofty ideas are easier put to paper than into action. The states that ratified the Rome Statute recognized, "that such grave crimes

[41] In reference to "crimes that threaten the peace," Rome Statute, Preamble.
[42] Clarke, "Fictions of Justice," xii.

threaten the peace, security and well-being of the world,"[43] but their declared determination to end impunity for these crimes has not manifested itself in support of the ICC's work in Uganda, DRC, and Sudan.

These issues are rooted in the founding statute, because although the document emphasizes the goal of ending impunity, it is hardly the document's only emphasis. It might be "cosmopolitan on the abstract level, but" it is "less so at the practical level."[44] The treaty requires member states to enforce the Court's decisions, but provides no method of enforcing this commitment. This new system, this new Court, "is in some respects the triumph of moral universalism,"[45] but it still very much depends on the old order of state sovereignty. Thus, paradoxically, "state sovereignty both enables and limits…the capacity of the ICC to serve the interests of justice."[46] It makes the Court acceptable within the international system, and gives it the tools to try and accomplish laudable goals within a realistic framework, but it also limits its independence and enforceability.

While it may be couched in the language of universal rights and cosmopolitanism, the ICC is really less an overarching global institution and more

> an international jurisdictional safety net designed to pick up where national jurisdictions are unwilling or unable to exercise jurisdiction, or when it is convenient for the Security Council and other national jurisdictions … As such, it is more a utilitarian institution than a utopian one.[47]

Thus, application of these ideally global norms is highly contingent on the state powers involved. The ICC may symbolize consistent global rule of law, but its actual

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[43] Rome Statute, Preamble.
[44] Eckert, "The Cosmopolitan Test," 205.
[45] Ibid.
[46] Ibid.
[47] Bassiouni, "Quo Vadis," 2.

implementation is quite inconsistent. The Court's ability to carry out its mandate is based on a complex balance of idealistic goals and the need to rely on pragmatic, statist means.

This compromise institution aspires to global justice, but operates within an international system in which state sovereignty remains a powerful norm. It is in essence, therefore, a court of last resort that is intended to fill in when a national judicial process is impossible. Given the Court's lack of enforcement powers, however, this 'safety net' must rely on the support of the national government or the international community (which has not been forthcoming thus far). This is a core contradiction, because the ICC safety net is only necessary when the national system has failed, but it cannot operate without the support of that same failed system. This type of international justice is set up to take the most difficult cases, but it is these complications that the Court does not have the resources or enforcement powers to address. In this sense, the ICC is only necessary for situations that it is incapable of dealing with.

The framework set up by the Rome Statute loses sight of the importance of making sure that the judicial process does not ignore peace making, because it is caught between cosmopolitan idealism and realpolitik. Peace, therefore, is not a central concern, and is barely mentioned in the Rome Statute. Because of the pressing need for the officials at the ICC to balance the idealist and pragmatic elements in their decision-making, they have no space to take the needs of peace into consideration.

Challenges for International Justice

While international justice has grown in acceptance, there are still a number of challenges, some of which date back to Nuremburg and others that have emerged as the field has matured.

One problem for international criminal trials is that they can be used in place of protective measures or to assuage the guilt of international bystanders. For example, in the case of the Democratic Republic of Congo, one might ask why the international community sends lawyers rather than effective peacekeepers. The Rwandan tribunal also demonstrates the problem – how can the international community impose justice after ignoring and denying the genocide when military intervention was possible? These examples illustrate that international justice can easily be an excuse for inaction.

Another criticism is that international justice is, almost inevitably, victor's justice. As Nuremburg prosecutor Jackson said, "However unfortunate it may be, there seems no way of doing anything about crimes against the peace and against humanity except that the victors judge the vanquished."[48] Considering that war is a bloody and messy affair, it is often the case that both sides are accused of war crimes. Whether these claims are true or not, it seems self-evident that no one accuses himself of a crime against humanity. Even international institutions may be reluctant to charge the victors since they will need their cooperation to operate within a sovereign country. Whether in post-war Germany or post-war Rwanda, the losers, not the winners, stand trial. And while these cases may pose little challenge, if both sides are guilty but only one is prosecuted and controversial, is that justice? Or scapegoating?

This question points to the fact that situations of conflict are always immensely morally and legally complicated. The idea of criminal justice is to hold individuals accountable for their actions, but Courts do not distinguish between individual and collective guilt. Large-scale atrocities require many participants. The leaders and planners

[48] Ehrenfreud, *First Kill Your Family,* 48.

rely on their foot soldiers to carry out the plans, but the foot soldiers also rely on them for direction, so the two are symbiotic. Which group is responsible? Which actors? Using the now relatively uncontroversial example of the Nazis: is Hitler to blame for the overall ideology? Or Himmler for commanding the genocide? Or Eichmann for planning it? Or the concentration camp guards who did the actual killing? Or those German civilians who supported it? Or those who benefited? All? None? Who do the courts choose?

On a less philosophical level, the idea of a justice system without many of the markers usually associated with it – a police force to enforce its decisions, a legislature to enact laws, a consistent legal tradition to refer to for guidance– is highly problematic. In this sense, the idea of an international criminal law implies a level of unity and consensus at the international level that simply does not exist. As Booth notes, "The idea of an international criminal law – involving a public law dimension with an underlying system of shared social ethics – seems strangely inappropriate, given that the international regime has no central sovereign and is morally pluralistic."[49]

This type of law is a radical departure from the traditional notion that standards of justice are, at the international level, normative not legislative. This does not mean they have no weight, but that international rules of conduct have not been enforceable in the sense of domestic laws. Instead, they have the weight as norms. "Enforcement mechanisms may exist, and that makes the rules stronger, but even in the absence of an impartial enforcer of sanctions (which would imply that contending parties have become part of a single state), there must be enough trust for the parties to continue following

[49] Booth, "Prospects and Issues for the International Criminal Court," 185-186.

them."[50] Paradoxically, the ICC is an enforcement mechanism, but one without 'teeth.' It relies on the support and trust of member states, while claiming the weight of legal authority.

Finally, the application of international justice to African countries, the focus of all of the ICC's cases to date, is open to criticism as 'Western Justice' or even neocolonialism. The cultural relativism objection poses a serious challenge. As noted earlier, there are significant differences between Western legal traditions, and these differences pale in comparison to those between the legal traditions of other continents. In Uganda, for instance, cultural leaders oppose the ICC and point to cultural reconciliation practices as more beneficial for their community. If justice is something done out of service to the victims, can a justice system derived mostly from a foreign culture be effective? At the same time, many African countries have supported the Rome Statute and are members of the ICC. Since the human rights discourse has been globalized, it can be argued that the values that the ICC represents no longer reflect simply those of the 'Western world', but now reflect a global consensus.

The 'ICC for Africa'

At the ICC's inception, African nations were generally quite supportive of the idea, and were active at the Rome Conference. Indeed, "Africa has generated the largest support base for the Court at 30 ratifying states … over half of the continent's 52 countries."[51] Yet as the ICC pursues imperfect investigations into cases on the continent, African countries now seem less enthusiastic, uncomfortable with "the reality that

[50] Chirot and McCauley, *Why Not Kill Them All?*, 115.
[51] Jalloh, "Regionalizing International Criminal Law?" 447.

African states are likely to be the frequent users … because of a relatively higher prevalence of conflicts and serious human rights violations and a general lack of credible legal systems to address them."[52]

This position makes the tensions between the ICC's global and local roles much more pronounced in Africa. While promising and hoping to deliver peace, justice, and accountability to each situation it takes on, the ICC was designed less as a short-term solution to be applied to specific instances and more as a long-term institution to encourage accountability at a global scale. This is what distinguishes the permanent court from ad-hoc tribunals such as the ICTY and ICTR. This often means that its perspective, interests, and goals differ from those of local leaders, activists, communities, and victims. These differences become especially clear when it comes to peace negotiations, reconciliation, amnesty, and even definitions of justice.

Since it is so new, the ICC has to show results (in the form of warrants and convictions) to prove itself a relevant and effective institution. This is essential for it to build a solid reputation, ensure the support of member states, and attract new members. This, however, is frustrating and disappointing for local people who, in some cases, feel that local concerns are treated as secondary to global ones and that they are being used as guinea pigs in a sort of global justice experiment.

So, the question remains: is the ICC a 'Western Court' that has been imposed on Africa? While many of such accusations come from biased sources – such as the government of Sudan – there is at least an element of truth in them. One Ugandan politician, however, pointed to a different core issue, saying, "there is a culture of

[52] Jalloh, "Regionalizing International Criminal Law?" 447.

impunity, and it will take time for this culture to change. And this will change when we also begin to change the kind of leadership we have … in the Great Lakes region [of Africa]."[53] He argued that accusations of 'Western justice' or other ICC bias really say more about the critics than the court. "People fear being affected, because they know, in one way or another, they contributed or they took part."[54] There is no denying that there is a deep, historical, and systemic lack of accountability in the political systems of Uganda, Congo and Sudan. "As one Congolese lawyer recently commented, 'In Congo we reward those who kill, we don't punish them.'"[55] The same could be said of Uganda or Sudan. This is what makes the ICC so applicable to these cases, but it does not necessarily mean that the ICC is the antidote to the problem.

The more substantial problem is that, even at their best, international institutions cannot comprehensively substitute for national ones, and the ICC does not address the long-term underlying problems that are at the root of many African conflicts. Even at its best, the Court will have a limited an symbolic impact on African nations, and "the continent and its people cannot rely on the UN or the 'international community' to solve its numerous crises."[56] We may refer to 'crimes against humanity', but they are actually more crimes against the real victims, citizens of Uganda, DRC, and Sudan, than against humanity in general. With this in mind, "Does the Court, or for that matter any distant international institution, possess the legal and moral right to make such far reaching

[53] Ojara Martin Mapenduzi (Gulu District Chairman), in discussion with the author, April 19, 2011.
[54] Ibid.
[55] Mattioli and van Woudenberg, "Global Catalyst for National Prosecutions?" 55.
[56] Jalloh, "Regionalizing International Criminal Law?" 456.

decisions for war-battered African communities?"[57] The Court stands at the delicate intersection between global obligations to humanity and pious interference.

Room for Peace and Reconciliation?

