The ICC – Savior or Spoiler?
Potential Impacts of International Criminal Justice
on Ending the Darfur Conflict

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Abstract

This thesis takes the Darfur conflict as a case study to examine the issue of whether and how the International Criminal Court (ICC) can play a more active role to halt mass atrocities. Due to the provisions of the Rome Statute and general international law, the ICC Prosecutor has the legal discretion and obligation to balance the positive and potentially negative outcomes of its actions on ongoing conflicts like the one in Darfur.

The ICC involvement has already had effects on the political situation in Sudan. However, these impacts could be more significant if key players of the conflict, including high officials of the Sudanese government, were targeted. While proceeding carefully and in the interests of the victims, the ICC can, together with the necessary political support of the international community, develop into an institution that furthers international peace and security by influencing ongoing conflicts.

Résumé

Cette thèse prend le conflit au Darfour comme exemple pour examiner la question à savoir si et comment la Cour pénale internationale (CPI) peut jouer un rôle plus actif afin de limiter des atrocités de masse. En raison des dispositions du Statut de Rome et du droit international général, le Procureur de la CPI a la discrétion et l’obligation d’équilibrer les effets positifs et ceux potentiellement négatifs de ses actions dans des conflits actuels comme celui au Darfour.

Déjà, l’implication de la CPI a eu des effets sur la situation politique au Soudan. Cependant, ces impacts pourraient être plus importants si des acteurs clés du conflit, y compris les hauts responsables du gouvernement du Soudan, étaient visés. Tout en procédant prudemment dans l’intérêt des victimes, la CPI peut devenir une institution qui favorise la paix et sécurité internationales en influençant les conflits actuels. Le soutien politique de la communauté internationale envers la CPI est crucial afin d’atteindre ce but.
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<tbody>
<tr>
<td>AMIS</td>
<td>African Union Mission in Sudan</td>
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<tr>
<td>AU</td>
<td>African Union</td>
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<td>DPA</td>
<td>Darfur Peace Agreement</td>
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<td>EU</td>
<td>European Union</td>
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<td>GoS</td>
<td>Government of Sudan</td>
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<td>ICC</td>
<td>International Criminal Court</td>
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<td>ICTR</td>
<td>International Criminal Tribunal for Rwanda</td>
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<td>ICTY</td>
<td>International Criminal Tribunal for the former Yugoslavia</td>
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<td>ILC</td>
<td>International Law Commission</td>
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<td>JEM</td>
<td>Justice and Equality Movement</td>
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<td>LRA</td>
<td>Lord’s Resistance Army</td>
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<td>MONUC</td>
<td>United Nations Mission in the Democratic Republic of Congo</td>
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<td>NATO</td>
<td>North Atlantic Treaty Organization</td>
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<tr>
<td>NGO</td>
<td>Non-Governmental Organization</td>
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<tr>
<td>NIF</td>
<td>National Islamic Front</td>
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<td>NRF</td>
<td>National Redemption Front</td>
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<tr>
<td>ONUMOZ</td>
<td>United Nations Operation in Mozambique</td>
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<tr>
<td>OTP</td>
<td>Office of the Prosecutor</td>
</tr>
<tr>
<td>PDF</td>
<td>Popular Defense Force</td>
</tr>
<tr>
<td>RUF</td>
<td>Revolutionary United Front</td>
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<tr>
<td>SCSL</td>
<td>Special Court for Sierra Leone</td>
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<tr>
<td>SLA/M</td>
<td>Sudan Liberation Army/Movement</td>
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<tr>
<td>SPLA/M</td>
<td>Sudan People’s Liberation Army/Movement</td>
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<tr>
<td>TRC</td>
<td>Truth and Reconciliation Commission</td>
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<td>UN</td>
<td>United Nations</td>
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<td>UNMIL</td>
<td>United Nations Mission in Liberia</td>
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Introduction

As we have witnessed since the beginning of the 1990s, international law, in particular international criminal justice, can have a significant impact on the peace process and the reconciliation of societies in post-conflict periods. However, debates over peace versus justice, justice versus reconciliation, and truth versus justice have shaped attempts in the last decades to determine the controversial place of international criminal justice. This thesis attempts a different approach which follows none of the aforementioned concepts and focuses on the impacts that international criminal justice has on ongoing conflicts. More precisely, the Darfur conflict will serve as a case study to examine the question whether and how the International Criminal Court (ICC) can, in addition to offering post bellum justice, also play a more active role to halt or, at least, to restrain mass atrocities. These opportunities are a new phenomenon in the field of international law.

The current war in Darfur, unfolding since 2003, has provoked one of the worst ongoing humanitarian disasters. The international community has been exceptionally slow to react to the growing crisis; the only stringent collective measure was the referral of the situation to the ICC by the Security Council on March 31, 2005, a novelty in international law and international relations. For the first time, the ICC was activated by the Security Council and without the consent of the respective state. Sudan is a signatory to, but has not ratified the Rome Statute and consistently rejects ICC jurisdiction over its nationals and over crimes committed on its territory. As we will see in the first chapter, it is probably even more remarkable that the ICC was activated while the conflict was still going on and far from being resolved. Until now, international criminal justice mechanisms have usually delivered post bellum justice, and influencing the conflict itself was never a major issue. However, the ICC is a permanent institution that is ready to act, thus being able to shift the delivery of post-conflict justice towards in-conflict justice. As a result of the Security Council referral, the ICC has the chance to demonstrate that it can have significant impacts on ongoing conflicts.
The Darfur conflict is characterized by massive violations of international humanitarian law and international human rights law, which have mainly been committed by the Sudanese army and a government-sponsored militia, as we will see in the second chapter. It is important to understand the roots of the current conflict as well as the complex issues regarding the different warring parties in order to examine the potential impacts of international criminal justice on the key players of the conflict.

The victims of the conflict urgently need the support of every international player that has the potential to end their suffering and help to achieve long-lasting peace. The ICC is one of these players. The third chapter examines the role of the ICC in the conflict, beginning with the activation of the Court and admissibility issues. It will be argued that, thanks to the large prosecutorial discretion as to whether to indict political and military leaders, the ICC is an active player that can exercise significant pressure on key players of the conflict, above all on the Sudanese government and its Darfur policy. Although the ICC should not be dominated by political issues, this does not mean it cannot have important direct and indirect political effects. Potential risks of the ICC involvement, such as endangering the conclusion of a peace agreement, thus prolonging the conflict, or the deployment of a peacekeeping mission, also have to be taken into account by the ICC. It is once more the prosecutorial discretion that makes the ICC, and in particular the Prosecutor, an active player who must balance the possible benefits against the dangers of its activity. It will also be argued that, so far, the activity of the ICC, in particular the indictments of a member of the Sudanese government and a militia leader, has had modest, but positive effects on the conflict. In addition to this evaluation, further steps will be proposed in order to maximize the positive impact of the ICC activity on the situation in Darfur in the long run.

The fourth and final chapter will show that the ICC is, however, as an institution in the context of international politics, still clearly limited in its capacity to influence ongoing conflicts like the one in Darfur due to the constraints of time
and enforcement. Suggestions regarding how to face these deficiencies will be made in order to adapt the work of the Court to the current challenges arising in this correlated context of international criminal justice and international relations in order to allow the ICC to have more immediate impacts on ongoing conflicts.
1. International criminal justice and armed conflicts

1.1. Tribunals *ad hoc* providing *ex post facto* justice

International criminal justice has evolved rapidly since the beginning of the 1990s. Nearly fifty years after the International Military Tribunals set up in Nuremberg and Tokyo, which prosecuted crimes committed during World War II, the international community created judicial bodies to deal with war crimes, crimes against humanity and genocide. The International Criminal Tribunal for the former Yugoslavia (ICTY) was created by a Chapter VII Security Council resolution in 1993 to face the international crimes committed during the war in Bosnia and Herzegovina.\(^1\) The Security Council followed the same approach a year later to deal with the genocide in Rwanda by installing the International Criminal Tribunal for Rwanda (ICTR).\(^2\) These two *ad hoc* tribunals target specific situations, which are both limited in time and space. Both tribunals, in particular the ICTY, have produced an important amount of case law, thus advancing international criminal law significantly. They were, however, ineffective or else came too late to influence the conflict whilst the atrocities were being committed. The ICTR was established several months after the genocidal outbreak in Rwanda. The ICTY was established during the conflict in Bosnia and Herzegovina but did not have the desired impact of diminishing mass atrocities in the conflict itself. In fact, both tribunals can be considered a substitute to a more effective involvement of the international community, such as more stringent diplomatic pressures or military intervention. The tribunals presented themselves as a financially and politically inexpensive way of responding to demands of the international community to act.\(^3\)

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1 S/RES 827 (1993).
2 S/RES 955 (1994).
The tendency towards implementing international criminal justice manifested itself in another major step in 1998 when the Rome Statute was adopted. It established an International Criminal Court (ICC), which became functional in 2002. Recent developments in the field of international criminal justice also include the establishment of so-called hybrid or internationalized tribunals, which are made up of national and international judges. The Special Court for Sierra Leone (SCSL) was created in 2002\(^4\) to deal with the crimes committed during the brutal civil war; the trial of its most notorious suspect, former Liberian president Charles Taylor, started in June 2007. In Kosovo, East Timor and Cambodia, international judges support local courts in delivering international criminal justice. These and other special mechanisms, such as the Iraq High Tribunal trying Saddam Hussein and others, have been necessary due to the facts that the ICC does not have jurisdiction over crimes committed before July 1, 2002, and because several states in war zones, including Iraq, have not ratified the Rome Statute.

1.2. Limited effectiveness of *ad hoc* tribunals

It is difficult to judge the success of the *ad hoc* tribunals, as no generalized standards exist to measure success or effectiveness.\(^5\) Since both the ICTY and the ICTR were established by the Security Council using its Chapter VII powers, however, one of the goals of the tribunals must therefore be to restore international peace and security. The ICTY has been criticized for not fulfilling these expectations, particularly due to its inability to arrest senior officials while the conflict was still going on.\(^6\) Only eight arrests were made by the end of 1996. Moreover, most of those who were indicted until 2000 were lower-rank officials.\(^7\)

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\(^4\) On the basis of Security Council Resolution 1315 (2000), the Secretary General negotiated an agreement between the United Nations and the government of Sierra Leone to establish the Special Court for Sierra Leone.

\(^5\) Roper & Barria, *supra* note 3 at 83.


\(^7\) Roper & Barria, *supra* note 3 at 86.
More general critics of prosecutions argue that criminal trials are selective, politicized, and prevent social and ethnic reconciliation. More specifically, the *ad hoc* tribunals have been criticized for not meeting their goals:

“Criminal tribunals in places such as Rwanda and the former Yugoslavia were supposed to bring justice to oppressed peoples. Instead, they have squandered billions of dollars, failed to advance human rights, and ignored the wishes of the victims they claim to respect. It’s time to abandon the false hope of international justice.”

The well-known “peace versus justice” debate has been a central issue for international criminal justice and its critics since the beginning of the 1990s. The basic argument made by advocates of international criminal justice is that justice is a necessary element to achieve peace and that justice can only be accomplished through trials. If domestic judicial systems are unable or unwilling to indict perpetrators, the international community must react. Opponents of prosecutions argue that indictments complicate peace negotiations and prolong conflicts and ongoing violence, as amnesties are sometimes a necessary prerequisite to achieve a peace deal. Moreover, traditional criminal prosecutions are criticized for not acknowledging the particular realities of the different armed conflicts and not allowing other, allegedly more effective, mechanisms of holding individuals accountable.

The issue of reconciliation has also shaped the debate over the effectiveness of international criminal tribunals, reconciliation of war-torn societies being a necessary precondition for long-term peace. The need to reconcile Bosnian Serbs, Croats and Muslims was widely recognized when the ICTY was established. The goal of national reconciliation was even specifically mentioned in Security

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9 Helena Cobban, “Think Again: International Courts” *Foreign Policy* (March/April 2006) [Cobban, “Think Again”].
Council Resolution 955 and is therefore an integral part of the ICTR’s mandate. Again, the success of the tribunals’ contribution to the reconciliation of Hutus and Tutsis in Rwanda as well as the different groups in Bosnia is difficult to evaluate. It has been argued that the ICTR has exercised a moderating influence and that revenge killings in the region would have been far greater without the ICTR.\(^{11}\) Promoters of international criminal justice also argue that trials help to bring about truth, which is necessary for reconciliation. Others deny that the ICTR has had any significant impact on reducing the horrors\(^ {12}\) or claim that the fragile peace in the Balkans is chiefly a product of international troops, and not of the ICTY.\(^ {13}\)

The effectiveness of international criminal tribunals has been compared to other mechanisms, such as truth and reconciliation commissions (TRCs), which were installed in many countries over the last decades with varied success. They have been combined with amnesties in different forms; blanket amnesties have been less and less accepted by legal scholars as well as the international community, while conditional amnesties are still tolerated to a certain extent. While the most prominent example is the South African TRC, the most interesting recent one is the TRC in Sierra Leone that was installed to complement the SCSL. Helena Cobban, a scholar and veteran journalist, concludes that the TRC in South Africa, granting conditional amnesties, and the absence of any individual accountability in Mozambique have delivered much better results than, for instance, international prosecutions in Rwanda.\(^ {14}\) However, it seems difficult to establish a general rule by linking situations that are hardly comparable. The effects of individual accountability mechanisms cannot be the same for a post-genocidal society like


\(^{12}\) Adam Roberts, “Implementing the Laws of Wars in Late 20\textsuperscript{th}-Century Conflicts, Part II” (1998) 29:3 Security Dialogue 265 at 274.

\(^{13}\) Cobban, “Think Again”, supra note 9.

\(^{14}\) Helena Cobban, Amnesty after Atrocity? Healing Nations after Genocide and War Crimes (Boulder, Colo.: Paradigm Publishers, 2007) at 194 [Cobban, Amnesty after Atrocity?].
Rwanda, where the genocidal outburst lasted a few months, and in South Africa where a decades-long policy of apartheid was followed by a negotiated regime change. Furthermore, an isolated assessment of accountability mechanisms in post-conflict societies can hardly be comprehensive since there are many other factors that must be considered. In addition to the particularities of every situation of armed conflict, the broader context, such as the politics of neighboring countries and the international community as well as the socio-economic circumstances, must not be overlooked. In general, trials, TRCs and amnesties are more likely to have a better outcome when supported by political reforms and a strong institutional system.15

Another important rationale of international criminal justice is deterrence. In the history of states, holding criminals individually accountable has been an efficient and valuable instrument of national jurisdictions to deter future crimes. Ideally, the same logic would also apply to international criminal tribunals. Since international criminal justice is in its nascent stage, its credibility is still emerging. With the establishment of the ICTY, the Security Council wanted to send a message to other perpetrators of international crimes that the international community would no longer tolerate impunity.16 However, in the context of large-scale crimes, specific deterrence cannot easily be ascertained.17 The Srebrenica massacre of an estimated 8,000 Bosniaks at a moment when the ICTY was already fully operational is a gloomy illustration of the tribunal’s insignificant

15 The paradigm that “trials work best when they are needed least” (Jack Snyder & Leslie Vinjamuri, “Trials and Errors, Principle and Pragmatism in Strategies of International Justice” (2004) 28:3 International Security 5 at 20) can be extended to other mechanisms; weak democratic structures will always lower the positive effects of trials, TRCs and amnesty programs.