The ICC operates on the thesis that the global root of conflict is widespread impunity for crimes against humanity and that its judicial process can address this. It hopes to set a global standard for individual accountability and a precedent that individuals who commit crimes against humanity must always answer for them. With the ICC, as with other instances of trials for war crimes and crimes against humanity, however, "the problem is that the reassignment of the guilt of thousands of people to a single chief commander and a few of his top aides neither ends the violence nor capture adequately the complicity of multiple agents involved in the making of war."[58] In northern Uganda, one local bishop voiced similar criticism of the ICC underlying method, arguing that prosecution of a few will not address the root causes of the war, which are deeply ingrained in Uganda's post-colonial power-structures.[59] The scope of the investigation and the number of defendants are constrained by practical limitations on the Courts resources, political concerns, and jurisdiction limits based on time and place. This means that the ICC process cannot really address the totality of a situation, and, as the cases in Uganda and Congo demonstrate, partial justice may be even more dissatisfying and potentially explosive.

Another serious concern is that punitive justice cannot heal societies broken by war, and, as such, does not represent genuine justice. Critics "argue that criminal trials

[57] Jalloh, "Regionalizing International Criminal Law?" 489.
[58] Clarke, *Fictions of Justice,* 19.
[59] John Baptist Odama (Catholic Archbishop of Gulu), in discussion with the author, May 8, 2011.

are selective, politicized, and prevent social and ethnic reconciliation",[60] by bringing "polarization between the two parties." In Uganda, local religious and cultural leaders have advocated forgiveness and community reconciliation as a more beneficial alternative.

Even if this enlightened attitude of forgiveness is not universally shared, it is impossible to deny that a negotiated peace is preferable to continued bloodshed in the name of a global precedent. Justice, after all, is hardly served by a continuation of conflict and atrocities, and it is not surprising that those closest to the suffering of the victims often advocate peace, even at the cost of a judicial process, as the perceived best and most just of the potential outcomes.

So while the ICC has rejected amnesties or promises of immunity, it is easy to see why these could be a necessary tool. The Rome Statute seems to allow for some concessions here. For example, it requires both the Prosecutor and judges to consider whether an investigation or trial is in the 'interests of justice', and this could be construed as allowing them to defer or dismiss a case out of respect for a peace process. In addition, the UN Security Council may defer a case for a year at a time. These provisions mean that the Rome Statute leaves room for compromise in the interests of peace, but Prosecutor Moreno-Ocampo's decisions, the general disengagement of the Security Council, and the consensus around the Court make this unlikely.

In addition, compromises, especially at this early stage would obviously create a difficult precedent for the ICC. It might risk creating a role for itself as an international bargaining stick or empty threat, rather than an imposing judicial body. It would also

[60] Kastner, "The ICC in Darfur," 3.

make it more obviously entrenched in politics, risking its reputation of independence, and could even reinforce the kind of impunity that the ICC was created to counteract.

Chapter Three: Background to the Case Studies

Uganda

The Ugandan government has been fighting the Lord's Resistance Army (LRA) since 1986. The war has historically centered on the Acholi sub-region of Northern Uganda, but has also affected other parts of Uganda, Sudan, Central African Republic, and the Democratic Republic of Congo. This conflict has its roots in Uganda's post-colonial politics, which have been dominated by violent conflict, power-struggles between ethnic groups, and an increasing political and economic gap between the northern and southern regions of the country.

Uganda is a landlocked country in East Africa, bordering South Sudan, the Democratic Republic of Congo, Rwanda, Kenya, and Tanzania. The Nile River flows northwest from Lake Victoria, separating the north and south of the country. This barrier marks the divide between two regions that have long been separated by ethnicity and development.

There are over forty different ethnic groups within Uganda's population of roughly 36 million people. The largest of these is the Buganda of central Uganda, but the Acholi, Lango, and Teso dominate the northern regions affected by the LRA conflict.

Prior to colonization, these ethnic groups mostly lived in territories controlled by independent kingdoms and chiefdoms. In the late nineteenth century, however, the British brought all of these into a single territory, named 'Uganda' after the Buganda Kingdom. The British East Africa Company controlled Uganda from 1888 until it became a protectorate in 1894. As part of their 'divide and rule' strategy, the British did little in the way of nation building, and instead encouraged tribal loyalties and divisions. They focused efforts at economic development and education on the south, while opportunities

for northerner groups, like the Acholi were generally limited to military service. This disparity between a more educated and developed South and a militarized North had a long-lasting legacy after independence, when southerners would dominate the civil service and government, while northerners controlled the military.

Uganda gained its independence from Britain in 1962. Milton Obote, a northern Lango who led a coalition political party, became Prime Minister, while the traditional Buganda king, Kabaka Mutesa, became president. It was a promising start, but when the two clashed, Obote's army commander, Idi Amin, attacked the king's palace and forced him into exile.

Obote ruled alone until 1971 when, after consolidating power within the military, Amin seized power in a successful coup. He purged the northerners from the army, intimidated Uganda's small group of intellectuals and professionals, and expelled all Asians from the country. This, along with his regime's blatant corruption, took an enormous toll on the nation's economy and infrastructure.

Amin's rule came to an end, however, when he attacked Tanzania over a border dispute in 1978. By 1979, he was deposed by a joint invasion of Tanzanian troops and Ugandan rebels. Obote, the former president, returned to power after winning a rather suspect election against Yoweri Museveni, who soon started the National Resistance Army (NRA) in hopes of ousting Obote. Meanwhile, Obote was once again overthrown by his own general and replaced by Tito Okello, an Acholi, in 1985.

Okello's government tried to negotiate with the Museveni, but in 1986 the NRA took over and Okello, along with all of his fellow Acholi were forced out of the government and military. Fear of further reprisals from Museveni's new government

inspired two Acholi rebellions – one led by former military leaders and the other led by a woman named Alice Lakwena, who claimed to be possessed by the Holy Spirit and preached an apocalyptic vision of renewal as well as resistance. Both of these rebellions failed, but new leader and former 'witch doctor' Joseph Kony drew on this early Acholi resistance to Museveni in creating the LRA. Kony was able to co-opt Lakwena's spiritualism as well as many of the fighters from both.

Like its predecessors, Kony's rebel movement is to some extent a based on a genuine distrust of the government among the Acholi, but it is also heavily influenced by his unique spirituality – a blend of Christianity and traditional Acholi beliefs – and claim to be divine messenger possessed by the Holy Spirit.[61] As Peter Eichstadt puts it, "Kony's mixture of spiritualism and brute force make his army a cult as much as a lawless militia."[62] The LRA have no clearly articulated political goals, except for removing Museveni and the NRM from power, although they do claim to fight for the liberation and purification of the Acholi people and to restore the Ten Commandments (despite having violated many of these themselves).

In addition, the region's geopolitical situation plays a role: in the past the LRA has received (and may continue to receive) support from the Sudanese government in return for attacking their own Southern Sudanese rebel group. All of these factors make it complicated and difficult to make sense of the conflict's roots and to distinguish between legitimate and mystical grievances.

Although the LRA claim to fight on behalf of the Acholi ethnic group, it is these people and others in the conflict effected-region that have been the war's primary

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[61] Kony claims to have inherited Alice Lakwena's position as a spirit medium.
[62] Eichstaedt, *First Kill Your Family,* 3.

victims. The civilian population has been devastated by systemic violence on the part of both the rebels and, to a lesser extent, government forces. One writer observed, "The civilian population is both the key and the victim. The widespread internment of civilians in camps and the abduction of children effectively leaves the population in a constant state of fear and insecurity."[63] Not only did normal daily life become impossible for those living in the affected region, but also according to one study, 86% were displaced and 76% lost at least one family member.[64] In the Acholi sub-region, 90% of the population were forced into Internally Displaced Persons Camps, and found themselves caught between the Ugandan Army (UPDF) and the rebels. Most devastating of all, were the abductions, often of children. The LRA's abductees "become sexual slaves or are deployed as combatants. Some are required to perform atrocities against civilians in order to punish them for accepting President Museveni's rule, demonstrate their loyalty and make it difficult for them to return home".[65]

While the government and international actors have made several attempts to rid the region of the LRA, none of their methods have been successful thus far. Although the government has been criticized for neither defeating the LRA nor adequately protecting civilians, the Ugandan army has sometimes tried to use military means to end the conflict, even crossing into southern Sudan in hopes of capturing Kony and defeating the LRA. However, in 2000, under heavy pressure from religious and cultural leaders from the North, the government passed an Amnesty Act, which offers immunity from prosecution to surrendered LRA combatants. There have also been efforts, pushed by

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[63] Jackson, " Negotiating with Ghosts", 323.
[64] Pham, Phuong et al. "When the War Ends," 28.
[65] Allen, *Trial Justice,* 42.

these same leaders as well as NGOs, to encourage a negotiated settlement between the LRA and the government. These culminated in the Juba Peace talks, which were brokered by South Sudanese leaders. While these were initially promising, Kony ultimately failed to sign the Comprehensive Peace Agreement that came out of the talks, claiming that he could not do so unless the ICC removed its arrest warrants.

At the time of this writing, northern Uganda is generally peaceful, but the LRA remains active in Sudan, the Democratic Republic of Congo, and Central African Republic.

Democratic Republic of Congo

The Democratic Republic of Congo, located in the center of the continent, is largest country in sub-Saharan Africa and has a population of 73.6 million. The ICC's involvement has focused on the eastern region of the country, bordering Uganda, Rwanda, South Sudan, and Tanzania, but the DRC also borders the Republic of Congo, the Atlantic Ocean, and Angola in the west, Central African Republic in the north, and Zambia in the South.

This vast swath of land is home to over two hundred different ethnic groups. It was first unified and colonized by King Leopold II of Belgium as "his own personal fiefdom"[66], ostensibly for the purpose of 'bringing civilization' to the country, but in reality for its vast supplies of rubber, ivory, and minerals, as well as the prestige of colonial power. With the approval of other European nations, Leopold acquired Congo Free State at the Berlin Conference in 1885. Of course, the conference could not give Leopold immediate control over his immense new territory. The consolidation of Belgian

[66] Edgerton, *The Troubled Heart of Africa,* 60.

power included clashes with Arab and British competitors. These were mostly fought through proxy Congolese militias, a tactic that would be copied by other African nations in the 1990s.

Power in Congo Free State was delegated to regional administrators responsible for maintaining order and extracting resources. While approaches varied among the individual administrators, in general, they carried out their mandates by brutally taxing and terrorizing the Congolese people to the extent that, according to one estimate, Leopold's "regime killed 10 million Congolese."[67]

Although spreading Christianity was used as the premise for colonization, missionaries working in Congo were the first to condemn the atrocities of Belgian rule. Under the international pressure arising from these denunciations, Leopold was forced the hand his colony over to the Belgian government, and it became Belgian Congo. The Belgian government, however, was ill equipped to administer its vast and diverse new territory. The government delegated much of the administration to Belgian companies and paid Congolese chiefs. Culturally, the colony was divided not only according to old ethnic divisions, but also between Europeans, European-educated Congolese, and the majority of Congolese.

After World War II, there was substantial international pressure for Belgium, like the other colonial powers, to set up a democratic government and withdraw from Congo. The Belgians initially dismissed this, but throughout the late 1950s pressure from Congolese nationalists grew, reaching its peak with the riots in 1959. Yielding to political pressure, the Belgian government agreed to independence in 1960.

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[67] Edgerton, *The Troubled Heart of Africa,* 112.

This might have been an opportunity for a new beginning, but, against the backdrop of the Cold War, Congo quickly disintegrated under the colonial legacy of deeply flawed social and political structures. First, within days of independence, the army and police force mutinied against their white officers. Soon after, the southeastern province of Katanga seceded, and Belgium sent its military to protect Europeans in Congo, amid growing riots and unrest. As situation worsened, UN troops, Soviet aid, and the CIA all attempted to manage the growing crisis. Meanwhile, President Kasavubu attempted to fire Prime Minister Lumumba, who was eventually assassinated by the Belgians and police in January of 1961. As violence spread in Katanga during the early 1960s, the UN attempted to enforce a peace to little effect.

In 1965, army chief Joseph Desire Mobutu seized power and would rule until he was ousted in 1997. He renamed himself Mobutu Sese Seko and his country Zaire, and his regime was characterized by his eccentricity and mismanagement. He tried to rid the county of all foreign influences, amassed a huge national debt, and presided over a government system that operated almost entirely on corruption. He built a huge personal fortune as his country and people grew more and more desperately impoverished, and paid mercenaries to deal with unrest.

The current conflict in the eastern DRC emerged against the backdrop of the "implosion of central government authority under decades of Mobutu's corrupt rule and similarly autocratic and ineffective governments of his successors, Presidents Laurent and Joseph Kabila"[68]. This crisis of leadership led to two wars that engulfed the entire nation and involved many of its neighbors.

[68] Baldo, "The Impact of the ICC," 4.

The First Congo War, between 1996-1997, pitted Laurent Kabila's Alliance of Democratic Forces for the Liberation of Congo (ADFL) against President Mobutu's government. Since the ADFL was supported by Ugandan and Rwandan troops,[69] Eastern Congo was a focal point for the war, and the ADFL used "tens of thousands of child soldiers"[70] recruited from Eastern Congo.

Mobutu fled the country when the ADFL entered the capital of Kinshasa, and Kabila took over as president in 1997. He soon alienated his Rwandan allies, however, and they threw their support behind the Congolese Rally for Democracy (RCD), another rebel group. The ensuing conflict, the Second Congo War, was even more deadly than the first and killed an estimated 3.3 million people, making it the world's deadliest since the Second World War. It is also referred to as 'Africa's first world war,' because in addition to troops from Uganda and Rwanda supporting the rebels, the governments of Zimbabwe, Angola, and Namibia sent troops to support the Kabila government. Over the course of the war, "All belligerents … used ethnic 'Mai Mai' and self-defense militias as surrogates, exacerbating local disputes"[71] and ethnic tensions.

In 2001, Laurent Kabila was assassinated, and his son Joseph Kabila became president. In 2003, President Joseph Kabila agreed to the Sun City Peace Accord, which created a transition government that included his administration, the unarmed political opposition, the RCD, and the Movement for the Liberation of Congo. While this brought relative peace to much of the country, it did not end the fighting or the atrocities in eastern Congo, in the Ituri and North and South Kivu regions in particular. Rebel groups

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[69] The Rwandan genocide spilled over into Eastern Congo, which is also home to ethnic Hutus and Tutsis, and many *genocidaires* escaped into Congo after losing the civil war in Rwanda in 1994.
[70] Vinck et al. *Living With Fear*, 10.
[71] Ibid. 11.

and individual soldiers in these regions were especially resistant to the transitional government's *brassage* policy of integrating all of Congo's armed groups into the national army, and continued to fight against the government and one another.

The conflict in Ituri "began in 1999 when a longstanding land dispute between Hema pastoralists and Lendu agriculturalists spiraled out of control, fueled by international and local actors involved in Congo's larger war."[72] Militias in the region have drawn from one community or the other, and fought against both rival rebel groups and the government troops. Recently, "the deployment of UN peacekeepers and the disarmament of the main militias have brought about relative stability", but,

> failure to address impunity for the massive violations that took place during the conflict … the absence of state institutions and the continuous plundering of the region's rich natural resources for the benefit of a few pose serious threats of a relapse into deadly violence.[73]

The conflict in North and South Kivu, however, is still very much ongoing, and its roots can be traced to the 1994 genocide in neighboring Rwanda. Ethnic Hutus and Tutsis also live in the region, and the defeat of the *genocidaire* government in Rwanda sent a flood of refugees (including former *genocidaires* and members of Hutu Power militias) over the border. This, along with the ensuing involvement of the new Rwandan government in Congolese affairs, sparked the conflict between Hutu and Tutsi militias, each of which claim to fight for their respective groups and also clash with the Congolese Armed Forces.

While the elections following the peace accord were largely peaceful in the Kivu regions, Tutsi groups lost political influence and anti-Tutsi rhetoric was widespread. With

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[72] Human Rights Watch, "Unfinished Business," 9.
[73] Vinck et al. *Living With Fear,* 14.

this in mind and with Rwandan government backing, Laurent Nkunda launched the National Congress for Defense of the People (CNDP) rebel group, claiming to protect Tutsi civilians. This group, rival Hutu militias, and the army have all allegedly committed serious crimes against civilians ranging from theft and looting to murder, use of child soldiers, and rape.[74]

Bosco Ntaganda[75] has since replaced Nkunda as leader of the CNDP, and in 2008, the group reconciled with the government and integrated into the national army, but the conflict continues. As Human Rights Watch reports,

> New acts of violence continue to be committed… by the largely Rwandan Hutu rebel group, the Democratic Forces for the Liberation of Rwanda (FDLR), by other armed groups, and also by soldiers of the Congolese national army, including those newly integrated from the National Congress for the Defense of the People (CNDP) and other armed groups.[76]

In 2008, the Congolese and Rwandan armies cooperated in a joint operation against FDLR, and the Congolese army conducted two more operations against the rebel group, supported by MONUC peacekeepers in 2009 and 2010. However, none of these have successfully defeated the FDLR, who continue to operate. As one report sums up, "In short, peace, social reconstruction, justice, and reconciliation remain distant dreams in Congo."[77]

Sudan

Like the LRA war in Uganda, the conflict in the Darfur region of Sudan has its roots in historical power-inequality and uneven development among the country's

[74] Vinck et al. *Living With Fear,* 13.
[75] Ntaganda is wanted by the ICC, but is currently serving as a general in the Congolese Armed Forces.
[76] Human Rights Watch, "Unfinished Business," 9.
[77] Vinck et al. *Living With Fear,* 14.

regions. Sudan is located in northeastern Africa, sharing its northern border with Egypt, and also abutting Libya, Chad, Central African Republic, Ethiopia, Eritrea, and the Red Sea. Since South Sudan gained its independence in July of 2011, Sudan has shared its southern border with the new state.

Sudan has been called 'the one-city state,'[78] with the capital of Khartoum being its only one major and modernized city in a country of 34 million.[79] This is by design, a strategy for British colonizers, and its Sudanese successors, to control and manage their territory. Uneven development continues today, maintaining an urban "core of wealth and optimism surrounded by rings of extreme poverty, injustice and political exclusion"[80].

Sudan was first colonized by Egypt (then part of the Ottoman-Turk Empire) in the 1820s. The Egyptians were primarily interested in the territory as a source of slaves, but this faded as the British took a more active role in Egypt and, by extension, Sudan. While colonial control was still rather informal at this point, a Sudanese spiritual and nationalist leader called the Mahdi led a rebellion, which successfully expelled the British and Egyptian administration in 1885.

In 1898, however, the British brutally defeated the independent Sudanese state, and regained full colonial control. They added the Darfur region to the territory in 1916, in retaliation for the Sultan of Fur's support for Turkey during World War I. The British administered Sudan as a single-commodity economy, focused on the export of to Britain cotton (the independent Sudanese government would later do the same with oil). They also encouraged the preexisting regional and ethnic divisions as a way of preventing any

[78] Cockett, *Sudan,* 19.
[79] This does not include the population of South Sudan, which is now independent.
[80] Cockett, *Sudan,* 19.

unified opposition to their rule. As part of this, they sent Christian missionaries to the non-Muslim south, to divide the Sudanese and prevent the spread of Islam into their more Christianized colonies in Uganda and Kenya. Colonial and post-independence leaders also used underdevelopment, particularly with regard to education, as a method of subjugation and control.

Sudan became an independent nation in 1956. While this might have been an opportunity to recover from the inequality and underdevelopment created by colonial rule, such aspirations were quickly disappointed. As the country prepared for independence a number of political parties sprang up, all linked to ethnic groups, families, and religious sects. The intense competition between these factions weakened the new democratic system left by the British at independence, and "Sudan lapsed into a familiar cycle: unstable, democratically elected coalition governments become weak, chaotic and unworkable, only to be swept away by military-led coups," creating a dictatorship that was soon to "be overthrown a popular uprising that returned the country to democracy again".[81] Meanwhile, following the lead of the British colonists, all development focused on Khartoum, and the military served to protect this core of authority, amidst nearly constant tension and conflict between the urban center and rural regions.

In 1970, Jafar Numeiri and his communist movement replaced the ruling Umma party after a successful coup (with help from the Egyptian government). Once in power, Numeiri turned toward liberalism, and while brutally suppressing his political rivals, he ushered in a temporary period of relative peace and national unity. At the same time,

[81] Cockett, *Sudan*, 60.

however, the Muslim brotherhood was growing in influence. Fearing loss of his power, Numeiri brought the increasingly powerful group into his government and instituted Sharia law throughout the country. This led to a renewed civil war with the non-Muslim south, at the same time as famine in Darfur and economic collapse threatened the country. Numeiri lost his position in the mid-1980s to demonstrations and an eventual military coup and, in 1989, another military led by Omar al-Bashir, ushered in an Islamic Revolution and an intensified war with the Sudanese People's Liberation Army (SPLA) in the south.