16 Akhavan, “The Yugoslav Tribunal”, supra note 9 at 264.

impact on the ongoing atrocities in Bosnia. Moreover, although the immediate
effect of international criminal justice mechanisms on human rights violators in
other countries is difficult to measure, it also seems evident that neither the ICTY
nor the ICTR have influenced the behavior of political and military leaders in
conflicts in Sierra Leone, Chechnya, East Timor or Darfur;\(^\text{18}\) there is scant
evidence for direct deterrent effects of international prosecutions on future
criminals. However, the potential long-term effects of international trials to
discourage future offenders are substantial. John Prendergast of the International
Crisis Group, for instance, argued in the context of a "peace versus justice" debate
regarding the SCSL that "[t]he precedent of removing an indictment against
Taylor would be disastrous for years to come in encouraging impunity and
making a mockery of attempts at establishing accountability for crimes against
humanity throughout the world."\(^\text{19}\) According to Payam Akhavan, former legal
advisor to the Prosecutor of the ICTY and ICTR,

> “the ICTY will help internalize the expectation that individuals, irrespective of their official position, may be held liable for violations of international humanitarian law. … Over time, this will contribute significantly to deterrence through the transformation of the political culture of the former Yugoslavia and the international community as a whole.”\(^\text{20}\)

It has been argued that the international community should only insist on holding
individuals accountable “if the benefits of accountability over the long term are
likely to outweigh the costs on the short term of prolonging an ongoing
conflict.”\(^\text{21}\) This decision will, in practice, turn out to be very complicated, since
the “long-term benefits” of deterrence are very difficult to predict and will often

\(^{18}\) See also Snyder & Vinjamuri, supra note 15 at 20, who focus on the tribunals’ effect on altering
the calculations of combatants in conflicts world-wide.

\(^{19}\) John Prendergast, cited in Somini Sengupta, “Besieged Liberian” New York Times (11 July
2003).


\(^{21}\) Nick Grono & Caroline Flintoft, “Negotiating Justice to Understand Accountability”, Expert
Paper for “Workshop 6 – Negotiating Justice”, Nuremberg Conference: Building a Future on
Peace and Justice (25 June 2007), online: International Crisis Group
<http://www.crisisgroup.org/home/index.cfm?id=4912>. 
be too abstract for victims suffering in a conflict that could have ended more quickly without insisting on prosecutions.

Regarding the urgent need to respond to mass atrocities in Bosnia, it must be concluded that the ICTY was established as a rather illusionary substitute to a military intervention since “it seemed that the tribunal was more an instrument for appeasing a troubled conscience that yearned for absolution from responsibility.”22 Even though it furthered international criminal law significantly by creating an important amount of case law, it had, unfortunately, only minimal effects on the conflict itself. While its positive impact on reconciling Balkan’s war-torn societies is also controversial, the ICTY has, at least, stigmatized several war criminals, and thus helped to remove them from the political scene.23 As for the conflict in Rwanda, the ICTR can be considered as another rather poor attempt of the international community to set things right months after the genocidal outburst. One must conclude that the ICTR, due to its institutional limits, can only provide *ex post facto* justice, while hoping that it will have, somehow, a deterrent effect on future genocidaires.

The hybrid tribunals have been trying to bring international justice closer to the people and increase its immediate effects on respective societies. Even though these efforts have a considerable potential to positively influence legal systems in need of international support, thus increasing both the level of deterrence and the possibility of reconciliation, it is unrealistic to expect that this type of criminal justice will ever have the potential to influence an ongoing conflict itself. In addition to the fact that both purely international and hybrid tribunals are very costly and are therefore unlikely to be installed on a regular basis, their establishment will always remain time-consuming and dependent on the political will of various players, including the respective governments and members of the

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22 Akhavan, “Justice in the Hague”, *supra* note 17 at 744; see also Smith, *supra* note 3 at 185.
Security Council. Therefore, expectations that hybrid tribunals will have immediate impacts on future ongoing conflicts do not seem realistic.

1.3. The imminent capacity of the permanent court to influence ongoing conflicts

The ICC is special for a number of reasons. First, it is not a tribunal installed by a Security Council resolution but a treaty-based legal institution. It is the outcome of an international treaty, which was negotiated and concluded between states; therefore, its democratic legitimacy cannot seriously be challenged. As a supranational authority, the ICC can also assume jurisdiction over nationals of non-States Parties.

Second, the ICC has no proper enforcement mechanisms and must therefore rely on the cooperation of the States Parties to the Rome Statute. Contrary to the ICTY and the ICTR, the ICC is not a UN body or sub-organ; it only concluded a relationship agreement with the UN. As a result, its jurisdiction will usually not be enforced by the Security Council. Moreover, the ICC does not have direct jurisdiction over the international crimes committed. Since its jurisdiction is marked by the principle of complementarity, the Court serves as an “international jurisdictional safety net” which only starts to work when national jurisdictions are unable or unwilling to deal with the crimes committed. Regarding its global effectiveness, the ICC will have to undergo a difficult test whether it can create deterrence without the direct ability of enforcement, as “deterrence depends on the predictable ability to enforce the

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27 Article 17 of the Rome Statute.
law coercively, which often falls short in countries where abuses take place."  

However, if the ICC activity is triggered through a Security Council referral, which also obliges the respective state to cooperate with the ICC, the Court might resume a similar function as the ICTY and the ICTR as a Chapter VII enforcement organ.

Third, the ICC is also special for its permanent character. Security Council resolutions or agreements with the governments involved, as it was the case for the ICTY, the ICTR and the SCSL, are not necessary to trigger ICC jurisdiction. Specific situations will not have to be dealt with by the establishment of ad hoc tribunals, which have shown to have many political and legal difficulties, are very costly, and, most importantly, in order to have a realistic impact on an ongoing conflict, take important time to become functional. The ICC has, therefore, the potential to shift the delivery of post-conflict justice towards in-conflict justice. It has a novel capacity to react immediately and influence armed conflicts by stigmatizing those who are most responsible for war crimes, crimes against humanity and genocide, while the conflict is still going on. This approach will mostly target political and military leaders, which is likely to produce considerable effects on the character of the respective conflict.

The ICC also adds to the capacity of deterrence of international criminal justice. The ICC will be far more effective, in a global sense, than ad hoc tribunals can be in providing a deterrent effect. The ICTY and the ICTR have shown that the international community cares about international crimes and wants to end impunity. However, it is unlikely that costly ad hoc tribunals would be established through Security Council resolutions for every situation

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28 Snyder & Vinjamuri, supra note 15 at 11.
29 See below, c. 4.3.
30 For more information, see McGoldrick, supra note 8 at 454.
31 On the difficulties for the ICC to conduct investigations and prosecutions without delay, see Bassiouni, supra note 26 at 423. The possibility for the OTP to start investigations on its own initiative, according to article 15(1) of the Rome Statute, is an important asset for the ICC in order to act politically independent from the Security Council and states parties; on the relationship between the ICC and the Security Council, see below, c. 3.3.6.
where mass atrocities are being committed. Now, thanks to its permanent character, an international criminal court exercises a permanent threat for perpetrators. Because the ICC functions as a court of last resort and exercises a direct influence on national systems to act, it is realistic to believe that its mere presence will augment the number of national prosecutions in the future, and thus increase the long-term potential for global deterrence.

Moreover, specific deterrence will probably be at least as important as deterring perpetrators of future armed conflicts, which has been an important goal of international criminal justice so far. Now, international criminal justice, thanks to the Court’s permanent character and its capacity to react faster, can have a deterrent effect on those fighting in the middle of a conflict situation over which the ICC has assumed jurisdiction. Political and military leaders will be more careful in their decisions once the Prosecutor’s role has switched from a theoretical threat to a concrete prosecutorial organ.

Besides these unique aspects, the Court already faces similar criticism as the *ad hoc* tribunals and finds itself in the middle of a discussion over justice versus peace, individual accountability mechanisms versus amnesties or pardons, trials versus TRCs. Targeting political and military leaders of warring parties unavoidably influences peace negotiations; situations might be destabilized because of international indictments; these are issues the ICC is even more susceptible to due to its potential ability to interfere in any ongoing conflict. A controversial case is northern Uganda, the first situation that was referred to the ICC. The government of Uganda activated the ICC through an article 14 referral in December 2003, thus trying to raise awareness on the international scene about

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32 Parliamentarians for Global Action, “A Deterrent International Criminal Court-The Ultimate Objective”, (6-7 December 2004), online: Parliamentarians for Global Action <http://www.pgaction.org/uploadedfiles/deterrent%20paper%20for%20NZ_panel%201_.pdf> at 2. The ICC will, however, have difficulty in building a true threat for perpetrators worldwide due to its lack of coercive enforcement mechanisms; see below, c. 4.3.
the long-lasting armed conflict between the Lord’s Resistance Army (LRA)\textsuperscript{33} and government troops, a conflict which has caused the death of about 100,000 people in the region and the displacement of up to two million.\textsuperscript{34} At the beginning, northern Uganda seemed to be an easy first case for the ICC; there was no doubt about the LRA leaders’ responsibility for the mass atrocities committed among the civilian population of northern Uganda. However, the ICC has been criticized since its activation for being the main obstacle to the peace process.\textsuperscript{35} We will see later that, although the nature of the conflict in northern Uganda and the way of activating the ICC are radically different from Darfur, many issues regarding the ICC involvement are comparable in the two situations.

\textsuperscript{33} For the history of the LRA, see Tim Allen, \textit{Trial Justice, The International Criminal Court and The Lord’s Resistance Army} (London: International African Institute, 2006) at 25.


\textsuperscript{35} See below, c. 3.3.4.
2. The conflict in Darfur

2.1. Origins of the conflict

When it comes to identifying those individuals who are most responsible for mass crimes committed in Darfur and evaluating the potential impact of the ICC on them, it is necessary to understand the complexity of the war and the different warring parties, as well as the origins of the conflict.

The current armed conflict between the government of Sudan (GoS) and rebel groups in Darfur started in 2003. The Sudan Liberation Army/Movement (SLA/M) and the Justice and Equality Movement (JEM) turned against the GoS, which had continued the British colonial administration’s policy of neglecting the region. This deliberate underdevelopment of Darfur had already led to tensions before and was particularly criticized during the devastating, but foreseeable famine of 1984, which cost the life of around 100,000 people. Darfur of the late 1990s has been described as an “increasingly marginalized, violent and frustrated place”.

In addition to this policy of marginalization, the ever-present cleavage between farmers and herdsmen, which had largely become equivalent to a distinction of Africans versus Arabs in the mid-twentieth century, was increasingly exploited.

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37 Darfur had been an independent sultanate for centuries, before it was annexed to the Anglo-Egyptian Condominium in 1916. For more information on the British administration of the province, see Julie Flint & Alex de Waal, Darfur, A Short History of a Long War (London: Zed Books, 2005) at 12.
39 Ibid. at 81.
40 Collins explains that these cattle and camel nomads claim Arab origins and speak Arab, but are ethnically the result of intertribal marriage with their African neighbors since their arrival in the 16th and 17th century; see Robert O. Collins, “Disaster in Darfur: Historical Overview” in Samuel Totten & Eric Markusen, Genocide in Darfur, Investigating the Atrocities in the Sudan (New York: Routledge, 2006) 3 at 3. Prunier emphasizes that the ambivalence is not grounded
The draughts of the 1970s and 1980s multiplied the incidents between sedentary agriculturalists and cattle-raising nomads, which did not, however, necessarily correspond to the Arab-African dichotomy.\textsuperscript{41} The Arab-Islamist GoS added a new dimension to the difference between nomadic and sedentary lifestyles in Darfur by emphasizing the ideological and racist definition of “Arab” and zuruq (black) more and more.\textsuperscript{42} In the late 1980s, nearly all Arab groups, influenced by this new pro-Arab ideology propagated by Libya and Khartoum, united themselves to fight the Fur.\textsuperscript{43} In this time, the term \textit{Janjaweed} also came up for the first time, referring to Arab militiamen on horseback. They are not a popular representation of the Arab tribes in Darfur,\textsuperscript{44} but can be considered as armed bandits that were tolerated to some extent by the government because of their Arabic correlation.\textsuperscript{45}

Another aggravating factor was the introduction of automatic weapons in the 1980s, which gradually buried traditional forms of dispute settlement over land ownership and access to water wells.\textsuperscript{46} These disputes are another major source of the conflict. Some commentators explain the ethnic cleansing chiefly with a fight over land: “il s’agit de vider des espaces de leurs habitants, et c’est bel et bien une guerre pour le contrôle de la terre qui semble se dérouler.”\textsuperscript{47} Such claims have been viciously exploited by the government who has been presenting the whole

\begin{footnotesize}
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\item \textsuperscript{41} Jérôme Tubiana, “Le Darfour, un conflit pour la terre?” (2006) 101 Politique africaine 111 at 113 [Tubiana, “Le Darfour, un conflit pour la terre?”].
\item \textsuperscript{42} Collins, \textit{supra} note 40 at 9. On the genealogical constructs of Sudanese “Arabs” and the “African” identity, the latter being adopted by the SLM/A similar to that of the SPLA, thus reproducing a polarized discourse; see Ruth Iyob & Gilbert M. Khadiagala, \textit{Sudan, The Elusive Quest for Peace} (Boulder, Colo.: Lynne Rienner Publishers, 2006) at 31.
\item \textsuperscript{43} Tubiana, “Le Darfour, un conflit pour la terre?”, \textit{supra} note 41 at 113. Darfur literally means “land of the Fur”.
\item \textsuperscript{44} Prunier compares the \textit{Janjaweed} to the Rwandan Interahamwe, who were not a natural expression of the Hutu in Rwanda either; Prunier, \textit{The Ambiguous Genocide}, \textit{supra} note 38 at 97.
\item \textsuperscript{45} \textit{Ibid.} at 97.
\item \textsuperscript{46} Collins, \textit{supra} note 40 at 6. The easy availability of weapons was largely due to the war in southern Sudan and the use of Darfur as a basis for Chadian rebels, who, supported by Libya, launched their attacks from Darfur; see “Report of the International Commission of Inquiry on Darfur Pursuant to Security Council Resolution 1564 of 18 September 2004”, UN Doc. S/2005/60 (Geneva, 25 January 2005) at para. 58 [UNCOI].
\item \textsuperscript{47} Tubiana, “Le Darfour, un conflit pour la terre?”, \textit{supra} note 41 at 112.
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conflict as a low-level inter-ethnic dispute over land. According to Alex de Waal, a social anthropologist and one of the most renowned experts of Darfur, the dichotomy between Africans and Arabs is “historically bogus, but disturbingly powerful”. In sum, the facts that members of the two groups have intermarried in the past and that they are all Muslim and mostly speak Arabic are strong indicators for a largely political construction of the Arab-African distinction.

2.2. Escalation in 2003

On February 26, 2003, the constant, low-level violence suddenly erupted. About three hundred members of the SLA seized the town of Golu, killed two hundred government soldiers and proclaimed their political demands, the most important of which were that Khartoum address the uneven development and socio-economic marginalization of Darfur as well as the separation of religion and politics. The GoS decided to fight the insurrection, hoping that it would be able to solve the conflict before it could affect the fragile peace process with the South. However, the victories of the SLA in Western Darfur rapidly showed that the Sudanese army was incompetent and insufficiently prepared. Moreover, the GoS could not fully rely on its army, largely made up of Darfurians, to fight its “own” people.

Khartoum responded by rearming the already existing Janjaweed militias and by recruiting mercenaries from Libya, Chad, and other countries. Although not a

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51 Collins, supra note 40 at 9. The SLA’s manifesto largely resembles the SPLA’s vision of a united, but decentralized Sudan; according to Flint and de Waal, senior SPLA members coauthored the political declaration of the SLA; see Flint & de Waal, supra note 37 at 82.
52 Prunier, The Ambiguous Genocide, supra note 38 at 97. For the North-South peace process, see below, c. 3.3.1.2.
53 Prunier gives a good overview of the origins of the Janjaweed; see Prunier, The Ambiguous Genocide, supra note 38 at 97.
new practice, since the GoS increasingly armed Arab tribes and their militias and
disarmed non-Arab tribes with the purpose of intensifying the ethnic divide
throughout the 1990s, this major sponsorship was decisive in setting off wide-
spread atrocities in Darfur. *Janjaweed* fighters were partly incorporated into the
Sudanese army through an associated group called the Popular Defense Force
(PDF). They received weapons, official army uniforms, and were paid and
trained by the central government. They have been described as an “ad hoc unit of
Sudan’s army”. Usman Tar, an expert on African peace studies, explains why
the *Janjaweed* were ready to take up arms against the insurgents and the civilians
in Darfur:

“Janjaweed militias have seemingly cashed in on their strategic positions
as agents of the Sudanese government, perhaps with the tacit approval of
the latter, to vent their racial/ethnic anger and hatred on rival African
communities with whom they have clashed for decades over economic
resources and ethnic/racial differences.”