As it tried to quell the rebellion in the South, Bashir's government faced growing resistance in Darfur. The region is populated by a mix of ethnic groups and, in recent decades has become particularly "divided with respect to race and tribal affiliation."[82] These divisions, along with "the context of famine", "the increasing availability of weapons," and "the rise of an Arab supremacist ideology"[83], formed the foundation for the conflict that began in 2003, when "constant, low-level violence suddenly erupted"[84] into a civil war between the government and government-supported *Janjaweed* militias on one side, and the Sudan Liberation Army and other smaller rebel movements on the other. The *Janjaweed* campaign against the non-Arab population of Darfur pre-dates the civil war, but with the rebellion, it became a government strategy for crushing resistance. *Janjaweed* and government forces would purposely attack "villages without a rebel presence"[85] instead of "targeting rebel strongholds in the mountains."[86]

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[82] Eckert, "The Cosmopolitan Test," 207.
[83] Ibid. 208.
[84] Kastner, "The ICC in Darfur," 7.
[85] Eckert, "The Cosmopolitan Test," 209.
[86] Ibid.

The government's support for these attacks is clear both from their participation and the lack of accountability for the perpetrators. Government forces and *Janjaweed* often work and fight together, and the Sudanese Air Force sometimes supports *Janjaweed* attacks.[87] Human Rights Watch reports that the government and *Janjaweed* crimes include, "the targeted killing, summary execution and rape of thousands of civilians, the destruction of hundreds of villages, the theft of millions of livestock and the forced displacement of more than two million people in Darfur."[88] The scale of the violence is so great that, in 2005, UN official Jan Egeland "estimated that 10,000 people were dying each month."[89]

The international community has been shockingly slow in their reaction to the Darfur crisis, partially because the international dynamics were already very complicated in Sudan. For one thing, China is heavily involved in Sudan, as both an oil exporter and a development partner. Less nefariously, the violence is Darfur increased "at the same time as the negotiations between the North and the South came to an important point, with all eyes of the international community fixed on the peace talks"[90] The net result, however, was an international apathy which enabled "climate of impunity" that, "has encouraged government-backed … abuses."[91]

Eventually, the African Union and the United Nations both sent peacekeeping forces to Darfur, but they have been hampered by the Sudanese government and

[87] Eckert, "The Cosmopolitan Test," 210.
[88] Human Rights Watch, "Lack of Conviction," 3.
[89] Eckert, "The Cosmopolitan Test," 210.
[90] Kastner, "The ICC in Darfur," 8.
[91] Human Rights Watch, 4.

notoriously ineffective. In fact, "the only stringent collective measure was the referral of the situation to the ICC by the Security Council on March 31, 2005"[92].

[92] Kastner, "The ICC in Darfur," 2.

Chapter Four: The Case Studies

There are three ways for the ICC to open an investigation into a new case. The first is when a state party refers the situation to the Court, the second is when UN Security Council recommends the situation to the Court, and the third is a when the ICC's Prosecutor begins an investigation into a situation over which the Court has jurisdiction on his own initiative (with approval from the judges of the pre-trial chamber). State referrals are the most common, and initiated the investigations in Uganda, the Democratic Republic of Congo, and Central African Republic. The cases in Sudan and Libya were both referred to the Court by the Security Council, and the Prosecutor began his own investigations in Kenya and Cote d'Ivoire.

Once the case has been referred to the Court and taken up by the Prosecutor, the Office of the Prosecutor (OTP)'s investigative teams are charged with evidence-gathering for the particular situation. These teams are based in The Hague, but carry out frequent field missions to collect evidence. Human Rights Watch's "research in the DRC, Uganda, and Chad revealed that the work of ICC investigators was generally well regarded" and that researchers where "professional" and "concerned with witness confidentiality and safety".[93] However, Human Rights Watch also reported that the ICC was severely short of investigators, and that

> the absence of its own police force means that ICC officials … must rely on state officials and other actors … for assistance in conducting investigations. This includes locating potential witnesses and providing security. Although necessary, this reliance carries significant disadvantages for the ICC's credibility.[94]

[93] Human Rights Watch, "Courting History," 55.
[94] Ibid. 57.

Self-Referral: Uganda and Congo

Both the Ugandan and Congolese governments choose to self-refer situations of internal conflict to the ICC. While impunity for horrible atrocities is a significant problem in the conflict-stricken regions of both countries, it is likely that the referring presidents were motivated by more pragmatic concerns. For both Congo's President Kabila and Uganda's President Museveni, the rebel groups in the regions in question pose threats to their regimes. Although neither the LRA nor Congo's various militias threaten to topple the national governments, they are continued destabilizing influences as well as potential allies for more serious opponents.

In addition, both leaders were aware that the ICC's Prosecutor, Luis Moreno-Ocampo, was interested in the situations *before* receiving their referrals. By referring their cases themselves and assisting the ICC investigations at an early stage in the Court's development, when the ICC was eager to show results, they probably hoped to direct the investigation and remain in the Prosecutor's good graces. Thus, they could use warrants and trials to demonize their opponents and avoid censure for crimes that they may be responsible for. In both cases, it seems that the government has achieved its goal – all of the warrants to date have been for rebels, not members of the government or national military.

Uganda

Predating the ICC's involvement in Uganda, a concentrated effort on the part of local civil and religious leaders, as well other peace activists, to establish peace talks between the LRA and the government began in the 1990s and continued into the next decade. These activists were responsible in large part for Uganda's national Amnesty

Law[95] and, in conjunction with South Sudanese leaders, for instigating the Juba Peace Talks that ran from 2006 to 2008.[96] The ICC, therefore, began its investigation in the midst of these ongoing efforts to reach a peace settlement between the warring parties.

President Museveni referred the situation to the ICC in 2003, and the decision was announced in 2004. Many commentators believe that Prosecutor Luis Moreno-Ocampo had sought out the referral at a time when "The ICC had much to prove", and expected the LRA case to be "a relatively simple case to start with, one that would help to establish the court's credentials"[97] without raising too many complications. The main perpetrators were rebels from group with little international or domestic or clout. The choice of defendants (all from the LRA and none from the Ugandan government or military) appears to have been "based … in part on the gravity of crimes committed but also on a desire to avoid prosecuting government officials, upon whom it relies heavily for security and evidence during ongoing conflict."[98] The Prosecutor, it seems, believed that the culprits in Uganda would be easy to isolate and bring to justice, and that this could be an early success that would set an important precedent for the ICC's future.

Perhaps for this reason, the Court set out with "an expansive … to prosecute the top commanders of the LRA and claiming that in doing so, it could help deliver peace."[99] Local cultural and religious leaders and NGO officials immediately challenged this ambitious aspiration. In particular, they criticized the timing of the investigation and, particularly of the warrants. These were unsealed in 2005, just before the Juba Peace

[95] Grants immunity from prosecution to surrendered rebels.
[96] Allen, *Trial Justice,* 78.
[97] Ibid. 82.
[98] Clark "Law, Politics and Pragmatism," 43.
[99] Ibid. 42.

Talks began in 2006. These leaders also questioned whether the prosecution and imprisonment of top leaders (if even possible) would really address the roots of the conflict and help to resolve it. They worried that "attempts to arrest the LRA leadership in the absence of any peace agreement may translate into, even justify, an increased military offensive by the government of Uganda, which the LRA are likely to respond to with more violence against citizens."[100] Thus, local stakeholders felt that their voices and efforts had been overlooked, and that for all its good intentions, the ICC's involvement was likely to perpetuate the conflict. In short, they argued that the people of Northern Uganda would bear the costs of this international experiment.

This unexpected "antipathy in Uganda from the very organizations that it hoped to work with on the ground"[101] made the Office of the Prosecutor (OTP)'s investigation more difficult that it had initially expected. It also made the OTP even more reliant on the Ugandan government for support and assistance. The ICC was already dependent on national authorities because of the Court's setup, particularly at a time when US antipathy toward the Court meant that there would be no backing from the UN. While the referral and support from the Ugandan state was useful for the ICC, it also created a perception of bias. The central problem is that the Court is, in a sense, "acting on behalf of the Ugandan state, even though the Ugandan government is itself involved in the conflict."[102] While the military and government's actions should not be compared to those of the LRA, they have also been accused of war crimes. In particular, the government decision to forcibly move almost the entire population of the Acholi region into Internally Displaced Persons

[100] Allen, *Trial Justice,* 84.
[101] Ibid. 87.
[102] Ibid. 91.

(IDP) Camps, ostensibly for their protection from the LRA and subsequent failure to provide protection, is seen by some as a deliberate attack on the Acholi as a group. These charges are either impossible to prove or occurred before 2002 (then the ICC's jurisdiction begins), but this failure still creates a strong impression of bias and makes it difficult for the ICC to maintain its independence.

It is also problematic that the Court has supposedly "been requested to deal with crimes that are beyond the capacities of the Ugandan judicial system," when "The Ugandan judiciary – one of the most proficient and robust in Africa – is unquestionably able and willing to prosecute serious cases such as those involving the LRA."[103] Since the main problem regarding the LRA was, and remains, that it seemingly cannot be defeated and captured, and the ICC cannot deploy any troops to do so, the ICC really has no more ability to dispense justice than the Ugandan courts. Therefore, the Court has, in a way, "opened the case in northern Uganda on grounds for which it is not adequately equipped to respond."[104]

Democratic Republic of Congo

Congo's President Kabila referred his country's situation to the ICC's Prosecutor in 2004. His decision is widely considered "an effort to head off the ICC's initiative to launch its own investigation into the situation".[105] While many, both inside and outside the country, saw the Court's involvement as a positive step for addressing impunity in Congo, there were many challenges from the outset, and these demonstrate a clear

[103] Clark "Law, Politics and Pragmatism," 43.
[104] Ibid. 43.
[105] Leonard and Roach, "From Realism to Legalization," 64.

tension between the ideals of justice and the pragmatic realities of prosecuting during an on-going conflict.

As in Uganda, the ICC's reliance on the Congolese government is unavoidable but problematic, and, as in Uganda, it is unable to investigate the many crimes that predate its inception in 2002. Similarly, the Kabila government's reasons for cooperating with the Court are reminiscent of those of the Ugandan government – to demonize their enemies and allow the international community to bear the cost of a complicated legal case. The Congo situation, as the only one that has, as yet, yielded any arrests or trials, is undeniably a valuable opportunity for the Court to prove itself. To some extent, the ICC 'owes' this opportunity to the Congolese government's referral, and that undermines the Court's ability to pursue a truly independent prosecution. The ICC is obviously highly unlikely to prosecute members of the Congolese government or national military for crimes they may have committed. Further, the Court has no way of addressing the possible crimes of members of the Rwandan and Ugandan governments and armies whose support for militias and involvement in Congo lies at the root of the conflict. Thus, the ICC's ability to provide genuine accountability and address the key underlying causes of conflict is quite limited.

Pragmatic calculation on the part of the OTP is evident in its selective investigation in Congo. While atrocities have occurred in both Ituri and the North and South Kivu regions, the investigation initially focused exclusively on Ituri,[106] and there was no warrant issued relating to the violence in the Kivus until 2010.[107] Focusing on the

[106] Vinck et al. *Living With Fear,* 14.
[107] A warrant was issued for Callixte Mbarushimana on September 28, 2010, but the case was dismissed on December 16, 2011 and he was released on December 23.

region with less instances of government culpability allows the ICC to steer clear of that complication, and helps "to maintain good working relations with the Congolese government in order to facilitate ICC investigations during ongoing conflict."[108]

In investigating and planning its case, the Office of the Prosecutor must exploit its limited resources, and choose the charges based on the severity of the crimes, but also on consistent patterns and winnable cases.[109] Like any ordinary domestic prosecution, the ICC prosecutions of crimes occurring during conflicts must still be based on the evidence admissible in Court. In situations like eastern Congo, however, this evidence is much more difficult to collect, and the process is not always conducive to creating a complete picture of the conflict. Not all crimes that take place during a civil war can realistically be proven to the standard of legal proof, so some will inevitably go unpunished. The OTP's careful scrutiny of available evidence and selection of winnable cases is pragmatic but, according to Human Rights, another key element is missing from this calculus: "crimes that are most representative of victimization."[110] Based on the warrants that have come out of these investigations so far, not all groups involved in the Congo conflict will have their grievances and victimization addressed equally. Because the choice of charges and defendants is not representative of the conflict as a whole, the ICC cases risk exacerbating existing tensions.

The issue first arose in the investigation of Thomas Lubanga Dyilo, leader of the Union of Congolese Patriots (UPC) rebel militia and the first defendant ever to be tried before the ICC. The warrant for his arrest was rushed so that he could be transferred to

[108] Clark, "Law, Politics and Pragmatism," 42.
[109] Human Rights Watch, "Courting History," 62.
[110] Ibid.

the Court in The Hague before the government of DRC released him and so that, after two years of investigations, the OTP could finally bring the ICC's first case into the courtroom.[111] For these reasons, the Court did not indict Lubanga for all of his many alleged crimes, but only for using child soldiers, which was the easiest to prove with the available evidence. While this strategy was pragmatic and effective on the legal level, it was also controversial given local circumstances. For one thing, the local population does not consider the use of child soldiers the worst of Lubanga's crimes and, for another, it is a crime committed against his own ethnic group – the Hema – not against the Lendu, who consider themselves as his primary victims.

This selective prosecution became even more problematic as OTP continued its investigation, expanding it to the Nationalist and Integrationist Front (FNI) and the Front for Patriotic Resistance in Ituri (FRPI), rival militias of Lubanga's UPC that draw from the Lendu ethnic group. The investigations into the leaders of these groups – Germain Katanga (FRPI) and Mathieu Ngunjolo Chui (FNI) – yielded much more comprehensive charges. This particular mismatch of charges is potentially very damaging because it "feeds the historic narrative of Hema superiority by portraying Lendu as more brutal."[112] Thus, incomplete justice may actually exacerbate the conflict rather than encourage a future built on peace and justice.

UN Security Council Referral: Darfur

The Darfur case is another landmark for the ICC: its first case to be referred to the Prosecutor by the UN Security. In this case, it was obvious that a referral from the

[111] Human Rights Watch, "Courting History," 63.
[112] Ibid. 65.

Sudanese government was not forthcoming. While the Congolese and Ugandan governments have uncomfortable but arguably tenuous ties to crimes, the Sudanese government is quite clearly responsible for them. Thus, while the aforementioned governments have sought to manage the ICC, Sudan's government has instead sought to exclude and discredit it.

The international response to the Darfur was very slow, primarily because their humanitarian efforts were focused on the peace talks over the earlier civil war between the northern and southern regions of Sudan.[113] Distracted by these negotiations, "Western governments and leaders…were praising themselves for solving the civil war, while Darfur had to wait for attention."[114] Russian and Chinese economic ties to the country also hampered any international efforts. In September of 2004, however, the Security Council issued Resolution 1564, establishing the International Commission of Inquiry on Darfur to investigate alleged crimes and recommend a course to ensure accountability. The Commission issued its report in January of 2005, informing the Security Council, not only that crimes against humanity had taken place, but also that most of the systemic crimes committed in Darfur "were perpetrated by the Government forces and the Janjaweed in a climate of total impunity and even encouragement to commit serious crimes against a selected part of the civilian populations."[115] It therefore advised, "the ICC is the only credible way of bringing alleged perpetrators to justice."[116] Based on this information and recommendation, the Security Council referred the situation in Darfur to the Prosecutor with Resolution 1593 on March 31, 2005.

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[113] These talks resulted in a referendum and the creation of the new state of South Sudan in 2011.
[114] Kastner, "The ICC in Darfur," 149.
[115] International Commission of Inquiry on Darfur to the United Nations Secretary-General, 159.
[116] Ibid. 146.

This referral was itself a surprise and an accomplishment for the ICC. China and the US (both permanent members of the Security Council) are both outspoken opponents of the Court, and the Russian and Chinese governments both have military arms contracts with the Sudanese. A remarkable achievement, the "activation of the ICC through the Security Council can be regarded as the first and, besides the more recent efforts to deploy a joint U.N.-AU peacekeeping mission, only major reaction of the international community to the Darfur crisis."[117] Without being combined with more concerted efforts, however, it can easily be seen as a token gesture in the absence of more substantive action. In addition, efforts to prosecute crimes are no substitute for prevention, and the Security Council's referral might be seen as an excuse to avoid more concrete steps.

The ICC Prosecutor announced the beginning of an investigation into the situation in Darfur on June 6, 2005. This investigation posed new challenges for the Court, because, "While the three referring states pledged their full cooperation with the ICC, Sudan from the onset challenged the jurisdiction of the ICC on grounds of complementarity and sought to undermine it."[118] During the investigation stage, Sudan did ostensibly cooperate with the ICC, but this "appeared calculated to pre-empt the ICC proceedings and defeat them on technical grounds."[119]

On June 7, Sudan created a Special National Criminal Court on the Events in Darfur (SCCED), which Sudanese leaders explicitly stated, "was 'considered a substitute to the International Criminal Court'."[120] The Khartoum government hoped that the SCCED would disqualify the ICC's jurisdiction, especially because, unlike the Ugandan

[117] Kastner, "The ICC in Darfur," 164.
[118] Baldo, "The Impact of the ICC," 2.
[119] Ibid.
[120] Human Rights Watch, 8.

or Congolese governments, the Sudanese government's ties to crimes were such that it "had reason to fear that even cases brought against mid-level government officials and members of the government-supported Janjaweed militia could implicate senior leaders, including President al-Bashir himself."[121] They, therefore, did not consider cooperation and management an option, and instead appealed to Article 17 of the Rome Statute, which states that a case is inadmissible if it "is being investigated or prosecuted by a State which has jurisdiction over it, unless the State is unwilling or unable genuinely to carry out the investigation or prosecution".[122] Thus, the government hoped that "Moreno-Ocampo's admissibility probe" would "conclude that domestic courts in Sudan should retain the authority to prosecute war crimes suspects"[123]. This calculated cooperation was completely reversed as soon as this strategy failed and Court issued its first warrants.

The problem with this tactic was that the domestic judicial system, including the SCCED, was manifestly "unwilling to truly investigate most of the militia leaders and those members of the GoS [Government of Sudan] who bear individual responsibility for the atrocities committed in Darfur."[124] Indeed, rather than demonstrating the competence and will to try these cases domestically, the SCCED has instead shown even more clearly that the domestic judicial system is in fact unable or unwilling to try these cases.

During this investigation phase, there was hope that the ICC could prove a catalyst for improvement of the situation in Darfur, particularly because the ICC began its work when there was no peace process in place. At this point, the government in Khartoum was clearly apprehensive about the ICC, and while it was always "unlikely that

[121] Peskin, "The International Criminal Court, the Security Council, and the Politics," 306.
[122] Rome Statute, Article 17.
[123] Peskin, "The International Criminal Court, the Security Council, and the Politics," 306.
[124] Ibid.

those most responsible for the crimes committed in Darfur" could " be incapacitated by ICC indictments",[125] many hoped that the threat of prosecution would induce them to change their behavior and provide an incentive to negotiate peace before warrants were issued. Another hoped-for possibility was that the stigma might "influence … elections in 2009, thus forcing Khartoum to change its Darfur policy",[126] or that the ICC might be a catalyst "to make the international community exercise more coherent pressure on the key players of the conflict to stop violence and negotiate an agreement".[127] Unfortunately, none of the optimistic predictions have proved accurate.

Instead of working to improve its record, deal with past crimes, and mollify the ICC, however, a defiant Sudanese government tried first to disqualify and then to discredit the Court. It aimed to make the debate about the Court rather than the crimes. Al-Bashir's government argued, first, "that the ICC prosecutor has no legal right to prosecute Sudanese citizens and that the prerogative belongs exclusively to the Sudanese courts," and second, that the ICC is a form of neocolonialism. By referring to the Court as a Western institution bent on enforcing its norms on African leaders, Sudan hoped to frustrate its investigation and appeal to allies from the continent and the Arab League to support it in the face of ICC warrants.