It is interesting to note that Khartoum’s decision to recruit Arab militias was not a
novelty in its fight in peripheral regions in Sudan. As early as in 1985, Baggara
militias, known as *Murahaliin*, were recruited to fight against the SPLA and to
terrorize civilians suspected of supporting the SPLA; in the 1990s, the GoS
armed Arab tribes to sponsor a brutal ethnic-cleansing campaign in the Nuba
Mountains.

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54 UNCOI, *supra* note 46 at para. 68.
55 Armin Mekki Medani, *Crimes Against International Humanitarian Law in Sudan, 1989-2000*
(Cairo: Dar El Mostaqbal El Arabi, 2001) at 204. For more details on the attacks of Arab
militias on hundreds of Masalit villages in 1997 and 1998, see *ibid.* at 206.
56 Flint & de Waal, *supra* note 37 at 102. The PDF emerged in the 1980s, its members being
associated with the Muslim Brotherhood; see also Pablo Castillo, “Rethinking Deterrence: The
57 Usman Tar, “Counter-Insurgents or Ethnic Vanguards? Civil Militia and State Violence in the
Darfur Region, Western Sudan” in David J. Francis, ed., *Civil Militia, Africa’s Intractable
59 Flint & de Waal, *supra* note 37 at 24; see also Belachew Gebrewold, “Civil Militia and
Militarisation of Society in the Horn of Africa” in David J. Francis, ed., *Civil Militia, Africa’s
60 Lucian Niemeyer, *Africa, the Holocausts of Rwanda and Sudan* (Albuquerque: University of
New Mexico Press, 2006) at 435.
Since the increased level of violence in Darfur, government troops and Janjaweed militias have been fighting the local insurgencies, above all the SLA, which had grown to a force of approximately 11,000 men in 2005 compared to a few hundred in 2001.\textsuperscript{61} The JEM, albeit much smaller, could rely on the military and political experience of its leaders, some of them having been part of the central government.\textsuperscript{62} Although several ceasefire agreements were negotiated and concluded, the fighting has never stopped. The main issue of the conflict became the targeting of the civilian population of Darfur by the Sudanese army and the Janjaweed. The presence of rebels in Darfurian villages has been irrelevant for the attackers; a general fear that civilians from the Fur, Zaghawa and Masalit tribes might join the rebels or give them foodstuff and shelter has resulted in the destruction of hundreds of villages. Numerous atrocities, including crimes against humanity and war crimes, have been reported: persecution, murder, rape, intentional attacks on civilians and civilian property, pillaging, and other crimes within the jurisdiction of the ICC\textsuperscript{63} have led to at least 200,000 deaths and two

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\textsuperscript{61} Flint & de Waal, supra note 37 at 85.

\textsuperscript{62} For more information on the two main pillars of the JEM, one being its link to the Islamist movement, the other its tribal component due to its close relation to the Kobe branch of the Zaghawa, see ibid. at 89.

\textsuperscript{63} See ICC, “Fourth Report of the Prosecutor of the International Criminal Court, Mr. Luis Moreno Ocampo, to the UN Security Council Pursuant to UNSCR 1593 (2005)”, 14 December 2006, online: International Criminal Court <http://www.icc-cpi.int/library/organs/otp/OTP_ReportUNSC4-Darfur_English.pdf> at 4 [ICC, “Fourth Report of the Prosecutor”]. The debate whether genocide is being committed has become a key question for Western governments and in the Western media to measure the degree of violence and possibly justify a humanitarian intervention. This debate, however, does not serve the interests of the hundreds of thousands of victims for whom it makes little difference whether they are being targeting with genocidal intent or “only” persecuted; it is worth noting that the outcome of crimes against humanity can be worse than genocide. The rather specific question of the offenders’ intent should be solved by a judicial institution. It has been argued that the “use of the “G-word” in the Darfur crisis has neither helped galvanize broad international support for action to stop the killings nor forced the Sudanese government to halt its campaign of ethnic cleansing;” see Martin Mennecke, “What’s in a Name? Reflections on Using, Not Using, and Overusing the “G-Word”” (2007) 2:1 Genocide Studies and Prevention 57 at 60; Gareth Evans, the President of the International Crisis Group, has argued that using the term genocide in the Darfur case can be “unproductive, non-productive, and even counterproductive,” see Don Cheadle & John Prendergast, “Not on Our Watch, The Mission to End Genocide in Darfur and Beyond” (New York: Hyperion, 2007) at 2; on the genocide debate, see also William A. Schabas, “Darfur and the ‘Odious Scourge’: The Commission of Inquiry’s Findings on Genocide” (2005) 18 Leiden J. Int’l L. 871; Scott Strauss, “Darfur and the Genocide Debate” (2005) 84 Foreign Affairs 123; Jerry Fowler, “A New Chapter of Irony: The Legal Definition of Genocide and the Implications of Powell’s Determination” in Samuel Totten & Eric Markusen, Genocide in Darfur, Investigating the Atrocities in the Sudan (New York: Routledge, 2006) 127. On the social impact of applying the
million displaced persons.⁶⁴ Because of these brutal attacks on civilians, the rebels have enjoyed growing support among the population and had no difficulty in finding new recruits who want to resist Khartoum.⁶⁵

Although the GoS hesitates to admit any link with the Janjaweed and usually labels them “armed bandits,”⁶⁶ many sources show that the GoS has been arming, training and funding the militias, as well as coordinating the attacks on civilians.⁶⁷ Victims describe a typical pattern in which most of the attacks on their villages have been carried out by the Sudanese army, which first launches aerial attacks, followed by the militias, who attack the villages on horseback and camels.⁶⁸ Recent documents show that the violence, including indiscriminate and disproportionate air strikes by the GoS, continues without interruption.⁶⁹

Because, unfortunately, Arab tribes are often blamed as a whole for the atrocities committed among Africans, it is important to note that the largest and most influential Arab tribes in the region, including the Baggara, the Rizeigat, and the Habbanyia, are not involved in the conflict; they seem to emphasize good

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⁶⁴ Q&A: Sudan’s Darfur Conflict” BBC News (16 November 2006) online: BBC <http://news.bbc.co.uk>; Human Rights Watch, “Q & A: Crisis in Darfur”, online: Human Rights Watch <http://hrw.org/english/docs/2004/05/05/darfur8536.htm>. The estimated numbers vary a lot. Other sources estimate that up to 400,000 have died; see Save Darfur Coalition, “Background” (25 October 2006) online: SaveDarfur <http://www.savedarfur.org>.

⁶⁵ Res Publica, supra note 36 at 12.

⁶⁶ UNCOI, supra note 46 at para. 117.


neighborly relations over racial divides, which are, moreover, seldom absolute.\(^70\) In addition, it seems that members of the SLA/M do not consider the Arab tribes as their enemies.\(^71\) Experts have even argued that, “[f]or the people involved, this is a political, not an ethnic or racial conflict.”\(^72\) It must be noted that, while most Arab tribes have remained neutral, a few originally non-Arab, but arabized groups joined the side of the government and the Janjaweed, largely because of strategic reasons.\(^73\) Clashes over land between different Arab tribes, in particular in South Darfur since late 2006, underline the limits of a model of an African/Arab dichotomy as sole explanation for conflicts in Darfur.\(^74\)

2.3. The response of the international community\(^75\)

The initial reaction of the international community to the rising conflict in Darfur was very slow. The situation in Darfur deteriorated 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 in Naivasha, Kenya. International negotiators were willing to leave the nascent crisis in Darfur aside or, at least, to postpone open criticism and more active involvement, in order to avoid endangering the promising peace process for the South: “Khartoum effectively held the carrot of peace in front of the noses of the international community while it wielded the stick in Darfur.”\(^76\) Gérard Prunier, a historian and eminent Darfur specialist, argues that the whole year of 2003 and the first half of

\(^{70}\) Flint & de Waal, supra note 37 at 124.
\(^{71}\) Res Publica, supra note 36 at 17.
\(^{72}\) Khalid Medani, “The Darfur Crisis and the Challenge of Democracy in Sudan” (Paper presented to the Conference The Challenge of Development in Sub-Saharan Africa: Conflict Resolution, Democratic Governance and Education, Centre for Developing-Area Studies, McGill University, 29 March 2007) [unpublished].
\(^{73}\) Tubiana, “Le Darfour, un conflit pour la terre?”, supra note 41 at 112.
\(^{75}\) The Security Council resolutions concerning the ICC will be discussed in more detail below; see c. 3.1.
2004 were lost time for Darfur, because the GoS knew that “as long as it showed ‘good faith’ in Naivasha it could do what it wanted in Darfur.” Western governments and leaders - in particular President Bush who tried to boost his election campaign by showing his own Christian electorate that he was acting in behalf of the persecuted Christians in southern Sudan - were praising themselves for solving the civil war, while Darfur had to wait for attention. In fact, both the North-South conflict and the Darfur conflict must be considered in the broader context of a center-periphery dichotomy in Sudan, with important inequalities between Khartoum and the rest of the country.

The situation had already horribly deteriorated in Darfur, when Western politicians finally started to openly condemn the GoS and its Darfur policy. Particularly the United States intensified its discourse: the Congress declared in July 2004 that the first genocide of the 21st century was happening in Darfur.

However, the Bush administration, the UN, and the EU showed themselves more reserved; Jan Egeland, the personal representative of the UN Secretary General, for instance, denounced the atrocities as “ethnic cleansing”. Overall, the international community could not exercise any coherent pressure on the GoS due to the lack of a unified position. Proposals for economic sanctions through a
Security Council resolution were unrealistic from the beginning; China would veto any measures that might endanger its heavy investments in the Sudanese oil industry. Furthermore, both Russia and China concluded lucrative contracts to sell military equipment to the GoS, thus representing the most important supplier countries for Sudan.\(^8^1\)

The first measure deserving mention was the adoption of Security Council resolution 1556 on July 30, 2004, stipulating an arms embargo for the warring parties in Darfur. The embargo excluded, however, the Sudanese army. The resolution called for

\[\text{“all states to take the necessary measures to prevent the sale or supply, to all non-governmental entities and individuals, including the Janjaweed, operating in the states of North Darfur, South Darfur and West Darfur, by their nationals or from their territories or using their flag vessels or aircraft, of arms and related materiel of all types.”}\(^8^2\)

This embargo was a first step of the international community to face the conflict in Darfur, but it overlooked the fact that many \textit{Janjaweed} fighters were incorporated in the army or in quasi-military forces, such as the PDF. In addition to this deficit, a first assessment of the effects of Resolution 1556 shows that the arms embargo has been constantly violated.\(^8^3\)

On March 29, 2005, Security Council Resolution 1591 condemned the

\[\text{“continued violations of the 8 April 2004 N’Djamena Ceasefire Agreement and the 9 November 2004 Abuja Protocols, including air strikes by the Government of Sudan in December 2004 and January 2005 and rebel attacks on Darfur villages in January 2005, and the}\]

\(^8^1\) According to Amnesty International, these weapons, including helicopters and airplanes, were used to attack civilians in Darfur; see Amnesty International, “Sudan: Arms Continuing to Fuel Serious Human Rights Violations in Darfur”, online: Amnesty International <http://web.amnesty.org/library/print/ENGAFR540192007>.

\(^8^2\) S/RES 1556 (2004) [emphasis added].

\(^8^3\) Report of the Panel of Experts established pursuant to resolution 1591 (2005) concerning the Sudan prepared in accordance with paragraph 2 of resolution 1665 (2006)”, UN Doc. S/2006/795 (3 October 2006).
failure of the Government of Sudan to disarm Janjaweed militiamen and apprehend and bring to justice Janajaweed leaders and their associates who have carried out human rights and international humanitarian law violations and other atrocities.”

Contrary to the United Nations and Western governments, the African Union (AU) has been directly involved in the conflict since an early stage. This involvement is praiseworthy, but unfortunately has not proved very effective. The 7,000 strong personnel mission in Sudan (African Union Mission in Sudan, AMIS), deployed in Darfur since 2004, was only able to provide very limited protection to civilians and did not have significant effects on the conflict itself.

In sum, although the GoS would have the primary responsibility to protect its citizens against atrocities, the international community has failed to react and take measures to take the place of the GoS, which is, in fact, the driving force behind the ethnic cleansing. “The sad reality is that Darfur simply does not matter enough, and Sudan matters too much, for the international community to do more to stop the atrocities.”

2.4. Recent developments

Since the large-scale massacres orchestrated in 2003 and 2004, the nature of the conflict seems to have shifted towards a chaotic situation, with numerous rebel groups split up into small fractions which are fighting without common goals due to different political, tribal and individual interests. The Darfur Peace Agreement (DPA), concluded in Abuja in May 2006, could not end the conflict.

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86 For more information on the splintered groups, see Gérard Prunier, “Darfur, La Chronique d’un « Génocide Ambigu »” Le Monde Diplomatique (Mars 2007) 16.
Weak on the subject of power sharing, the DPA was only signed by a faction of the SLA led by Minni Minawi; the SLA branch led by Abdel Wahid Mohamed Nour as well as the JEM refused. These two groups subsequently formed the National Redemption Front (NRF). To add to the confusion and the level of violence, the different rebel groups have also been fighting each other; as early as in October 2005, for instance, several members of the JEM were killed in an attack of a dissident JEM faction.

On the one hand, since the Abuja Peace Agreement, Minni Minawi and its “SLA-MM” have been fighting against the NRF on the side of the GoS, whose tactic of dividing the rebel groups seems to be successful. Civilians who are suspected of cooperation with the NRF are now not only suffering under Janjaweed and army attacks, which are still ongoing in Darfur and which recently started in Eastern Chad, but also under attacks by the SLA-MM. Rebel groups have added to the crisis by diverting international aid for their own purposes. On the other hand, some Janjaweed fighters appear to have changed sides and now fight the regular army together with rebel groups, probably fearing that Khartoum will scapegoat them for the atrocities committed among civilians and send them to The Hague.

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88 Since the DPA was not supposed to affect the 2005 power sharing agreement between the North and the South, the DPA gave the Darfuran insurgents only twelve of 450 seats in the national assembly; see International Crisis Group, “Darfur: Revitalising the Peace Process”, supra note 74 at 27.
89 Reporters Without Borders, supra note 87 at 6.
91 Amnesty International, supra note 81.
3. The role of the ICC in the conflict

3.1. Expectations after the Security Council referral to the ICC

With Resolution 1564, the Security Council established a Commission of Inquiry in September 2004 to examine the violations of international humanitarian law and human rights law in Darfur.94 The commission delivered a report to the Secretary-General in January 2005, recommending a Security Council referral to the Office of the Prosecutor (OTP). Surprisingly, because of the generally negative attitude of the United States and China towards the ICC,95 the Security Council, acting under Chapter VII of the UN Charter, followed this recommendation on March 31, 2005. Resolution 1593 triggered ICC jurisdiction for crimes committed in Darfur since July 1, 2002, stating that “the Government of Sudan and all other parties to the conflict in Darfur shall cooperate fully with and provide any necessary assistance to the Court and the Prosecutor and … urges all States and concerned regional and other international organizations to cooperate fully."96 In other words, the Security Council explicitly obliged the GoS to cooperate with the ICC, but failed to establish such an obligation for those states which are not parties to the Rome Statute.