Unexecutable Warrants: Uganda and Sudan

In both Uganda and Sudan, none of those wanted by the ICC have been arrested or seem likely to be in the foreseeable future. The reasons for this are quite

[125] Kastner, "The ICC in Darfur," 20.
[126] Ibid.
[127] Ibid. 15.

different in each country. In Sudan, this is because those wanted are members of the government; while in Uganda, it is because the wanted rebel leaders continue to elude capture. Despite these differences, in both cases, previous attempts to find negotiated solutions had already failed and the situations were already complicated and untenable. So, the question is: does the presence of these somewhat impotent warrants change this? If so, for better or worse?

Additionally, the ICC's jurisdiction is admissible only when the state government is unable or unwilling to exercise its own jurisdiction, but if the government is unable to pursue the case, as in Uganda, or unwilling, as in Sudan, how can the ICC get the support it needs to carry out its mandate? These cases demonstrate the seeming paradox that if the ICC's jurisdiction is admissible, it is impossible to exercise.

Uganda

The ICC issued its first warrants in 2005, for Joseph Kony and four other LRA commanders: Vincent Otti, Okot Odhiambo, Dominic Ongwen, and Raska Lukwiya. While these warrants are certainly significant, they have not accomplished their goal of arresting the suspects and bringing them to trial. Kony, Odhiambo, and Ongwen are still at large, while Otti and Lukwiya are now dead. This failure highlights what one commentator called the "Achilles heel"[128] of the ICC: without any real enforcement mechanism, it may claim the authority to "compel state cooperation",[129] but is actually powerless to ensure that its decisions are upheld. As one Ugandan politician explained, the ineffectiveness of these warrants have made many within the country question the

[128] Jalloh, "Regionalizing International Criminal Law?" 452.
[129] Ibid.

purpose of the Court; in their view " 'it's like the ICC behaves like a toothless dog, barking and barking and barking, and not biting.' In other words, some people were saying, 'instead of really barking and barking, why don't you give us time to find a better solution?"[130]

This question raises another: how can an institution so dependent on local support fill in the gaps of local inability to prosecute? In Uganda, "The failure of any domestic or international party to capture and arrest the LRA leadership undermines the legitimacy of the ICC in the eyes of a Ugandan population that is already skeptical of the Court's apparent refusal to address government criminality."[131] The problem of arresting Kony and the others obviously predates the ICC, and indeed if they could be captured or killed the conflict would likely be over. Instead, their continued elusiveness is what has perpetuated the conflict for over twenty years. It is this that apparently necessitated the involvement of the ICC, even though the Ugandan government is probably willing and able to prosecute the LRA. The inability to arrest is obviously a serious problem, but one than the ICC is even *less* competent to solve.

These warrants, however, are not a complete failure. Despite the fact that they have not been executed, they have undoubtedly changed the landscape. They reportedly helped to reduce the number of atrocities committed by both sides of the conflict, because both government troops and lower-level LRA commanders feared being added to the list of suspects. It also helped to discourage support for the LRA from the Sudanese government, which stopped funding and arming the group once the warrants were issued. All this is widely believed to have played an important role in pushing the LRA into

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[130] Ojara Martin Mapenduzi (Gulu District Chairman), in discussion with the author, April 19, 2011.
[131] Clark "Law, Politics and Pragmatism," 43.

peace talks. [132] While it was hardly the only factor, there is evidence that the IC was an important threat to the LRA and forced them to agree to participate in the Juba Talks.

At the same time, actors on the ground in northern Uganda worried about the effect, and in particular the timing, of the warrants on the peace talks after they commenced. As a northern Ugandan bishop explained, a "peace talk demands a lot of confidence",[133] and activists feared that the ICC's involvement would shatter what little confidence the LRA had in their opponents and make any peace settlement impossible. Indeed, one local leader opined, "most of the people who were really pursuing the peace process … felt that ICC proved an obstacle for the top leaders to be directly involved in the peace talk"[134] and created gave Kony a tool, an "excuse … for preventing the peace agreement to be signed."[135]

Nonetheless, it is important to remember that Kony's intentions and reliability have always been highly suspect, and it is doubtful that he would have agreed to peace even in the absence of the ICC. In fact, the LRA used the truce to rearm and enhance their military position, and if the Ugandan government had truly wanted to prioritize peace there is no reason they could not have flouted the ICC to protect Kony. Supporters of the ICC rightly point out that Kony has attempted to blame problems in the negotiations on the ICC in order to distract from his own responsibility. ICC spokeswoman Maria Kamara objected to this, saying, "You cannot use the ICC arrest warrant as a bargaining chip for peace, because these are two different mechanisms in one sense, and in another sense the have to work hand in hand at the end of the day to

[132] Human Rights Watch, "Courting History," 67.
[133] John Baptist Odama (Catholic Archbishop of Gulu), in discussion with the author, May 8, 2011.
[134] Ibid.
[135] Ibid.

achieve permanent and sustainable peace."[136] Nonetheless, both the Ugandan government and Kony *have* used the ICC as a 'bargaining chip,' and the issue of compromise is clearly a problem for the ICC, as it is for many transitional justice efforts. It would be unjust to allow Kony and the others responsible for terrible crimes against humanity to simple return home to live among their victim. At the same time, it would also be terribly unjust to allow the conflict to continue out of unwillingness to compromise. The ICC must make sure that, in trying to deliver both peace and justice, they do not "miss both".[137]

It is important, however, not to put too much of the blame for the failure of the Juba Talks on the ICC. As a former LRA victim and ICC spokesman pointed out,

> many peace processes were conducted in northern Uganda before the creation of ICC … many people argue that the most successful peace process was this Juba Peace Process, with the presence of ICC, because the people went there knowing that somehow something is watching them.[138]

It is also important to remember that in spite of the failure of the peace process, it did contribute "to increased stability in northern Uganda"[139] and "brought on the table of the peace discussions the issues of accountability and justice at the national level."[140]

Another serious issue that has emerged is the local perception that the ICC was allied with or a tool of the Ugandan government. While the national Army, the Ugandan People's Defense Force (UPDF), is responsible for relatively little violence compared to

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[136] Maria Mabinty Kamara (ICC Field Outreach Coordinator for Uganda), in conversation with the author, April 14, 2011.
[137] Okema Santo (Ker Kwaro Acholi Program Coordinator), in conversation with the author, April 22, 2011.
[138] Jimmy Otim (ICC Field Public Outreach Assistant, Registry of the ICC), in conversation with the author, April 27, 2011.
[139] Human Rights Watch, "Courting History," 67.
[140] Maria Mabinty Kamara (ICC Field Outreach Coordinator for Uganda), in conversation with the author, April 14, 2011.

the LRA[141], they bear as much or even more blame in the eyes of some of the Acholi people and many local leaders. A possible reason for this is that the LRA perpetrators, unlike the government or the UPDF, come from their own ethnic group and are still seen as members of the community despite their crimes. On the part of the leaders, there may also be a sense of guilt for failing to prevent such horrible division and violence within their community.[142] By advocating communal reconciliation, they hope to repair damage they feel partly responsible for. Reconciliation is also attractive because this conflict was characterized by constant abductions, making the line between the victims and perpetrators very blurry. Finally, the UPDF is widely resented not only for particular crimes, but also for the internment of civilians in IDP camps and their failure to protect those camps from the LRA.

This, however, should not diminish the importance of equitable justice. The crimes of the UPDF may not amount to the same magnitude as those of the LRA, but this does not excuse ignoring them. The problem for the ICC is both politics and the timeframe of the alleged crimes. The abuses committed by the UPDF, generally, took place before 2002, which means that the ICC has no jurisdiction. In addition, the government's decision to force migration to IDP Camps and the UPDF's failure to protect the population would only be criminal if the OTP could prove malicious intent on the part of their leaders. Thus, while the case against the LRA is fairly straightforward,

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[141] A survey conducted throughout northern Uganda found that 4.4% of their respondents had had family members killed by the UPDF, compared with 85% who lost family members overall – indicating that 80% of these deaths can be attributed to the LRA. Yet this same survey found that around 40% felt that the government should be held accountable, remarkably close to the 50% who felt that the LRA should be held accountable. (Pham, Phuong et al. *When the War Ends,* 33).

[142] For example, Archbishop Odama, one of the leaders of the ARLPI, reportedly "offered a public apology to the children of the north on behalf of Ugandan society and institutions … 'I feel I could have done more, but because [the war's end] has not happened, forgive me.'" (Eichstaedt, *First Kill Your Family,* 172-173).

any case against the government (even disregarding the political complications) would be almost impossible to prove. This means that the ICC cannot really investigate "the situation of northern Uganda in its totality"[143], or address the root causes of the conflict.[144] With these limitations, the ICC's ability to bring genuine justice is questionable.

One thing that unites Ugandans of all opinions is the belief that justice, diversely defined, is essential for the recovery of the community and their country. Even those who oppose the ICC reject the simplified 'peace versus justice' dichotomy. As Bishop Ochola said, "Peace and justice are the same thing. … We don't say, 'I need peace without justice' or 'I need justice without peace.'"[145] He and others feel that their scarred society desperately needs both.

Sudan

The reasons for the lack of arrests in Sudan are quite different from those in Uganda. As in the other case, however, this one raises questions about the ICC's ability to carry out its mandate. On February 27, 2007, the ICC issued its first two warrants for the case in Darfur: for Ahmad Muhammad Harun, the former Minister of the Interior and current Minister of Humanitarian Affairs, and Ali Muhammad Ali Abd-Al-Rahman, an alleged leader of a *Janjaweed* militia. Another warrant followed in 2008 for President Omar Hassan Ahmad Al Bashir, and three warrants for rebel leaders Bahar Idriss Abu Garda, Abdallah Banda Abakaer Nourain, and Saleh Mohammed Jerbo Jamus were issued in 2009 and 2010.

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[143] Macleord Baker Ochola (Anglican Bishop of Kitgum), in discussion with the author, April 25, 2011.
[144] Ibid.
[145] Ibid.

The government's previously limited cooperation, or rather toleration, of the ICC ended entirely with the first warrants. Bashir's government called the Court's decision neocolonialism[146] and pledged not to hand over any Sudanese citizens for trial in The Hague. The warrants were "immediately used … as a pretext for expelling thirteen major international humanitarian organizations from Darfur and from other highly distressed regions of northern Sudan",[147] with immediate and catastrophic humanitarian consequences. Should the ICC be blamed for this? It is probable that the government was simply able to use the warrants as an excuse to remove "troubling international 'eyes on the ground,' which had served as a … deterrent to attacks on civilians."[148]

This is a stark example of the critical problem for the ICC in Darfur and elsewhere – without meaningful international or domestic support, the ICC's decisions are purely symbolic, while retaliation by perpetrators has immediate consequences. The Court has "no police powers and no means of apprehending those indicted, it has no way of protecting those who might be endangered in the wake of an indictment."[149] In effect, if the warrants make no progress toward removing perpetrators form their positions of power, while it has put victims and witnesses at risk, there does not seem to be much point.

While international assistance could theoretically make up for this, lack of meaningful support has been a persistence problem for both the Darfur conflict and the ICC. Although the initial referral was a heartening step, the UN Security "Council's lack of clear and consistent policy with respect to prosecutions for international crimes in

[146] Rice, "Sudanese President Bashir charged with war crimes."
[147] Reeves, 13.
[148] Ibid. 14.
[149] Ibid. 16.

Darfur is detrimental to the ICC's legitimacy"[150] in the long-term. Without such a policy, it is difficult to see how the ICC can possibly overcome the resistance of Sudan's government to have its desired impact.

This is particularly true because, in the absence of strong international leadership from the Security Council, Sudan has been quite successful in rallying regional support for its view. The government has argued that the ICC warrants are a breach of its sovereignty and a barrier to peace and has sought support from the African Union and the Arab League by characterizing the ICC as neocolonialism and Western justice. This argument, of course, resonates with resentment towards the 'dark continent' stereotype of African bad governance and underdevelopment. Indeed, "The *al-Bashir* case has also brought to the fore the mounting opposition to the prosecution of African leaders for international crimes." [151]

The African Union, for example, has called for the Security Council to defer proceedings and issued a report, stating that prosecution might exacerbate the current conflict, which they felt "may not be in the interest of the victims and justice".[152] Such thinking from Sudan's allies raises the question: with warrants issued, and unlikely to be suspended, rescinded, or executed, what is next for Darfur and the ICC? The application for warrant for Bashir

> triggered an extensive debate about the ostensible tension between the exercise of judicial functions and the search for political solutions to end the Darfur conflict…. There were concerns that the arrest warrant against al-Bashir may make the peace process more difficult and adversely impact on political stability.

[150] Oette, "Peace and Justice, or Neither," 7.
[151] Ibid. 1.
[152] Jalloh, "Regionalizing International Criminal Law?" 465.

> However, the political situation in Sudan was already fragile and prone to recurring outbreaks of violence[153].

Now that warrants have been issued, there is little incentive for those wanted by the Court to change their behavior, negotiate, or give up power. Thus, the ICC may actually be giving them an even greater interest in winning the war and maintaining their power at all costs.[154] Although there was no peace process in place or forthcoming, the warrants allow Khartoum to portray as the primary barrier to peace, and "make the ICC a bargaining chip in future peace negotiations",[155] just as the Ugandan government and the LRA have done.

While these many issues are frustrating and demonstrate the crippling limitations of the ICC, other analyses put them in a larger perspective:

> The arrest warrant against al-Bashir has not brought peace or justice. At the same time, the warrant has not led to a dramatic worsening of the situation to date either, at least not in Darfur itself. While the initial fallout has been damaging for the ICC, it has accelerated the ongoing debate about the exercise of international criminal justice, particularly in Africa.[156]

Where this debate will lead, however is still uncertain, and while the potential for international justice to encourage change remains, the Darfur case, much like Uganda and Congo, also gives a clear picture of the Court's weaknesses. Most importantly, in this case, the Court cannot achieve its actual goal of subjecting perpetrators to trial. While the Court may be choosing cases that reflect the nature of the conflict better here than in Congo or Uganda, this lack of bias means that the ICC has alienated a necessary means of support.

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[153] Oette, "Peace and Justice, or Neither?" 2-3.
[154] Kastner, "The ICC in Darfur," 16.
[155] Ibid.
[156] Oette, "Peace and Justice, or Neither?" 9.

The statist institutional structure of the ICC does not seem strong enough to accomplish its goals in the face of such robust opposition from the state in which it is operating and without meaningful action on the part of the international community. On its own the ICC does not have the resources to make a significant impact without either government support or serious international engagement, and so its impotent warrants simply leave the whole issue unresolved.

Arrests and Trials: Congo

The Congo situation is unique among the ICC's cases, because it is the only one in which there have been any trial to date. These trials, however, have had little more impact on events on the ground than its warrants in Uganda and Sudan. In spite of arrests, trials, and one conviction, the plethora of actors and militias in Eastern Congo make peace especially elusive, and while the arrests and trials in the Hague are symbolically important, they are hardly a complete solution or comprehensive justice.

In March of 2006, the DRC government surrendered Thomas Lubanga Dyilo to the ICC. Despite the fact that, "Lubanga's UPC militia committed a range of horrific crimes, including murder, torture and rape, the ICC has only convicted him of the war crime of enlisting and conscripting children".[157] As mentioned earlier, this is problematic both because it ignores Lubanga's other crimes and because of the disparity between these charges and those against other defendants. The issue of picking a single crime from the extraordinary amount of violence that occurred during the conflict is also pragmatic from the legal point of view, but inexplicable for those many of those who experienced the conflict first hand.

[157] Human Rights Watch, "Courting History," 62.

The technical legal issues that have threatened this first trial further demonstrate the difficulty of subjecting such a complicated situation to a legal process. The most significant of these issues came up just before the beginning of the trial, when it came to light that the OTP had failed to turn over exculpatory evidence to the defense. Proceedings were suspended and Lubanga was almost released. The evidence in question came from organizations working in Congo and was given under confidentiality agreement. The OTP had endeavored to comply with this agreement, but the Court considered this a violation of Lubanga's right to a fair trial.

Collecting evidence during a conflict, as this incident highlights, presents a unique challenge because it is so difficult to ensure the safety of individual witnesses and organizations providing evidence, while at the same time ensuring the rights of the accused. Indeed, while during the investigation stage it is possible to protect the anonymity of witnesses and other sources of information such as NGOs and UN agencies, this can pose a serious challenge when the process moves on the trial phrase and the prosecution must share evidence with the defense. This may mean exposing vulnerable people and organizations to possible retaliation from a defendant's militant groups, without any security forces to protect them.

The two other Congolese defendants who have been brought to trial are Germain Katanga and Mathieu Ngudjolo Chui, both of whom leaders of Lendu-affiliated militia groups: the Front for Patriotic Resistance in Ituri (FRPI) and the Nationalist and Integrationist Front (FNI) respectively. They were transferred to the ICC in 2007 and 2008, and their joint trial began in November of 2009. Both defendants are accused of murder, rape, sexual enslavement, using child soldiers, pillaging, destroying property,

and attacking civilians. A large part of the case centers on a joint attack committed by the two militias against the village of Bogoro.

The difference between these charges against Katanga and Chui and against Lubanga is striking, and damaging for the ICC reputation of impartiality in the Ituri region. Given the origins of the conflict, the appearance of bias could "exacerbate ethnic tensions in Ituri … increasing security risks for witnesses and OTP staff in the field"[158]. By unevenly charging Hema and Lendu militia leaders, the prosecutor has created an impression of favoritism. In addition, even if the charges were even, these three men are hardly the only perpetrators in Ituri. With so many still free, and even returned to their communities or integrated into the Congolese army, the ICC's promise of accountability can look rather hollow.

The politics of the ICC's war crimes trials go beyond the ethnic tensions in Ituri. For one thing, despite the "recent decision by the ICC's Pre-Trial Chamber characterizing the conflict in the DRC as being of an international nature,"[159] there has been little discussion or investigation into the culpability of the neighboring countries involved in aiding the various militia groups. Prosecuting militia leaders is an important step, but they are not the only guilty ones, and no one from the government has been punished. After all, "President Joseph Kabila has been happy to turn over for trial a few politically dispensable people, such as Lubanga, but be is unlikely to ever turn over those of his cabinet ministers who have equally bloody hands."[160] The same is obviously true in Uganda and Rwanda, and as long as the actions of Congolese, Rwandan, and Ugandan

[158] Human Rights Watch, "Courting History," 52.
[159] Baldo, ""The Impact of the ICC," 5.
[160] Hochschild, "The Trial of Thomas Lubanga," 82.

government officials are strategically ignored, the ICC is a long way from its promise of ending impunity.

It is not only members of governments who have been able to escape prosecution: rebel leaders who have compromised with the state are also been protected. The most notable of these is Bosco Ntaganda, a former rebel who is now the army general in charge of the government's troops in Eastern Congo. He continues to operate freely despite the ICC warrant for his arrest. His case demonstrates the limits of the Congo government's cooperation – they are glad to use the ICC to get rebels out of the country, but are unwilling to hand over useful allies.

The ICC, however, has also had a positive influence. There is evidence that the warrants have frightened fighters in Congo. For example, Human Rights Watch reported that some militia "commanders warned their troops to refrain from attacking civilians" after the arrests.[161] There has also been an increased awareness in Congo of the unacceptability of recruiting child soldiers. Sadly, many families willingly gave their children to militia groups, but the ICC arrests seem to have curbed this. Indeed, "child protection agencies admitted that the Lubanga case seems to have reached out to families in the region much more effectively than years of their own campaigning."[162]

For all its limitations, the ICC's promise (or threat) of accountability is having at least some impact in Eastern Congo. This small step toward changing the status quo is its greatest accomplishment, but the ICC's inability to carry this through completely is its greatest weakness. As one local leader explained, "'During the worst of the atrocities, in 2002, no one ever dreamed anyone would come after them. Now they think twice. The

[161] Human Rights Watch, "Courting Conflict," 67.
[162] Ibid. 68.

weakness will be if the court doesn't arrest everyone people think should be arrested.'"[163] Inevitably, they will not. The ICC cannot and will not bring justice for every victim or every perpetrator and is bound to disappoint. Both because of its limited capacity and its reliance on the Congolese state, the ICC cannot address every crime. Thus, the ultimate success of the Court in fostering accountability is contingent not on its own activities but on local ones. Trials for men like Lubanga must be followed by domestic ones for other perpetrators and by political reform.

The ICC found Thomas Lubanga Dyilo guilty on March 14, 2012. The Katanga and Chui case is still on going, and the prosecution rested its case in December of 2011. Callixte Mbarushimana (the only defendant involved in the conflict in North and South Kivu) was released from ICC custody in December of 2011, after the Court decided not to confirm the charges against him. Bosco Ntaganda is still at large in Congo, serving as general in the Congolese army.