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 UN-AU peacekeeping mission, only major reaction of the international community to the Darfur crisis. The expectations following this measure were mixed; the ICC referral has been criticized for focusing too much on the future punishment of perpetrators rather

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than the immediate prevention of mass atrocities. The possibility of deterring violence in Darfur thanks to the ICC has been dismissed as a “specious hope”.  

A more optimistic view of the referral to the OTP suggests that the ICC represents a significant threat for key players of the conflict, being able to pressure the GoS to cut support for the Janjaweed. Members of the SLA expressed their hope that the ICC would quickly indict those who they consider responsible for the atrocities committed in Darfur, in other words senior figures of the Khartoum regime, including President Omar el-Bashir and Vice-President Ali Osman Taha. It has been argued that making public the names of the 51 individuals, which are on the list of the Commission of Inquiry, would already stigmatize and de-legitimize the GoS.

The activity of the ICC has been given much weight in the case of Darfur, in particular due to the lack of any other concerted measures of the international community, the dimensions of the conflict and its increasing mediatization. The following chapters argue that this responsibility conveyed to the ICC can be dealt with by the organs of the Court, in particular the OTP, in a sensible and conscious manner. First, as a basic precondition, the case is admissible according to the Rome Statute. Second, the OTP has large prosecutorial discretion regarding its further procedure, which makes the ICC an active player in the context of international politics.

3.2. Admissibility under Article 17 of the Rome Statute

As a result of the Security Council referral, the ICC has jurisdiction over crimes committed in Darfur, although Sudan has not ratified the Rome Statute. However, specific cases must also be admissible according to the principle of complementarity, which means that Sudan must either be unable or unwilling to

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carry out the investigation and/or prosecution. The Sudanese judicial system can be considered functional from a general point of view. Even though crimes have been committed on a large scale, it should, nonetheless, not be unable to carry out investigations and prosecutions in the sense of the Rome Statute. However, the numerous crimes committed in Darfur have been dealt with by the national court system very insufficiently. The little efforts of the GoS to tackle the crimes in Darfur, such as through its National Commission of Inquiry, established in May 2004, and the Special Court for Darfur, established in June 2005, have had very limited effects. Until recently, only a few low-level officers had been indicted, and only for crimes less grave than those that have been committed on a large scale. Human rights organizations, such as Amnesty International, have dismissed the establishment of the Special Court as a tactic by the GoS to avoid ICC prosecutions. The timing of the establishment of the Special Court, shortly after the OTP announced the opening of investigations into the situation in Darfur, certainly gives rise to allegations that it was only set up to try to thwart ICC jurisdiction. However, since the end of 2006, the Sudanese Ministry of Justice has been committed to showing more concrete actions; it arrested, for instance, Ali Kushayb, an important militia leader who is also denounced by the OTP as one of the persons who is most responsible for the crimes that have been committed. However, it is obvious that the judicial system has been unwilling to truly investigate most of the militia leaders and those members of the GoS who bear individual responsibility for the atrocities committed in Darfur. Even if


102 ICC, “Prosecutor’s Application”, supra note 68 at 89. Regarding the admissibility of the case against Ali Kushayb, the OTP affirmed that its own investigations and those made by the Sudanese did not relate to the same conduct; see ICC, “Fifth Report of the Prosecutor”, supra note 69 at 8.
investigations are carried out, it is, furthermore, unlikely that they will fulfill the requirements of article 17(2)(c) of the Rome Statute that such investigations be conducted independently and impartially, as well as with the “intent to bring the person concerned to justice.” Generally speaking, it should not be difficult for the OTP to prove the admissibility of cases concerning the situation in Darfur; in this case, an activity of the ICC perfectly corresponds to the purpose of the Rome Statute due to the direct involvement of the GoS and its influence on the judicial system. In its application to the Pre-Trial Chamber to issue summonses to appear against Ahmad Harun, a government official, and Ali Kushayb, a militia leader, the OTP concluded that the case was admissible, since the “Sudanese authorities have not investigated or prosecuted the case which is the subject of the Application.”

3.3. The proactive role of the ICC thanks to its prosecutorial discretion

The ICC is not a passive player in the interlinked field of international criminal justice and international relations who must act in a certain, quasi-predetermined way in a given situation. In particular in the case of Darfur, the ICC has rather large prosecutorial discretion because of the limited obligation for states to prosecute international crimes and several provisions of the Rome Statute enlarging the ICC’s options to act.

3.3.1. The legal obligation to prosecute

3.3.1.1. The legal framework

To address the question of prosecutorial discretion, it is important, regardless of any practical considerations, to consider whether international law has created a

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103 ICC, “Fact Sheet, The Situation in Darfur, the Sudan”, 27 February 2007, online: International Criminal Court <http://www.icc-cpi.int/library/organs/otp/ICC-OTP_Fact-Sheet-Darfur-20070227_en.pdf>. The warrants of arrest were issued by the Pre-Trial Chamber two months later, on April 27, 2007.
legal obligation to prosecute. When states are under an international obligation to prosecute but do not fulfill their obligation, the ICC should be at the forefront. As the ICC was set up as an institution to put an end to impunity, it cannot easily refuse to act according to those provisions of international law that form the material basis of ICC jurisdiction. However, from a strict legal point of view, unlike states, the ICC is not obliged to prosecute. The obligation for states is "relevant but it is not determinative of the stance of the ICC in carrying out its mandate". Justifying the exercise of discretion in form of evading prosecutions would be significantly more difficult for the ICC in situations when states are under a legal obligation to prosecute. The problem is aggravated by the fact that the Rome Statute is silent about any obligation to prosecute and does not clarify the issue of how the ICC will deal with nationally granted amnesties or pardons, regardless of whether or not they violate an international obligation to prosecute. In fact, the Rome Statute contributes to the tendency towards an obligation to prosecute by stipulating in its preamble the “duty of every State to exercise its criminal jurisdiction over those responsible for international crimes” and by “affirming that the most serious crimes of concern to the international community as a whole must not go unpunished.” However, this duty could only find its place in the preamble, as states were not able to agree on its inclusion into the body of the Rome Statute at the Diplomatic Conference.

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105 Michael P. Scharf, “The Amnesty Exception to the Jurisdiction of the International Criminal Court” (1999) 32 Cornell Int’l L.J. 507 at 515 [Scharf, “The Amnesty Exception”]; Scharf concludes that “[i]t would be inappropriate for an international criminal court to defer to a national amnesty where the amnesty violates obligations contained in the very international conventions that make up the court’s subject matter jurisdiction.”


107 Ibid. at 492.
For the purpose of this thesis, it is important to address the fundamental question whether the discretion of the OTP may be limited by a general obligation to prosecute to the detriment of a temporary situation of impunity.

The Genocide Convention clearly creates an obligation to prosecute. According to article 4 of the convention, anyone who commits genocide “shall be punished”. Therefore, it would be very difficult for the OTP to justify the respect of domestically granted amnesties or a situation of impunity, even provisional, concerning crimes falling under article 6 of the Rome Statute. In addition, the Genocide Convention is also recognized as customary international law and is therefore binding on states which are not parties to the convention. Although some commentators still recognize a certain degree of discretion due to the fact that the convention is “unclear as to the precise modalities of such punishment”, the discretion is minimal. Furthermore, the purpose of the Genocide Convention to oblige States Parties to punish perpetrators is clear; requiring details of the penalizing process seems exaggerated.

Similarly, states must punish perpetrators of grave breaches under the 1949 Geneva Conventions. States Parties must “provide effective penal sanctions for persons committing, or ordering to be committed, any of the grave breaches of the present convention.” The obligation is absolute; there is no room for immunities or amnesties. However, there is no international obligation to

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108 Convention on the Prevention and Punishment of the Crime of Genocide, 9 December 1948, 78 U.N.T.S. 277 (entered into force 12 January 1951). The obligation is not based on the principle of universal jurisdiction, but of territorial jurisdiction, which means that genocidaires must be tried by the state where the genocide was committed or by an international criminal tribunal; see article 6 of the convention. Similar obligations arise under the Torture Convention and the Apartheid Convention.

109 Prosecutor v. Kayishema and Ruzindana (1999), ICTR-95-1-T (Judgment, 21 May 1999) (International Criminal Tribunal for Rwanda, Trial Chamber) at 88. Sudan, for instance, only signed the Genocide Convention but has not ratified it.


prosecute “other serious violations of the laws and customs applicable in international armed conflict” (article 8(2)(b) of the Rome Statute), although states may, of course, prosecute these “other” crimes. Furthermore, the duty to prosecute is limited to international armed conflicts and does not extend to internal armed conflicts, as the grave breaches provision only applies to those conflicts where two or more states are involved.

In addition to genocide and war crimes, another important type of crime in the Rome Statute is crimes against humanity. As no treaty exists concerning crimes against humanity, states are not required to prosecute these violations under treaty law. However, many commentators and human rights groups argue that customary international law has not only created permissive jurisdiction, but, in fact, obliges states to prosecute perpetrators of crimes against humanity. Indeed, a trend towards the recognition of a duty to prosecute international crimes is observable; national and regional jurisprudence ground this obligation on the respect of human rights law. In Velasquez-Rodriguez, the Inter-American Court ruled that a situation of impunity violated the American Convention on Human Rights;\(^{112}\) it affirmed that states must investigate and prosecute those responsible for human rights violations. Both the European Court of Human Rights and the UN Human Rights Commission reiterated this obligation.\(^{113}\) The jurisprudence of these bodies, the establishment of international criminal tribunals,\(^{114}\) as well as the important change in attitude of states concerning impunity since the Pinochet case are part of the tendency towards the prosecution of crimes against humanity.

This tendency to prosecute does not necessarily go along with a generalized obligation to prosecute. Although the issue remains controversial, Michael P.


\(^{114}\) Both the ICTY and the ICTR stipulate an obligation to hold individuals accountable for war crimes, genocide and crimes against humanity; see article 7(1) of the ICTY statute and article 6(1) of the ICTR statute.
Scharf, an eminent specialist in the field of international criminal justice, concludes that “there is scant evidence that customary international law requires the prosecution of crimes against humanity.”115 Since some states still use amnesties as a policy instrument without any objections of the international community, it has been argued that “any conclusion that a generalized duty to prosecute exists would thus fly in the face of current state practice.”116 In contrast, Darryl Robinson, former legal advisor to the ICC Prosecutor, affirms that there is a general duty, or at least an emerging duty, to prosecute those who committed crimes under the Rome Statute as “it would seem incongruous and convoluted to recognize a duty for some ICC Statute crimes …, but not for equally serious or more serious ICC Statute crimes.”117 These arguments seem convincing from a practical point of view, but the issue of a legal obligation to prosecute the different crimes is more complex; international law does not always correspond to the easiest or most logical option. Robinson concedes, however, two interesting limitations to the asserted duty. First, it can be enough for a transitional government to prosecute the persons most responsible for the crimes committed; second, a necessity exception to a general duty to prosecute is conceivable in situations of “grave and imminent threat.”118 These limitations possibly correspond to the role of the ICC Prosecutor, who is committed to bringing to justice the principal offenders and must take into account the interests of the victims.119 Another important differentiation is made by Law Professor Leila Nadya Sadat who explains that blanket amnesties have become less and less acceptable over recent years; although amnesties are, in general, still permissible under international law, decisions of regional courts suggest that “a prohibition against the grant of blanket amnesties for the commission of jus cogens crimes

117 Robinson, supra note 106 at 492.
118 Ibid. at 493.
119 See below, c. 3.3.4.
may now have crystallized has a matter of general customary international law.”

In addition to state practice, the question of opinio juris, which is the second necessary element to constitute customary international law, must also be addressed. There is scant evidence that states have ever prosecuted crimes against humanity with the sense of a legal obligation. Only the statements of a few states’ representatives, such as Uruguay, El Salvador and Chile, can be interpreted as recognizing their amnesty laws as an exception to a general duty to prosecute. However, most states that avoided prosecutions and granted amnesties instead have not made any declarations concerning a legal obligation to prosecute. It can therefore be concluded that most states do not recognize a legal obligation to prosecute crimes against humanity despite increasing evidence of opinio juris.

In sum, a legal obligation to prosecute crimes against humanity or war crimes other than grave breaches of the Geneva Conventions is possibly developing thanks to customary law, but state practice is far from being pervasive at the moment. As we will see in the next chapter, states often avoided activating individual accountability mechanisms when international crimes had been committed.

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120 Sadat, “Exile, Amnesty”, supra note 110 at 1022.
121 Karen Gallagher, “No Justice, no Peace: The Legalities and Realities of Amnesty in Sierra Leone” (2000) 23 Thomas Jefferson L. Rev. 149 at 183; however, Gallagher underlines that these states were under the additional regime of the American Convention on Human Rights. Their declarations might, therefore, not originate from the opinio juris of a general customary international law duty.
122 See similarly ibid. at 186.
3.3.1.2. State practice

This chapter discusses a few recent examples of amnesty and/or impunity. The list is far from exhaustive; many states, in particular in Latin America, have relied on various forms of amnesties, sometimes in combination with truth and reconciliation commissions (TRCs), over the last decades. The following examples, which were in majority taken from an African context, illustrate both positive and negative effects of avoiding judicial accountability and also reflect the approval of large-scale amnesties by the international community.

South Africa – the success of the TRC

The South African transition from an apartheid regime to a representative democracy following the 1994 elections was relatively smooth and non-violent. An important aspect of this successful transition was that the new government, dominated by the African National Congress, avoided a climate of retributive justice and emphasized the need for long-term reconciliation within the country. The government had realized that by facing, but at the same time accepting, what had happened during the former regime the basis for future cooperation could be formed. It was clear that “[s]uccess in the constitutional negotiations depended to a large degree on making a deal with the previous regime, and Nuremberg-type trials were not an option if the country was to reach democratic elections without a coup or chaos.”

As part of the negotiated transfer of power, a TRC was established in 1995, mandated to grant full amnesty to those who confessed entirely in their crimes, as long as these crimes had been politically motivated. Although South Africa’s

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123 Generally, an obligation to prosecute prohibits the granting of amnesties. Sadat observes that the two questions are often related, but still distinct. Even if an obligation to prosecute is answered in the negative, international law does not necessarily recognize the legality of amnesties in the case of mass atrocities; see Sadat, “Exile, Amnesty”, supra note 110 at 1019.
TRC stands outside the regular legal system, its decisions are binding on the national courts.\textsuperscript{125} To decide on amnesties in particular cases, the TRC had to take several criteria into account, such as the motive and the objective of the perpetrator, the context of the crime, its gravity, the proportionality of the act to the objective pursued,\textsuperscript{126} and other aspects which are also typically taken into account when sentences are to be determined in trials. Although the TRC has also been criticized,\textsuperscript{127} its achievements are considerable, some of them being similar to the advantages of traditional prosecutions. Both TRCs and prosecutions help to bring about truth. The crimes of the past will not be forgotten. The model of South Africa stands therefore in sharp contrast to the blanket amnesties that were typically granted after the transition from military regimes to democracy, such as the amnesties granted for crimes committed during the “dirty war” of the 1970s in Argentina.\textsuperscript{128} Furthermore, in the case of the South African TRC, individuals were also publicly identified, which produced individual responsibility, enabled societal instead of legal sanctions and thus created some satisfaction for the victims. Interestingly, the South African way of dealing with the crimes of the past was largely supported by the international community.\textsuperscript{129} Although, during the apartheid regime, General Assembly resolutions repeatedly called for an implementation of the Apartheid Convention and for prosecutions of offenders,

\textsuperscript{127} See e.g. Lansing & King, supra note 125 at 771. 50 to 60 per cent of the victims regret having testified before the amnesty commission; see Yves Beigbeder, Judging War Criminals (New York: St. Martin’s Press, 1999) at 121
\textsuperscript{128} Lansing & King, supra note 125 at 784. The South African example also shows that TRCs work best when a reformist political coalition wants to bring about democratic changes. Citing Chad’s President Idriss Déby’s false efforts to reveal the atrocities of the former regime by installing a truth commission, Snyder and Vinjamuri come to the conclusion that “[i]n the absence of an effective reformist coalition, truth commissions are at best an empty gesture and at worst a fig leaf covering up continued abuses.” Snyder & Vinjamuri, supra note 15 at 33.
\textsuperscript{129} Another good example of an amnesty program backed by the international community is Haiti. In 1993, at about the same time when the ICTY was established, the Security Council and the Organization of American States pressured the re-instated President Aristide to accept the negotiated broad amnesty for the military; see Jessica Gavron, “Amnesties in the Light of Developments in International Law and the Establishment of the International Criminal Court” (2002) 51 I.C.L.Q. 91 at 106.
the General Assembly finally appreciated the transition to democracy without reiterating its demands for prosecutions.\textsuperscript{130}

South Africa has shown that a transition relying on amnesties does not always promote a climate of impunity that must be rejected as violating victims’ rights or the interests of the international community. Furthermore, as Sadat underlines, TRCs \textit{per se} do not threaten individual accountability and do not necessarily exclude criminal prosecutions.\textsuperscript{131}

Mozambique – blanket amnesties as part of a successful way to peace

Mozambique followed another way to cope with the crimes of its civil war. The October 1992 General Peace Agreement not only ended the brutal civil war that had cost nearly one million lives since its outbreak after Mozambique’s independence in 1975, but also granted blanket amnesties to former combatants of both sides, even though horrible crimes had been committed against civilians.\textsuperscript{132} Both sides had concluded that no truth-telling in exchange for amnesty would take place; they wanted to “move on”.\textsuperscript{133} Therefore, Mozambique did not install a war crimes tribunal or a truth commission, thus disregarding the two most common mechanisms to deal with crimes in a post-conflict period. Furthermore, the peace agreement also allowed rebel leaders to become part of the political scene.\textsuperscript{134} Former combatants were successfully reintegrated into society through traditional healing and cleansing rituals.\textsuperscript{135} It is important to note that this process was supported by the international community who carried most of the costs for disarmament, demobilization and reintegration.\textsuperscript{136} In the case of Mozambique,

\textsuperscript{130} Ib. at 115.
\textsuperscript{131} Sadat, “Transformation”, supra note 115 at 53.
\textsuperscript{133} Ib. at 141.
\textsuperscript{134} Gallagher, supra note 121 at 188.
\textsuperscript{135} Cobban, \textit{Amnesty after Atrocity?}, supra note 14 at 159.
\textsuperscript{136} Ib. at 152.
concentrating on material poverty and underdevelopment seems to have been even more important than addressing reconciliation; a South African model of reconciliation was not considered necessary. Moreover, the implementation of the peace agreement was facilitated by the UN peacekeeping mission ONUMOZ, deployed in December 1992. Thanks to the lasting stability that resulted from the successful peace and reconciliation process, Mozambique has since experienced a modest, but noteworthy economic recovery.

Lomé, Dayton and Naivasha – ambiguous ways to achieve peace

Generally, the situation for international negotiators is even more difficult when mass atrocities are still going on and when a peace agreement is urgently needed, than when violence has already stopped and reconciliation mechanisms can start to work. In Sierra Leone, for instance, the international community felt obligated to include Foday Sankoh to achieve a settlement of the conflict, even though there was heavy evidence that Sankoh, as leader of the Revolutionary United Front (RUF), was responsible for international crimes committed in the decade-long conflict. The Lomé Peace Accord, signed on July 7, 1999, by the parties to the conflict and the Special Representative of the UN Secretary General, foresaw the establishment of a TRC to enable reconciliation in the country, but it also granted full amnesty to the members of the RUF, including Sankoh, and promised the latter the position of vice president in the Sierra Leonean government. Although the world opinion was already moving towards “ending a climate of

137 Ibid. at 166.
139 See article 5(2) of the agreement; article 9 states that “the Government of Sierra Leone shall take appropriate legal steps to grant corporate Foday Sankoh absolute and free pardon.” See Lomé Peace Agreement, UN Doc. S/1999/777 (7 July 1999). Another example where the UN opted against criminal investigations due to political considerations is Afghanistan. Even though, in September 2002, Human Rights Commissioner Mary Robinson urged to investigate political leaders of the UN-backed Afghan government because of their alleged responsibility for war crimes, the UN administrator Lakhdar Brahimi argued that such investigations would only endanger peace and stability in the country; for more information, see Snyder & Vinjamuri, supra note 15 at 8.
impunity”, as stipulated in the Rome Statute, a precarious peace agreement, which included blanket amnesties for notorious war criminals, was made by the government and backed by the United Nations in the case of Sierra Leone.\textsuperscript{140} The UN Special Representative, however, affirmed that the amnesty provisions should not apply to international crimes, such as genocide, crimes against humanity and war crimes.\textsuperscript{141} Interestingly, Mozambique’s successful path following the 1992 peace agreement was often evoked to claim that amnesties could also work in Sierra Leone.\textsuperscript{142} Sankoh, however, demonstrated after the conclusion of the Lomé Peace Agreement that he could not be stopped by these “soft” means; hostilities including attacks on the civilian population by the RUF continued without interruption; it became obvious that Sankoh’s acceptance of the peace agreement had only been tactical.\textsuperscript{143} He was finally arrested in May 2000 and, in 2003, indicted by the Prosecutor of the newly established hybrid tribunal, the SCSL, which speaks a clear language about the crimes committed by Sankoh.\textsuperscript{144}

Similarly, mediators in the Bosnian conflict had no better choice than to include Slobodan Milosevic in negotiations, even though there was already considerable evidence at the time that Milosevic had either supported the ethnic cleansing in

\textsuperscript{140} Several representatives of the international community also signed the agreement, including the presidents of Burkina Faso, Liberia, Nigeria and Togo and international representatives from the UN, OAU, ECOWAS and the Commonwealth; see Lomé Peace Agreement, supra note 139 at 31.

\textsuperscript{141} As Gallagher notes, this reservation was added so late that it does not appear in early copies of the agreement, such as in the UN document cited above; see Gallagher, supra note 121 at 163, n. 115. Kofi Annan also made it clear that it had been hard to accept this peace deal: “No one can feel happy about a peace accepted on such terms […] it is very hard to reconcile with the goal of ending the climate of impunity;” cited in Victoria Brittain, “Unrealistic Humanitarians” The Guardian (4 August 1999), online: Guardian Unlimited <http://www.guardian.co.uk/comment/story/0,,280229,00.html>.

\textsuperscript{142} Although Gallagher argues that the circumstances in Mozambique and Sierra Leone were remarkably similar, he also underlines that there are important differences. Due to the absence of natural resources in Mozambique, the RENAMO was more motivated to disarm and reintegrate itself in the political process than Foday Sankoh’s RUF was; see Gallagher, supra note 121 at 188.

\textsuperscript{143} John L. Hirsch, Sierra Leone: Diamonds and the Struggle for Democracy (Boulder, Colo.: Lynne Rienner Publishers, 2001) at 89.

\textsuperscript{144} Prosecutor v. Foday Sankoh (2003), SCSL-03-02-I-001 (Indictment, 7 March 2003) (Special Court for Sierra Leone); due to Sankoh’s death a few months later, the indictment was withdrawn.
Bosnia or was, at least, responsible for not avoiding it.\textsuperscript{145} In fact, the United States, as leading negotiator, had to rely on Milosevic because they did not want to deal directly with war criminals like Radovan Karadzic and Ratko Mladic, who were already indicted by the ICTY Prosecutor at the time; the result was, however, “dealing with evil to end evil.”\textsuperscript{146} If Dayton ended the atrocities in Bosnia and drew a new map to divide the land between Bosnian Serbs and the Muslim-Croatian federation, it also strengthened the power of leading nationalists in the region, particularly of Milosevic himself and Croatian President Franjo Tudjman. Although the negotiators tried to maintain a high pressure on Milosevic while Dayton was implemented, the agreement inevitably empowered the “international statesman”\textsuperscript{147} Milosevic and, in the mind of the public, confused his personal responsibility for the crimes committed during the Bosnian conflict. This power allowed him to orchestrate the ethnic cleansing of Albanians in Kosovo only a few years later. Some commentators even argue that “[t]he bloodshed of Kosovo is a symptom of the approach that strengthened Milosevic and Tudjman,”\textsuperscript{148} and that Milosevic had received “de facto immunity”\textsuperscript{149} at Dayton. Arguments that indicting Milosevic would only persevere and prolong the conflict were reiterated during the Kosovo crisis. Although Milosevic had already been indicted by the ICTY for his additional crimes committed in Kosovo, the UN Human Rights Commission’s special Rapporteur for the former Yugoslavia still suggested in 2000 that promising immunity was the only way to remove Milosevic from power.\textsuperscript{150} When he was finally arrested in March 2001 by Serbian police, his guilt for having committed international crimes was obvious. Unfortunately, the Kosovo crisis had been necessary to show that one of the key

\textsuperscript{145} Sadat, “Transformation”, supra note 115 at 69.
\textsuperscript{146} Derek Chollet, The Road to the Dayton Accords, A Study of American Statecraft (New York: Palgrave Macmillan, 2005) at 199.
\textsuperscript{147} Adam LeBor, Milosevic, A Biography (New Haven: Yale University Press, 2004) at 253.
\textsuperscript{148} Warren Bass, “The Triage of Dayton” (1997) 77:5 Foreign Affairs 95 at 96. However, Bass later concedes to appreciate that Dayton, at least temporarily, stopped the fighting; see \textit{ibid.} at 101.
\textsuperscript{150} Sadat, “Transformation”, supra note 115 at 71.
players of Dayton had had no intention to stop abusing his power. The threat of being indicted in The Hague did not seem to have a major influence on Milosevic as “he ignored Western diplomats’ face-to-face warnings that he would be prosecuted if he failed to stop Serbian abuses in Kosovo.”\textsuperscript{151} Although the activity of the ICTY was certainly not the only factor that must be taken into account, it strikes that a peace agreement was achieved shortly after Milosevic was formally indicted.\textsuperscript{152}

The examples of Sankoh and Milosevic both indicate that a climate of impunity can typically not settle a conflict, in particular when the key players remain in power. In both cases, the offenders were able to continue their criminal behavior. Although it was considered impossible to remove both leaders from power without further bloodshed, prosecuting them earlier might have helped to avoid a new outbreak of the war in Sierra Leone as well as the Kosovo crisis. Paradoxically, the international community, having already established the first war crimes tribunals since Nuremberg and increasingly calling for international justice, had no better choice than to endorse the promising, but very dangerous peace agreements of Lomé and Dayton.

Another most recent example of a peace deal, also approved by the international community, is the settling of the conflict in southern Sudan. The peace process in Naivasha, Kenya, resulted in a peace agreement between the GoS and the Sudan People’s Liberation Army (SPLA), signed in Nairobi on January 9, 2005. The agreement seeks to end the 20 year-long conflict between the Islamist North and the Christian-dominated South, promising the SPLA an important share of political power and oil revenues. A referendum, to be held in 2011, will decide whether the South will remain in Sudan or become independent.\textsuperscript{153} The peace

\textsuperscript{151} Snyder & Vinjamuri, \textit{supra} note 15 at 20.
\textsuperscript{152} Robinson, \textit{supra} note 106 at 496.
\textsuperscript{153} Denis M. Tull, “Sudan After the Naivasha Peace Agreement, No Champaign Yet”, (February 2005) German Institute for International and Security Affairs 1 at 1.
process in southern Sudan is interesting due to its link to the Darfur conflict.\textsuperscript{154} It is, however, even more important here that international negotiators put a lot of effort into the peace process and were happy to have the peace deal finally signed, even though it simply disregarded the question of prosecuting perpetrators, thus granting a \textit{de facto} blanket amnesty for war criminals of all sides. The horrible crimes, including summary executions, rape, abductions, and forced recruitment,\textsuperscript{155} committed by government troops and pro-government militias as well as the SPLA throughout the whole conflict will not be recalled, at least not officially. At a time when the Rome Statute had entered into force, proclaiming in its preamble to end a climate of impunity, thus highlighting a world-wide tendency, “justice was quietly put aside”.\textsuperscript{156} The peace agreement became the most recent case where the international community considered an implicitly accorded impunity a necessary prerequisite to make the warring parties, in particular the government in Khartoum, sign a peace deal.

3.3.2. Consequences for the ICC

As has been argued above, a legal obligation for states to prosecute international crimes limits the OTP in its discretion to accept amnesties or remain inactive facing a situation of impunity without individual accountability mechanisms. Where treaty law has created a clear duty for states, the goal of the Rome Statute would be perverted if, an admissible case given, grave breaches of the 1949 Geneva Convention or genocide were not prosecuted by the OTP. Although the text of the Rome Statute does not distinguish between the different types of crimes but lists genocide, war crimes and crimes against humanity as equally

\textsuperscript{154} Behind the religious connotation, the conflict in the south is also marked by the center-periphery dichotomy. It is interesting to note that the SPLA supported the nascent rebellion in Darfur by sending weapons to Darfur; see Res Publica, \textit{supra} note 36 at 10. For more information on the ambiguous relationship between the SLA and the SPLA, see Flint & de Waal, \textit{supra} note 37 at 81.


\textsuperscript{156} Flint & de Waal, \textit{supra} note 37 at 129.
punishable, the discretion is larger concerning crimes against humanity as well as war crimes committed in non-international armed conflicts. For these crimes, the role of the ICC is comparable to a state acting according to the principle of permissible universal jurisdiction; offenders can be prosecuted, but if they are not, international law is not violated.

Another important issue concerns the granting of amnesties and the necessary degree or technique of holding individuals accountable. Generally, amnesties, and even situations of impunity, as the example of southern Sudan recently showed, are still accepted by the international community out of political considerations. Even though the ICC, due to its mandate, must be devoted to prosecutions, it is clear that the acceptance of TRCs as in South Africa by the international community also increases the discretion of the OTP to defer to non-prosecutorial accountability mechanisms. However, blanket amnesties, without any mechanism of individual accountability or truth-telling à la South Africa, seem to have largely been outlawed by states. This means that the ICC, although the delegates at the Diplomatic Conference could not find a consensus as to how the ICC should deal with amnesties or TRCs, could almost certainly never accept blanket amnesties. As Robinson expresses it, “blanket amnesties are the precise antithesis of the ICC.”\footnote{Robinson, \textit{supra} note 106 at 497.} However, other methods, such as conditional amnesties that come close to judicial proceedings are not equivalent to impunity \textit{per se} and do not threaten the aim of holding individuals accountable.