[163] Hochschild, "The Trial of Thomas Lubanga," 82.

Chapter Five: Emerging Themes, Conclusions, and Recommendations

International tribunals are not like criminal courts in a well-functioning society, where most people caught committing a serious crime face a judge. They can only be selective and symbolic. … No international court can ever substitute for a working national justice system. Or for a society at peace.[164]

All of these cases pertain to unique countries and present their own particular set of challenges. As such, the ICC's approach and impact has varied, but there are also surprising similarities and emerging themes. One of these it is that the "dichotomous dilemma"[165] of peace or justice does not dominate decision-making. Firstly, this is because "the choice is seldom simply 'justice' or 'peace' but rather a complex mixture of the two".[166] Secondly, however, it is because the dominating issues are the tension between the ICC's cosmopolitan mandate to end impunity and the state-centric treaty basis for that mandate, and the tension between creating a standard of accountability at the local level and creating that same standard at the international level. Caught up in these important concerns, the ICC has no real room to address the issue of peace versus justice.

In these cases, however, there has not been a substantial conflict between peace and justice. The ICC's involvement did not cause the failure of a serious peace agreement in any of them. Uganda is a possible exception to this, but the evidence from the Juba talks suggests that neither party was ultimately committed to the talks in the first place, especially not the LRA. The ICC may have been a valuable scapegoat, but it did not derail the talks. In Congo, the government went ahead with a peace agreement, ignoring the ICC's warrant for Ntaganda and integrating him and his rebel group into the national

[164] Hochschild, "The Trial of Thomas Lubanga," 82.
[165] Sriram, "Transitional Justice and Peacebuilding," 1.
[166] Ibid.

army anyway. Finally, in Sudan, the ICC does not stand in the way of a peace process because the Khartoum government has no intention of engaging in one with or without the ICC warrants.

As for the Court's impact on the countries in which it is involved, it has been mixed. There are clear issues in every case, but the most basic one that underlies all of them is that the Court simply does not seem to be able to carry out its stated goal of ensuring accountability. It cannot arrest its defendants in Uganda and Sudan, and its limited prosecutions in Congo do not begin to address the real complexity of the conflicts there.

That said, in Uganda and Congo, the Court's chief strength is that it has, to some extent, changed expectations. It is clearly a good thing that Thomas Lubanga will spend most of his life behind bars rather than continuing to fight or enjoying his immunity or at best being killed in combat. This is particularly true because it is unprecedented in Congo. If the Court can someday ensure the same for Joseph Kony and the other LRA leaders, that would be a similarly positive development for Uganda. So, it is undoubtedly valuable for countries whose political past is based on violence to see the rule of law as an alternative, albeit a limited and politicized one. One of the most valuable accomplishments of the ICC is that it has made justice an important issue for conflict resolution in these countries. For example, while traditional justice in Uganda is usually framed as an opposing method to the ICC, they were never even suggested until the Court became involved. The ICC, then, is creating debate about a vitally important and previously under-addressed issue for the international community, in general, and

countries with a political culture of impunity like Uganda, Congo, and Sudan in particular.

What the ICC is not doing, however, is enforcing its laws and creating a meaningful system of global accountability. After ten years, it has only one conviction despite its many outstanding warrants. With or without convictions, though, the ICC's justice is politically fraught and compromised. In every case, the Court does not have the kind of clout to compel cooperation, so the role of the national government looms large and determines the scope of the case.

The Court may be intended to step in and be impartial when the government cannot or will not, but when it does it has to work with that same government and is thus equally unable to prosecute its officials. This is probably the most significant problem for the cases in both Uganda and Congo, because it both undermines the ICC's credibility and limits the scope, and therefore value, of its investigation.

In Uganda and Congo, the ICC has the approval of the government, whose cooperation is at once both helpful and compromising for the Court. The ICC has to rely on them to facilitate investigations and to make arrests, but neither of these governments is completely innocent and, thus, the connection between the Court and each government hurts its impartiality and limits the extent to which it can address the entirety of a situation. In sum, cooperation from the governments is at once both helpful and compromising for the ICC.

On the opposite end of the spectrum, Sudan has adamantly opposed the ICC's involvement in its affairs. While this is an advantage in that the ICC can hardly be accused of cooperating with the government, it also makes it difficult for the Court to

investigate and impossible to try anyone. It can only issue symbolic warrants, since it cannot possible hope to arrest any of its defendants. So, in each case, the Court finds itself either severely limited and compromised or completely limited, because with the government it cannot be independent and without it cannot be effective.

The ICC's cases in northern Uganda, eastern Congo, and Darfur, Sudan demonstrate the deep problems and questions that attend the Court's aspirations to create a global standard of justice and accountability. The accountability that the ICC is able to provide, then, is purely symbolic. It can only, at best, reach a few perpetrators and is always limited by the state that it must either work with or oppose. Lasting accountability will only come from internal change within the countries that the ICC is called to assist.

Recommendations

It is difficult to recommend a solution to the ICC's current limitation, not only because its problems are so deep and structural, but also because it emerged as the best possible compromise between the goal of justice and the reality of state interests. Neither of these has changed so much that an improved and more effective structure for the institution can likely be achieved. Also, it is possible that with time and successful convictions, the Court's prestige and clout will make its decisions more difficult to ignore, because, although the Court is already ten years old, it is still developing and may yet grow into a more effective role. Further developments in these cases, as well as new ones in Kenya, Cote d'Ivoire, and Libya will be important in determining the Court's future role.

If the ICC is going to be able to truly function as a 'court of last resort,' however, it needs to have the enforcement powers to do so. As things stand, it is not equipped to

handle its cases, because if the state is truly unwilling or unable to prosecute, the ICC cannot carry out its mandate within that country. It has only been able to do so in Congo because the state's attitude seems to be one of apathy – the Congolese government is not opposed to prosecution, at least of inconvenient rebels, so it is perfectly willing to allow the ICC to do it. In Uganda, however, where the state is unable, the ICC cannot solve the key issue of Kony's continued elusion of capture, and in Sudan, where of the state is adamantly unwilling to prosecute, the ICC cannot do so in its place because of government opposition.

The ICC is clearly never going to have an international police force at its disposal to enforce its decisions. So, if warrants are going to be executed and witnesses protected it needs another method of doing so. One way the Court might be better able to enforce its decisions is if it had a closer link to the Security Council. While this would be highly problematic for the Court's impartiality (which is why it was rejected at the Rome Conference) and contingent on the Council's very limited interest in humanitarian affairs, it is the only international body capable of compelling state cooperation. While the fact that the ICC is independent from the UN and does not have the United States, Russia, or China as members is beneficial for its autonomy, it is not actually independent in the countries in which it is pursuing cases. Having the backing of the Security Council and the US would make the Court more political in the international arena, but might make it less so on the ground where its actions are most significant.

Since the majority of its cases are in Africa, the ICC needs the support of African states and, in particular, the Africa Union, especially when it issues warrants for a member like President al-Bashir. Most African nations are members of the ICC, and even

more (including Sudan) signed the Rome Statute. When their failure to support the Court lends credence to arguments like Bashir's that the ICC is a form of neocolonialism. If African countries are not serious about creating a culture of accountability for their continent, they need to support prosecution for those of their members who fail their people on such an astounding scale because protecting men like Bashir and allowing him to co-opt legitimate concerns about Western dominance will not help Africa.

At the same time, the ICC needs to prioritize balancing charges to reflect the actual culpability and victimization of the conflict. As the Congo case illustrates most clearly, genuine justice during a conflict requires more than a guilty defendant. The Court must prosecute both sides equitably, even when it poses legal challenges; because failure to do so can be one of the most significant obstacles the ICC can pose to peace.

Even with equal prosecutions, though, the ICC is not capable of trying the large number of cases that would be necessary to provide genuine accountability for the many crimes committed during these conflicts. In all of these cases, the regions' "immense accountability needs cannot be addressed by the work of the ICC alone"[167], because the Court will only try a few of those most responsible. This means that the national efforts in conjunction with those of the ICC will be necessary. Its legacy, then, will be based to a large extent on how it impacts domestic justice, meaning that it will be contingent on national prosecutions and political reform. This clearly outside of its control, and is probably impossible until a minimal level of peace and security is established. However, the ICC needs to develop a better way to interact with local communities and the national justice system to ensure that they can take responsibility for trying other cases and

[167] Mattioli and van Woudenberg, "Global Catalyst for National Prosecutions?" 55.

provide a more comprehensive justice than the ICC can, because if the Court is not creating its intended culture of accountability in the countries where it is most active, it seems unlikely that it will be able to elsewhere.

Finally, while the ICC has not been a substantial stumbling block to peace in these cases, the potential is certainly there. While the Court does not allow promises of immunity, the Rome Statute does allow for the Court to consider whether proceeding against a defendant is "in the interests of justice."[168] This could be interpreted to allow a case to be deferred or dismissed in favor of a peace agreement. Or alternatively, the UN Security Council could defer a case indefinitely for the same reason. In any event, the possibility for immunity in exchange for peace seems one the ICC should leave open, however unappealing it may be. The Court should not create a precedent that prevents it from compromising in the interests of peace.

Practically, however, it is unlikely that the Court, or the attitudes of African governments, will undergo significant reforms and changes. The ICC is far more likely to continue to define its role incrementally, case by case. Perhaps, in doing so, it will get better at inducing cooperation and prosecuting cases in a locally-sensitive way.

While the Court's global mandate is quite clear, if unrealized, its role in specific localized situations is still evolving. This, however, is where it is most important. Peace, in these cases, is mostly outside of the ICC's control and influence. That said, in the Court's analyses, peace is not necessarily ignored, but it is often pushed to the side as these two animating interests of statism and accountability compete for the Court's

[168] Rome Statute, Article 53.

priorities. The Court's inability to operate independently of national authorities, its limited capacity, and the differences between local and international views and expectations of justice mean that it cannot really be effective in providing justice. These issues, in turn, compromise its ability to help to create more peaceful societies.

At this point, the International Criminal Court seems to be more an international symbol than a tool for localized peace or justice, and it is certainly not, and will never be, a perfect system of international justice. With all this in mind, however, the symbol of the ICC as a global standard for justice and human dignity is still valuable, particularly for countries like Uganda, Congo, and Sudan where power struggles, violence, and impunity have long dominated politics.

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