The acceptability of these mechanisms by the ICC are closely linked to the principle of complementarity and article 17 of the Rome Statute, which stipulates that a case is inadmissible when it has been “investigated by a State which has jurisdiction over it and the State has \textit{decided} not to prosecute the person concerned, unless the decision resulted from the unwillingness or inability of the State to \textit{genuinely prosecute}.”\footnote{Article 17(1)(b) of the Rome Statute [emphasis added].} If traditional prosecutions have not taken place,
the first prerequisite to fulfill this provision is that a non-prosecutorial body, such as a TRC à la South Africa, investigate the crimes. Although it has been argued that only criminal investigations can be subsumed under the term “investigations”, the ordinary sense of the word “investigation” suggests that a commission which systematically and objectively gathers the evidence can also meet this criterion. The second condition of article 17(1)(b) is that the state has discretion to decide whether or not to prosecute the person concerned. Unconditional amnesties must therefore be excluded, since they do not leave open any other option but amnesty. The South African TRC with its genuine power to grant amnesties or not serves again as a possible example and stands in contrast to situations like in Uganda. The Ugandan Amnesty Act only requires former combatants to report to an official and to surrender his weapons, thus granting a quasi-unconditional amnesty and leaving no choice for the amnesty commission to refuse to issue an amnesty certificate. As a third requirement of article 17(1)(b), the state must not be unable or unwilling genuinely to prosecute, which refers to the provisions stipulated in article 17(2) and (3); above all, non-prosecutorial proceedings must not be undertaken with the “intent of shielding the person concerned from criminal responsibility.” If the main purpose of an amnesty program is to bring about reconciliation while uncovering the crimes committed, it would not appear to primarily shield the offenders from criminal responsibility. Those TRCs which come, due to public hearings and the possibility of alternative sentences, close to criminal proceedings would, moreover, not be contradictory to article 17(2)(c), which states that the proceedings must not be “conducted in a manner which, in the circumstances, is inconsistent with an intent to bring the person concerned to justice.”

160 Robinson, supra note 106 at 500.
162 Article 17(2)(a) of the Rome Statute.
163 Article 17(2)(c) of the Rome Statute.
In sum, the discretion of the OTP to prosecute or not depends chiefly on the type of crime committed; international law can limit the prosecutorial discretion of the ICC significantly. Moreover, the efforts of the state in question to deal with the crimes committed also play an important role. In addition to the general question of complementarity, the manner how amnesties are granted, how TRCs are established and what mandate they are given will decide whether the OTP could accept nationally granted amnesties without infringing on its own principles. It has also been argued that the ICC will have to determine who his primary constituents are. As a result, the prosecutorial discretion will be exercised differently if the victims of an armed conflict are considered the principal constituents of international prosecutions compared to the interests of the larger international society; although “[j]ustice for an entire society may mean individual injustices for victims, … ignoring or sacrificing the needs of individual victims may not serve the long-term interests of the society.”

3.3.3. Significance for the Darfur conflict

The conflict in Darfur is clearly not of an international character. The protracted armed violence of the Sudanese army and the militias fighting the rebel groups, as well as the attacks on the civilian population are part of an internal armed conflict. The counts against Ahmad Harun and Ali Kushayb, listed in the Prosecutor’s Application, confirm this view; according to the OTP, crimes against humanity, as defined in article 7 of the Rome Statute, and war crimes, as defined in article 8(2)(c), have been committed. This means that the legal discretion of the OTP to prosecute is considerably large in the case of Darfur as no state would be obliged to prosecute these crimes. However, it is likely that precisely the mass atrocities committed in Darfur support a further shift towards a customary legal


165 ICC, “Prosecutor’s Application”, supra note 68 at 6.
duty to prosecute crimes against humanity and war crimes other than grave breaches. The ICC might even try to advance the tendency towards a legal obligation to prosecute by arguing that such an obligation is currently developing, in particular in the light of the establishment of several international criminal tribunals and the ICC itself. Only this role of the ICC will probably be acknowledged by those states which set up the ICC in order to close the loopholes where serious crimes have not been prosecuted until now.

Even though the discussion whether genocide is being committed in Darfur is all but helpful for the victims, it plays an important role to determine the legal discretion of the OTP. In the case of genocide, the discretion of the OTP is minimal. The Commission of Inquiry reached the conclusion that “no genocidal policy has been pursued and implemented in Darfur by the Government authorities,” but it did not reject the possibility that some individuals, including government officials, may be acting with genocidal intent. In this case, states would have the legal obligation to prosecute them. In such a situation of ambiguity, it is not clear what degree of certainty about the offenders’ intent is necessary in order to trigger a legal obligation for a state to clarify the issue before a competent tribunal. Should the OTP conclude that there is enough evidence that some offenders attacked civilians in Darfur with genocidal intent in order to prosecute the crime of genocide according to article 6 of the Rome Statute, a prosecution would be required; inactivity as well as a de-activation of the ICC would be inconsistent with international law.

Conversely, the GoS limits the discretion of the OTP by its minimal efforts to bring the persons concerned to justice. As argued above, the ICC and its

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166 See above, n. 63.
167 UNCOI, supra note 46 at 4. On UNCOI’s findings, see Schabas, supra note 63; for a comparison to the position of the United States, see Jamie A. Mathew, “The Darfur Debate: Whether the ICC Should Determine that the Atrocities in Darfur Constitute Genocide” (2006) 18 Fla. J. Int’l L. 517, demanding that the ICC hold the GoS and the Janjaweed responsible for genocide.
168 Article 53(2) of the Rome Statute speaks of a “sufficient basis for a prosecution.”
169 See above, c. 3.2.
approach to deal with the situation in Darfur can hardly be influenced by the recent “judicial” attempts of the GoS, since they come close to a total inactivity. In the currently unlikely case that the GoS starts to seriously deal with the crimes committed in Darfur, thus showing itself to be willing and able to bring the persons concerned justice, the principle of complementarity, as stipulated in article 17 of the Rome Statute, would be fully applicable. Already indicted persons, however, would remain under the jurisdiction of the ICC. It is interesting to note that a consortium of Sudanese civil society organizations has called for a broad truth commission, operating with the powers of amnesty, to achieve peace and democracy in Sudan. If an amnesty program is set up in Sudan, which might be considered particularly necessary in Darfur in order to stop the violence and to reconcile the largely divided society, the discretion of the OTP to defer to these nationally granted amnesties would depend on the criteria set up above.

3.3.4. The prosecutorial discretion in the context of article 53 of the Rome Statute

The discretion of the OTP to prosecute is not only guided by general norms of international law and the principle of complementarity but also by more specific provisions of the Rome Statute, which are distinct from the aforementioned line of reasoning. First, article 13 stipulates a very general discretion for the ICC to exercise jurisdiction. “The Court may exercise its jurisdiction” after having been activating by one of the triggering mechanisms, but it does not have to do so. Moreover, according to article 53(1)(c), the OTP has to take into account the

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171 A vague amnesty was already granted by Presidential Decree No.114 to members of the armed groups that signed the DPA and subsequent signatories. It is still unclear whether this amnesty should also apply to members of the Sudanese army; see Human Rights Watch, “Sudan: National Courts Have Done Nothing on Darfur” (11 June 2007), online: Human Rights Watch <http://hrw.org/english/docs/2007/06/11/sudan16110.htm>. The possibility of a regime change in Khartoum, which might be combined with a self-amnesty for government officials, is currently unlikely and will, therefore, not be seriously taken into account here.

172 Article 13 of the Rome Statute [emphasis added].
interests of justice when deciding on the initiation of investigations. A similar provision guides the decision whether there is a sufficient basis for a prosecution (article 53(2)(c)). These articles are the most important source of the Rome Statute which affirm the discretion of the OTP not to proceed in some cases, independently from the manner in which the respective state acts. Unfortunately, these cases are not clearly defined. Therefore, an interpretation of the vague provision “in the interests of justice” is necessary.

Generally, the ICC must be devoted to prosecute international crimes, since it is “[d]etermined to put an end to impunity for the perpetrators of such crimes and thus to contribute to the prevention of such crimes.” The Rome Statute seems, however, to follow a broader notion of justice than the rather narrow definition in the sense of prosecutorial criminal justice. According to article 53(2)(c), not only the gravity of the crime, the age of the perpetrator, his role in the alleged crime, and other traditional factors of criminal justice are to be taken into account, but also the interests of victims. This provision, “the interests of victims,” stands out as the most important one in the context of ongoing violence. Article 53 is not only intended to take into consideration the victims’ opinion or preference, in other words whether they want to bring the perpetrators to justice or whether they favor amnesties, having already forgiven the crimes and wanting to “move on”. It has convincingly been argued that “[t]his aspect of prosecutorial discretion is particularly important when investigations or prosecutions may arguably prolong or aggravate an ongoing conflict or undermine a fragile peace process.” In a conceivable scenario, which the OTP is, in fact, already facing in northern Uganda, indictments before the ICC might prolong an armed conflict and

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173 The OTP exercises this discretion under the supervision of the Pre-Trial Chamber. If the Pre-Trial Chamber does not approve the decision of the OTP not to proceed it can, according to Article 53(3)(b), oblige the OTP to investigate and/or prosecute.
174 Preamble of the Rome Statute.
175 As this list is not exhaustive, other factors can also be taken into consideration, thus enlarging the discretionary powers of the OTP; see Philippa Webb, “The ICC Prosecutor’s Discretion Not to Proceed in the “Interest of Justice”” (2005) 50 Crim. L.Q. 305 at 326.
therefore also prolong the suffering of victims. In such a situation, the interests of victims do not consist in trying to achieve immediate retributive justice. Victims will rather be interested in more elementary issues, in other words in stopping the ongoing atrocities and ending their suffering as quickly as possible. In certain cases, this will only be possible to the detriment of instant indictments.

The arguments of local peace initiatives in northern Uganda, which have been emphasizing the necessity of amnesties to bring the LRA leaders to the negotiating table, are a good example of the victims’ concerns. In this case, people from the region itself, including those directly suffering under the LRA, asked the ICC to withdraw. The Paramount Chief of the Acholi in northern Uganda, the main victims of the war, traveled to London, Washington, DC and Ottawa in July 2007 in order to try to convince these governments to pressure for a withdrawal of the ICC indictments. The interests of the victims could not be expressed more clearly. Unfortunately, it is not that easy and clear-cut that peace would immediately emerge if the ICC actually withdrew. However, article 53 is purposely directed at cases where, for instance, armed groups are willing to stop the fighting, but, due to the prospect of criminal prosecutions in The Hague, develop a nothing-to-lose attitude and continue to commit atrocities. Investigations and/or prosecutions cannot be in the interests of the victims, when their suffering is prolonged because an ICC activity frustrates peace negotiations.

On the one hand, since the interests of the victims must be taken into account as a result of this discretion, the OTP has the obligation to balance these practical considerations with the general insistence on prosecuting international crimes.

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177 The Acholi Religious Leaders Peace Initiative has been particularly active; see Adam Branch, “International Justice, Local Injustice” Dissent Magazine (Summer 2004), online: Dissent Magazine <http://www.dissentmagazine.org/article/?article=336>.


Therefore, articles 53(1)(c) and 53(2)(c) underline not only the discretion of the OTP not to proceed with investigations and prosecutions, at least at the time being, but also create an important caveat; the OTP cannot act without considering the effects of investigations and indictments on the victims’ situation. On the other hand, the OTP should not simply give way to the interests of the victims and close the file. The investigations and/or prosecutions should only be considered as postponed, in particular when an armed conflict is still going on, as political situations can change rapidly. The salient question will therefore often be how to find the good timing to indict those who are most responsible for the crimes committed.

Even if the interests of victims hinder criminal justice, it should be kept in mind that not every mechanism of holding individuals accountable is banned for the future. This is relevant in a post-conflict period, when efficient reconciliation must rapidly take place in order to avoid another outbreak of violence. A TRC which does not automatically grant blanket amnesties but can be perceived as a true non-prosecutorial alternative might be perfectly consistent with the interests of victims, while prosecutions would endanger a weak peace process or a newly established, still fragile democratic system.

3.3.5. The policy of the ICC concerning its prosecutorial discretion

So far, the policy, as well as statements and comments of the OTP confirm the discretion asserted above.\(^\text{180}\) Even though the ICC will never clearly pronounce that its activity might depend on the political situation,\(^\text{181}\) since it is obvious that the ICC does not want to become a bargaining chip in negotiations between

\(^{180}\) See e.g. Allen, supra note 33 at 193.
\(^{181}\) Philippe Kirsch clearly underlined this assumption after five years of the entry into force of the Rome Statute: “Pour parvenir à l’universalité, l’une des clés du succès de la Cour va être de se conduire en temps qu’organe judiciaire, de ne pas se comporter en tant qu’organe politique. Et j’estime qu’on ne peut pas trouver trace, dans les quatre années passées depuis la désignation des juges et du procureur, de politisation de la Cour;” cited in “Le long chemin de la Cour pénale internationale vers l’universalité” Le Monde (30 June 2007), online: Le Monde <http://www.lemonde.fr>.
warring parties, the ICC has already suggested that it would not dogmatically proceed with prosecutions under all circumstances. Considering the interests of justice, the OTP, for instance, noted in a 2005 report that it would “remain sensitive to developments” in regards to the restoration of peace and security in Darfur. Furthermore, the OTP has repeatedly underlined the importance of protecting victims and witnesses. It declared, for instance, in a report in 2006 that it had, due to the ongoing violence in Darfur, conducted its investigations from outside Darfur in order to avoid exposing victims and witnesses to additional risks. This can be interpreted as assertion that the public good of peace and security might have more weight than the interest of immediately bringing the persons concerned to justice in The Hague.

The OTP’s step-by-step policy also underlines this assumption: the Prosecutor did not announce charges against a larger group immediately and at the same time, for instance against several members of the GoS. Besides Ali Kushayb, an important militia leader, it targeted Ahmad Harun, a member of the Sudanese government who has had an important influence on the conflict in Darfur as former Minister of State for the Interior and current Minister of State for Humanitarian Affairs, but who is clearly not on the top of the chain of command. The policy of the OTP suggests that an immediate stigmatization of higher-ranked Sudanese officials, including President Bashir and Vice-President Taha, was considered to represent too high political risks.

In the case of northern Uganda, the exercise of prosecutorial discretion to take into account political developments is more obvious than for the situation in Darfur. Although the involvement of the ICC was heavily criticized by many sides and even appeared, at some point, as an obstacle for the government of

Uganda to solve the conflict, the ICC showed that it had considered the political situation before indicting the leaders of the LRA and issuing arrest warrants against them. First, the fact that the arrest warrants were not unsealed immediately after its issuance but only a few months later indicates that the ICC was conscious of the relatively promising looking peace negotiations in mid-2005 and did not want to endanger them. A member of the OTP also affirmed in late 2005 that “[w]e had intended to pull back if negotiations were completed.”

Moreover, by explicitly referring to the Ugandan Amnesty Act in a press release, the ICC indicated that the issue of national amnesties would not be disregarded:

“In a bid to encourage members of the LRA to return to normal life, the Ugandan authorities have enacted an amnesty law. President Museveni has indicated to the Prosecutor his intention to amend this amnesty so as to exclude the leadership of the LRA, ensuring that those bearing the greatest responsibility for the crimes against humanity committed in northern Uganda are brought to justice.”

This declaration highlights an important issue, namely that nationally granted amnesties, or the legal base in form of an amnesty act, are taken into consideration by the ICC. Due to this clear statement, a decision of the OTP not to proceed with investigations and/or prosecutions because of a national amnesty program appears at least possible.

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184 See below, c. 3.4.2.1.
185 The arrest warrants, issued two months after the Prosecutor’s application on July 8, 2005, were unsealed by the Pre-Trial Chamber on October 13, 2005, probably following an unplanned leak of information; see ICC, “Facts and Procedure Regarding the Situation in Uganda, 14 October 2005”, online: International Criminal Court <http://www.icc-cpi.int/library/cases/ICC_20051410-056-1_English.pdf>. According to some commentators, this delay was intended to ensure the protection of victims and witnesses; see e.g. Wasana Punyasena, “Conflict Prevention and the International Criminal Court: Deterrence in a Changing World” (2006) 14 Michigan State Journal of International Law 39 at 57.
186 Allen, supra note 33 at 193.
3.3.6. Political discretion of the ICC despite the powers of the Security Council

In the context of international criminal justice, political considerations and decisions are unavoidable. In particular when it comes to indicting political and military leaders, who are regularly most responsible for atrocities and will therefore be primarily targeted by the OTP, international criminal justice is inherently linked to the immunity of state officials and the relations between sovereign states. An international criminal court has the potential to influence international relations significantly. The question is whether lawyers should be allowed to make these political decisions of great consequence. It has been argued that “decisions to prosecute should be taken by political authorities, such as the UN Security Council or the governments of affected states, not by judges who remain politically unaccountable.” 188 Although this statement does not specifically target the ICC, its claim is clear: highly political decisions in the context of international criminal justice should be taken by the Security Council and not by the ICC. As a result, if the ICC affirms jurisdiction over a case or a situation, it should be able to proceed without bothering about the political situation or the political effects of its activity. In the line of this argument, it is not the ICC that should restrain itself but the Security Council that should block a politically inopportune ICC activity.

The Diplomatic Conference seemed to acknowledge that an ICC intervention might not always be politically appropriate and that the Security Council, deciding that a threat to international peace and security exists, should be able to interfere by adopting a resolution under Chapter VII of the UN Charter. Article 16 of the Rome Statute stipulates that the Security Council can halt the activity of the

188 Snyder & Vinjamuri, supra note 15 at 44. Similarly, Matthew R. Brubacher suggests that the OTP will follow a complementary policy in regard to the Security Council; see Matthew R. Brubacher, “Political Discretion within the International Criminal Court” (2004) 2 Journal of International Criminal Justice 71 at 83.
OTP for twelve months; this period is renewable, theoretically indefinitely, if the threat to international peace and security persists.

Article 16 was one of the most sensitive and controversial points at the Diplomatic Conference, as the states’ opinions on the relationship between the Security Council and the ICC varied significantly. Some wanted to follow the draft proposal of the International Law Commission (ILC) in order to subordinate the ICC under the Security Council, thus making the judicial body dependent on the political organ. Others wanted as much autonomy as possible to avoid a politicization of the proceedings before the Court. The final article 16 is a compromise which recognizes the central position of the Security Council to deal with issues threatening international peace and security but limits the risk to block the OTP when not absolutely necessary. Contrary to the proposition made in the ILC draft, a permanent member of the Security Council cannot hinder an ICC activity with its veto; the usual logic of veto in the Security Council is reversed, as a positive vote is necessary to invoke article 16. This means that each permanent member can veto an article 16 deferral and prevent that the ICC be requested not to investigate or proceed with a prosecution.

Article 16 is a powerful instrument for the highest political organ of the UN to control the activity of the ICC. However, this does not mean that political decisions should only be taken by the Security Council. The Rome Statute contains numerous other provisions that indicate the intention of the drafters to

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189 Article 23(3) states that “no prosecution may be commenced under this Statute arising from a situation which is being dealt with by the Security Council […] unless the Security Council decides otherwise;” see International Law Commission, Draft Statute for an International Criminal Court, in Report of the International Law Commission on the work of its forty-sixth session (2 May–22 July 1994), UN GAOR, 49th Session, Supp. No. 10, UN Doc. A/49/10 (1994).


make the ICC take into account political considerations. As argued above, particularly thanks to article 53 of the Rome Statute, the OTP is clearly mandated to take into account the political situation and the effects of publishing the results of its investigations or of an application to issue arrest warrants. The OTP is not doomed to act as a merely prosecutorial institution that is blind on the political eye, deliberately overlooking the impacts of its activity. Moreover, it has already shown that it will act according to this premise. A Security Council deferral should only be a possibility for extreme situations, with article 16 functioning as an emergency break. Its mere existence does not support the argument that the Security Council should be in charge of the political decisions in the context of international criminal justice to the detriment of the ICC. In sum, the ICC is not condemned to act as a narrow-minded judicial body, since the Rome Statute leaves enough room for political discretion.

Although it has been argued that, “[p]otentially, states and the Security Council have the ability to reduce the ICC to an ad hoc institution by limiting it to situations where there is international and political consensus,” the ICC decides whether or not it has jurisdiction over a case according to the principle of Kompetenz-Kompetenz, as stipulated in article 19 of the Rome Statute and established by the ICTY Appeals Chamber in Tadic. The Court is empowered to determine whether a Security Council referral corresponds to the principles and purposes of the UN Charter; in other words, whether the Security Council rightfully invoked Chapter VII. The Court is, however, limited to a legal analysis and cannot address the appropriateness or effectiveness of a Security Council referral. This principle is also applicable in the case of a deferral. Even

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195 Condorelli & Villalpando, supra note 192 at 641.
196 Ibid.
though an article 16 deferral creates an obligation for the Court to suspend investigations and/or prosecutions, the ICC is also entitled to decide on the validity of the respective Security Council resolution and its conformity with Chapter VII. This competence is an important mechanism to control the Security Council and limits its formal superiority, conveyed by article 16, to the benefit of the ICC.

Another interesting question concerns the consequences of a Security Council deferral according to article 16 in order to enable amnesties which are granted to achieve a peace agreement. It has been convincingly argued that this measure cannot realistically make the ICC respect nationally granted amnesties in the long run: “deferring to a national amnesty implies (since amnesty laws are rarely overturned) a permanent respect for that amnesty.” Since a repeated or perpetual renewal of the 12 month postponement is highly unlikely, an article 16 deferral cannot make the ICC having to respect amnesties eternally. In fact, article 16 was only intended as a delaying mechanism in order to temporarily suspend the work of the ICC and prevent it from interfering in peace negotiations trying to resolve an ongoing conflict.

As a result of these discretionary powers, the ICC has the opportunity, once it has assumed jurisdiction over a situation, to actively influence ongoing conflicts like the one in Darfur. The following chapter argues that this discretion can be used to positively pressure key players, in particular the Sudanese government, to change their policy in Darfur, while balancing certain dangers that accompany the ICC involvement.

197 Ibid. at 648.
198 Gavron, supra note 129 at 109.
199 Ibid.
3.4. Effects of the ICC activity on the Darfur conflict

3.4.1. Increase the pressure on key players

A prelude to future trials before the ICC occurred in April 2006. Security Council Resolution 1672 named four individuals allegedly responsible for crimes committed in Darfur and imposed on them travel sanctions, as stipulated in Security Council Resolution 1591, paragraph 3.\(^{200}\) The four individuals were Major General Gaffar Mohamed Elhassan, a commander of the Sudanese army, the well-known leader of the Jalul Tribe Musa Hilal, the SLA-commander Adam Yacub Shant, and Gabril Abdul Kareem Badri, a commander of the National Movement for Reform and Development. Choosing individuals from the different warring parties, the Security Council wanted to appear as impartial as possible, which was a noteworthy step. However, the Security Council did not target one of the roots of the problems by stigmatizing political leaders, in particular members of the GoS. Although some feared that the sanctions would have negative effects on the peace talks, others, such as the United States, which supported this measure, even argued that it would strengthen the political and diplomatic process.\(^{201}\) In any case, since the adoption of Resolution 1672, Khartoum’s attitude towards Darfur has not changed significantly. Now, the ICC has the potential to target the key players. The following chapter will analyze the possible effects of the ICC activity on those players who shape the ongoing conflict in Darfur.

3.4.1.1. Weaken the government of Sudan

The GoS seems to be a perfect target for the ICC. Since the political leaders exercise effective control over the army, the violations of international humanitarian law and human rights law committed by the regular Sudanese army

\(^{201}\) Moghalu, supra note 24 at 154.
are directly attributable to government officials. As individual criminal responsibility according to article 25 of the Rome Statute is difficult to establish for senior government officials, the focus will here be on the responsibility of superiors according to article 28. The President of Sudan, for instance, exercises de jure authority over the army; according to the 1998 Sudanese constitution, which was in force until July 2005, the President is “responsible for the command of the armed forces and other organized forces.” He remains “Commander in Chief of the Armed Forces” according to the 2005 Interim National Constitution. Due to the extremely hierarchical political and military organization in Sudan, de facto control of senior government officials over the army can also be assumed. Regarding the mental element, according to article 28(b)(i) of the Rome Statute, a non-military superior is criminally responsible for crimes committed by subordinates if he “either knew, or consciously disregarded information which clearly indicated, that the subordinates were committing or about to commit such crimes.” Although the threshold is higher than for military commanders, it would be enough to prove that members of the GoS knew about or were willfully blind regarding the atrocities committed by the Sudanese troops in Darfur.

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202 This assumption can, however, not be made without the remark that it is one thing to know pretty well what has been going on, but another one to establish responsibility of superiors and prove beyond reasonable doubt effective control of superiors over their subordinates.

203 However, contribution to the commission of crimes according to article 25(3)(d) might be conceivable.


206 The ICTY held in the Celebici case that de jure or de facto possession of powers or control over subordinates was sufficient to qualify a civilian as a superior; see Prosecutor v. Zejnil Delalic et al. (Celebici), IT-96-21-T (Judgment, 16 November 1998) (International Criminal Tribunal for the former Yugoslavia, Trial Chamber) at para. 370.

Members of the GoS can also be considered responsible for crimes committed by the Janjaweed, which is consistent with the concept of control established by the ICTY Appeals Chamber in Tadic: “In order to attribute the acts of a military or paramilitary group to a State, it must be proved that the State wields overall control over the group, not only by equipping and financing the group, but also by coordinating or helping in the general planning of its military activity.”208 When attacks are carried out jointly by the Sudanese army and the militia, the latter are even under the effective control of the GoS, thus acting as de facto agents of the GoS.209

Moreover, the GoS is an obstacle to peace due to its political considerations; peace in Western Sudan might further the creation of a common political front in Darfur, which would threaten the central government’s reelection in 2009.210 An insecure situation in the West is therefore important for the political survival of Bashir’s National Congress Party. Weakening, if not overthrowing, the regime in Khartoum seems at the moment to be a prerequisite to lasting peace in Darfur.

Traditionally, regime change has been a necessary precondition to start prosecutions or other accountability mechanisms.211 This was the case with the TRC in South Africa, the ICTR in Rwanda and the hybrid tribunal in Cambodia to try the Khmer Rouge.212 The situation in Sudan is radically different. At the moment, nothing indicates a possible regime change or overthrow of the Islamist government,213 which is in power since the 1989 coup. Its position can even be

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208 Tadic, supra note 194 at para. 131.
209 See also UNCOI, supra note 46 at para. 123.
212 Although established while the conflict was still going on in Bosnia, the ICTY also delivered mainly ex post facto justice; see above, c. 1.2.
213 One must be careful in labeling the current regime as “Islamist”, in particular since the removal of the leader of the Sudanese Islamist movement, Hassan al Turabi, from official powers in
considered to have been strengthened by the international community’s negotiation strategy to achieve peace for the South, while providing methods of accountability for government officials seemed to be a less important concern.\(^{214}\) Despite this political unwillingness of the international community to exercise a genuine pressure on the GoS for its involvement in the Darfur conflict, the ICC now has the potential to stigmatize the top leaders. The effects should not be underestimated, since “stigmatization eventually contributes to the loss of power and influence on the part of leaders, especially those who can no longer act as representatives on the international stage.”\(^{215}\) Ultimately, successful prosecutions could bring about regime change in Khartoum.

There is evidence that Khartoum and its politics are susceptible to international actions. In the case of Darfur, the reactions to offers of humanitarian aid, to the Security Council intervention and to the ICC activity show that the GoS is far from being indifferent to possible negative consequences of an international condemnation of the regime. Its discourse was rather marked by important efforts to avoid such a condemnation.\(^{216}\) Precedents to the reactions in the Darfur case underline the effectiveness of international pressure on the present government. In 1996, a Chapter VII resolution by the Security Council imposed travel sanctions on members of the GoS and the armed forces and obliged all countries to “significantly reduce the level and number of staff at Sudanese diplomatic missions and consular posts and restrict or control the movement within their territory of such who remain,”\(^{217}\) in order to pressure the GoS to surrender the

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\(^{214}\) Lipscomb, *supra* note 211 at 192.

\(^{215}\) Akhavan, “The Yugoslav Tribunal”, *supra* note 9 at 272.

\(^{216}\) Castillo, *supra* note 56 at 175.

\(^{217}\) S/RES 1054 (1996). It is interesting to note that, probably due to their lightness, the sanctions did not strengthen the regime in Khartoum, thus standing in sharp contrast to the situations in
three men suspected of attempting to assassinate Egyptian president Hosni Mubarak.\textsuperscript{218} Although the suspects were never extradited, these diplomatic sanctions had an immediate impact on the policy of the GoS, concerning, in particular, its support for terrorists. Numerous foreign extremists, including Osama bin Laden and dozens of Egyptian Islamists, were asked to leave the country shortly after Resolution 1054 had been adopted.\textsuperscript{219} According to Tim Niblock, a specialist of the politics of the Arab and Islamic worlds, the regime’s tendency for ideological expansionism has also been curtailed as a result of the sanctions.\textsuperscript{220}

One can therefore conclude with Didar Fawzy-Rossano, an Egyptian expert of Sudanese politics, that actions by the international community, even in the form of light diplomatic sanctions, should not be dismissed as unable to help in the case of Darfur:

“La pression n’est pas inutile car, sur un autre terrain, les sanctions internationales en matière de terrorisme ont effectivement provoqué au Soudan l’arrêt du projet de l’Internationale islamiste du Dr Turabi et le départ de dirigeants islamistes qui finaient les actions terroristes dans le monde, tel Oussama Ben Laden, en mai 1996.”\textsuperscript{221}

If international sanctions can influence Khartoum’s politics, threats to indict senior members of the government should do so as well. Khartoum has shown in the past that its policies are not immune to international actions. Even though the ICC’s potential is therefore extremely valuable, the inability to apprehend the indicted persons might be the most important obstacle for the

\textsuperscript{218} Iraq and Libya; see Tim Niblock, “Pariah States” & Sanctions in the Middle East, Iraq, Libya, Sudan (Boulder, Colo.: Lynne Rienner Publishers, 2001) at 213.
\textsuperscript{219} For more information on these sanctions, see \textit{ibid}. at 204.
\textsuperscript{220} \textit{Ibid}. at 212.
\textsuperscript{221} Didar Fawzy-Rossano, \textit{Le Soudan en question} (Paris: Éditions de la Table Ronde, 2002) at 262. For a different and probably more accurate view of the failure of Hassan al Turabi’s political Islam in Sudan, see de Waal & Abdel Salam, \textit{supra} note 213 at 106, who argue that divisions between Turabi and Bashir were insinuated throughout the 1990s. In short, de Waal and Abdel Salam describe the split of 1999/2000 between Turabi and Bashir as “entirely self-inflicted” and the dispute as “simply over power;” see \textit{ibid}. at 108.
ICC to have any direct effects on both the political and the militia leaders, since the ICC cannot count on the cooperation of the present regime. Nevertheless, there is evidence that the indictment of Ahmad Harun, who remains the current Minister of State for Humanitarian Affairs, has already had effects. Although Harun seems to enjoy a peaceful life in Sudan, it seems possible that he will be sacrificed by the GoS; “he knows that he may have little time,” as an Arab tribal leader expressed it recently.222

Furthermore, even without any cooperation of the GoS and without the option that a multinational force, mandated to arrest indictees, be installed in Darfur, more subtle effects than mere incapacitation are conceivable. The activity of the ICC can have an important influence on diminishing support for the GoS among the Sudanese population. As newspaper articles and editorials show, critical voices towards the National Congress Party are becoming louder. A March 18, 2007 editorial in the daily newspaper *The Citizen* condemned the support for the *Janjaweed* and called the GoS “a racist regime that is in many respects worse than the apartheid regime in South Africa, which at least had the dignity not to employ rape as a tactic of suppression.”223 This is an important development, since the GoS had initially felt powerful enough to suspend independent newspapers, such as the Arabic-language *Al-Ayam* and the English-language *Khartoum Monitor*, or to close *Al-Jazeera* in Sudan after it had reported the atrocities in Darfur as the first broadcast channel in the world.224 By showing the criminal face of the GoS, the ICC can, therefore, significantly contribute to weakening the regime in Khartoum in the long run and influence the elections scheduled for 2009.225

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223 Cited in Reporters Without Borders, *supra* note 87 at 8.
225 “General elections at all levels of government shall be held no later than the end of the fourth year of the Interim Period”, in other words at the latest in 2009; see article 216, *Constitution of*
Despite this potential pressure that can be exercised by the ICC, weakening the GoS seems to be a difficult task. In addition to the long-lasting negotiation strategy of the UN to give more emphasis to the peace process in southern Sudan and the indecisiveness of the international community to tackle the problem, the strong position of the GoS is due to three mainly internal factors. Oil revenues secure a permanent income that serves to build up the army, which is today one of the strongest in the region; there is no viable internal opposition to the regime; and the central government is protected by the geographical vastness of the country. A military intervention into Darfur, a territory as large as France, by an international coalition would require enormous resources.

Security Council Resolution 1593 obliges Sudan to cooperate with the ICC, but the GoS does not have to fear any stringent consequences of its non-compliance. It has too many allies in the world that are powerful enough to prevent the Security Council from taking more decisive actions, and threats of economic sanctions or a Chapter VII military intervention are, at least under the current circumstances, not realistic. China and Russia will block any invasive measures in the Security Council due to economic considerations, while the Arab League and other traditionally anti-US and anti-Israel organizations and states support Sudan out of ideological reasons.

Furthermore, the GoS is aware that the United States does not have the political and material resources to launch another major war as long as the engagement in Iraq persists and that Europeans, not as unified as they could be regarding their foreign policy, are “not ready to die for Darfur”.

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the Republic of Sudan 2005, supra note 205. According to experts of the Sudanese political system, the NCP takes the upcoming elections seriously and already gets ready for an election campaign. The GoS also seems to acknowledge that a hardline policy will only win the voices of some of Khartoum’s hardliners but not the elections; interview of Annette Weber, researcher at the German Institute for International and Security Affairs (3 July 2007).

226 Collins, supra note 40 at 22.
227 In addition to China, Malaysia and India have also heavily invested in the Sudanese oil sector; see e.g. Jean-Paul Marthoz, “Le Soudan, pays de tous les enjeux” (2006) 14 Enjeux Internationaux 13 at 14.
228 “[L]es Européens ne sont pas prêts à mourir pour le Darfur,” ibid. at 15.
From a realistic point of view, the ICC cannot be expected to have a major immediate impact on the position of the GoS in the current circumstances, but it is more than just a “symbolic act that can bring Khartoum in need to explain.” Members of the government have clearly become more nervous since the Security Council referral. They fear that some of them might be held individually accountable for the atrocities committed in Darfur; the possibility that someone will be surrendered to the ICC is a reality. In sum, the ICC involvement has the potential to be an important factor in causing change in GoS policy toward Darfur.

3.4.1.2. Pressure the Sudanese government to cut support for the \textit{Janjaweed}

If the GoS cannot be targeted directly through the ICC involvement, it can, however, be incited to change its policy in Darfur. Thanks to the ICC and the preliminary work of the Commission of Inquiry, crimes committed by the Sudanese army and the \textit{Janjaweed} against the Fur, the Masalit and the Zaghawa have been revealed, documented and made known to the international society. Khartoum’s method of arming and supporting the militias, allowing them to murder, rape, and pillage with guaranteed impunity, has been particularly criticized. The GoS knows that its Darfur policy is now closely followed by foreign governments and international NGOs and that it must show some good will in order to maintain or regain a certain credibility. To save the situation, or at least to appear in a better light, the GoS is likely to cut its support for the \textit{Janjaweed}.

There is evidence that the GoS is susceptible to pressure produced by the ICC. In the case of northern Uganda, the activity of the OTP increased the pressure on the GoS to end support for the LRA, which had become an important ally in its fight
against the SPLA in southern Sudan. The conflict went on largely unnoticed in the world, but the referral to the OTP mobilized the international community to a certain extent and isolated the LRA. The International Crisis Group noted in a report in April 2005 that the “ICC has already had a positive impact on the peace process by sobering the LRA and influencing Khartoum to reduce support.” If the GoS had to change its policy in the case of the LRA, it puts into question its motivation to continue to support militias within its own boundaries.

Leaders of the Janjaweed seem to fear now that they will be used as scapegoats and will be blamed by the GoS as the ones responsible for the atrocities committed since 2003. At the present time, it does not seem realistic that Khartoum seriously considers cooperating with the ICC; but should the government give in to the international pressure and take one step into this direction, it is conceivable that militia leaders will be “sacrificed” by the GoS. Under these circumstances, it is not surprising that some militia groups do not remain loyal to the government and have already started to fight side by side with the rebels against the Sudanese army.232

Even though it is encouraging that the activity of the ICC seems to have its first true effect on the conflict in Darfur, the issue is, however, extremely complex. Several other factors are at least as important as the ICC threat. Generally, there is no clear frontline in Darfur; the rebel groups have split, with some of them developing into armed bandits whose fighting patterns and attacks on civilians are similar to those of the Janjaweed.233 Many commentators also doubt that the GoS can still exercise any control over the militia leaders and believe that the situation has become unmanageable for Khartoum, thus making it impossible to disarm the


232 Perry, supra note 93.

Janjaweed.\textsuperscript{234} Moreover, the decreasing loyalty of some militia leaders is not really surprising and is not necessarily linked to the fact that militia leaders are afraid of facing trials in The Hague. According to Alex de Waal, the economic relationships between Arabs and non-Arabs have been so close in Western Sudan that, “given enough time they are likely to make common cause against the government.”\textsuperscript{235} Presumptions that the ICC is the cause for certain actions of the warring parties should, therefore, be made with awareness of the multifaceted dynamics of the conflict.

3.4.1.3. Bring rebel leaders back to the negotiating table

Even though it is unquestionable that most crimes in Darfur have been committed by the Sudanese army and the Janjaweed, the conflict is not only black-and-white. Rebels have reportedly also targeted the civilian population and looted civilian property,\textsuperscript{236} as well as attacked and raped aid workers,\textsuperscript{237} thus committing war crimes and crimes against humanity. Civilians reportedly call Minni Minawi’s troops “Janjaweed 2”.\textsuperscript{238} The international community has barely acknowledged this fact. However, one SLA-commander is among the four individuals against whom travel sanctions were imposed by Security Council Resolution 1672. There are also speculations that some of the SLA and JEM leaders are on the sealed list of the Commission of Inquiry.\textsuperscript{239}

The leaders of the SLA and the JEM mostly have a different background than the people they represent. Having lived in cities far away from their traditional

\begin{itemize}
  \item \textsuperscript{234} See e.g. Flint & de Waal, \textit{supra} note 37 at 122. “Forcible disarmament of the Janjaweed is almost certainly impossible,” \textit{ibid.} at 127; see also Jérôme Tubiana, “Le Darfur: un conflit identitaire?” (2005) 214 Afrique Contemporaine 165 at 175.
  \item \textsuperscript{235} Cited in Lydia Polgreen, “Militia Talks Could Reshape Conflict in Darfur” \textit{New York Times} (15 April 2007).
  \item \textsuperscript{236} In early 2005, hundreds of rebels had already shown “abusive behavior”; see Flint & de Waal, \textit{supra} note 37 at 88.
  \item \textsuperscript{237} “Sudan ‘Backs UN-led Darfur Force’” \textit{BBC News} (18 June 2007), online: BBC <http://news.bbc.co.uk/2/hi/afrika/6760781.stm>.
  \item \textsuperscript{238} International Crisis Group, “Darfur: Revitalising the Peace Process”, \textit{supra} note 74 at 8, n. 45.
  \item \textsuperscript{239} According to Flint and de Waal, seven of the 51 individuals named are rebel leaders; see Flint & de Waal, \textit{supra} note 37 at 132.
\end{itemize}
homeland, leaders like Minni Minawi and Abdelwahed Mohamed Nur were educated in Arabic or English or, such as in the case of SLA’s most prominent Masalit commander Khamis Abakir, have lived abroad for many years. Moreover, JEM’s leaders are politically and diplomatically experienced, since several of them, like Dr Khalil Ibrahim, had been part of the National Islamic Front (NIF) government or had been educated in Europe. They can be considered susceptible to international pressure to negotiate as well as to pressure from the ICC. Indicting rebel leaders could therefore create a similar situation as in the case of the LRA, where the activity of the ICC, along with military pressure, has arguably isolated the LRA and pressured Joseph Kony and other LRA leaders to come back to the negotiating table. It has been argued that “[t]he threat of apprehension and prosecution presents the LRA with clear negative consequences if the peace process fails.” Even though it is clear that the ICC does not want to become a bargaining chip in any peace negotiations but wants to remain as independent as possible in pursuing its vocation, its involvement can facilitate the conclusion of a peace deal. In the case of northern Uganda, prominent NGOs, such as the International Crisis Group, have pressured the international community to “continue to provide strong support for prosecution and only consider asking the court to suspend its activity when and if the LRA leaders begin to implement a fair settlement.”

240 Tubiana, “Le Darfour, un conflit pour la terre?”, supra note 41 at 114.
241 Flint & de Waal, supra note 37 at 66.
242 Ibid. at 91.
243 Akhavan, “The LRA case”, supra note 176 at 404. Clearly, the situation in Darfur is radically different from the LRA case. While the conflict in northern Uganda basically opposes an armed movement, that has completely lost its popular base and has been terrorizing civilians over the last 20 years, and the Ugandan army, the Darfuran rebel movements fight for relatively clear defined political goals against the central government and have been trying to protect the civilian population against attacks from the Sudanese army and the militias. ICC jurisdiction was also triggered in a different way; in the case of northern Uganda, the ICC can rely on the cooperation of the Ugandan government, which referred the situation to the OTP on December 16, 2003. In the case of Darfur, the Security Council triggered ICC jurisdiction, while the GoS has refused any cooperation. Despite these differences, the effects of the ICC indictments on LRA leaders are helpful to address the issue in Darfur.
245 Ibid. at 15.
This approach should also guide the attitude of international peace negotiators towards the rebel leaders in Darfur, despite the factual differences between the two conflicts. The ICC threat can be a useful incentive in the case of the Darfurian rebel movements in order to initiate negotiations once again. Moreover, members of the rebel groups seem to acknowledge the fact that some of their leaders are likely to be on the list of the Commission of Inquiry and risk to be indicted by the ICC. SLA members have even expressed their approval that their leaders accept responsibility for an eventual guilt. Generally, this is not perceived as an obstacle to peace. The SLA is certain that the crimes committed by government troops and the Janjaweed are much graver than those rebel leaders could be responsible for. Under the condition that Janjaweed leaders are brought to justice in The Hague, SLA members have also expressed their will to reconcile with the Janjaweed. As Abakir expresses it, “[o]ur problem is not with the Arabs. It is with the government.” Overall, some rebel factions can, at least for the time being, be considered as a supporting force for the ICC that is also susceptible to its pressure, since the rebels know that they are not immune from indictments.

3.4.1.4. Pressure the international community to act

The activity of the ICC also has the potential to make the international community exercise more coherent pressure on the key players of the conflict to stop violence and negotiate an agreement. The ICC is a powerful actor for two reasons. First, since the entry into force of the Rome Statute and the start of the ICC’s practical functioning, the Court has experienced significant attention by the world media. This interest increased with the first referrals and the OTP’s announcement of its first investigations. When arrest warrants were issued against Ahmad Harun and Ali Kushayb in February 2007, the world public was well-informed thanks to the broad coverage of the events. The ICC is, therefore, a well-known institution whose next steps will be closely observed. Second, courts in general have a

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246 Res Publica, supra note 36 at 31.
247 Ibid.
248 Cited in Flint & de Waal, supra note 37 at 70.
naturally increased authority to shape public opinion as long as their independence and impartiality are assured. An international court is, moreover, responsible to the international society as a whole,\textsuperscript{249} which is, in the case of the ICC, represented by the Assembly of States Parties. The Rome Statute provides different mechanisms to guarantee the independence of the Court \textit{vis-à-vis} national governments as well as the Security Council.\textsuperscript{250} For these reasons, findings of the ICC are likely to have more authoritative power than statements made by national governments or NGOs. It is a meaningful step if some Western governments or the International Crisis Group declare that the GoS is responsible for genocide in Darfur; it is another one if individuals are singled out by an independent international prosecutor who is ready to put them on trial in The Hague.

Thanks to this position, the ICC can play an important supportive role in raising awareness about the responsibility of some individuals for atrocity crimes and urging the international community to act. Charges by the ICC cannot easily be dismissed as politicized actions out of ideological reasons towards certain governments. Stigmatizing those who are mainly responsible for the atrocities in Darfur, in particular the top of the GoS, through the ICC would make it more difficult and arguably inevitable for the international community not to take more stringent measures against the regime. This indirect impact on an ongoing conflict like in Darfur could be extremely valuable. An ICC activity is not exclusive to the detriment of more rigorous diplomatic pressure or even a military intervention;\textsuperscript{251} such measures could be enacted as a consequence of the work of the ICC.

\textsuperscript{249} Here, the ICC’s backing by 104 States and its goal to reach universal ratification are emphasized over the fact that several States, including three permanent members of the Security Council, have been rejecting ICC jurisdiction so far. The ICC is responsible to a large international society and clearly represents internationalized interests.

\textsuperscript{250} For instance, independence of the judges and of the OTP, as stipulated in articles 40 and 42 of the Rome Statute.

\textsuperscript{251} The debate whether or not a military intervention would be helpful has split in particular French NGOs trying to find solutions to end the conflict; while organizations like Urgence Darfour fight vigorously for a military option, spokespersons of Médecins Sans Frontières, for instance, affirm that a military intervention would aggravate the conflict; see Agnès Gruda, “Le Darfour n’est pas le Rwanda” \textit{La Presse} (13 April 2007).
3.4.2. Concrete dangers of the ICC activity in the Darfur case

Many international criminal lawyers and human rights groups have been arguing that international crimes, such as war crimes, crimes against humanity and genocide, must and can be prevented.

“However, a strategy that many such groups favor for achieving this goal—the prosecution of perpetrators of atrocities according to universal standards—risks causing more atrocities than it would prevent, because it pays insufficient attention to political realities.”

The following chapter will address those facets of the ICC involvement that may prolong the conflict and aggravate the humanitarian situation of the victims.

3.4.2.1. Fewer prospects of a peace agreement – the ICC prolonging the conflict

“The pursuit of criminals is one thing. Making peace is another.”

One of the major problems in Darfur is that the conflict has had disastrous consequences on the humanitarian situation. In addition to the fact that around 2.5 million Darfurians live in refugee camps in Western Sudan and Eastern Chad, around six million people depend on food aid. Although the conflict has fortunately lost its characteristic of mass atrocities committed in 2003 and 2004 by the Janjaweed and the Sudanese Army, the effects of the lasting conflict on the civilian population are not less invasive.

It is obvious that an inclusive peace agreement is urgently needed to increase the probability of stopping violence; the mere fact that the level of violence has decreased does not save Darfurians from starving to death. Security cannot be reestablished in the region without disarmament of both the militias and the

252 Snyder & Vinjamuri, supra note 15 at 5.
different rebel groups, which would ideally be accompanied by the retreat of the Sudanese army and the deployment of a multi-national force. An agreement between the warring parties is an essential prerequisite for peace and also for some form of power sharing à la Naivasha, although the GoS would have difficulties to justify another “defeat”, as promising any form of political influence to the rebels would be rejected by Khartoum’s hardliners. One major problem is that it does not seem realistic to assume that any of those who are or will be indicted by the ICC could play an important role in peace negotiations or be part of a new government. As a result, it has been argued that indicting leaders “would only increase the incentive to ramp up the attacks and force a final resolution by eliminating the enemy.”

Furthermore, by portraying the ICC as an obstacle to peace, Khartoum is trying to make the ICC a bargaining chip in future peace negotiations.

It has often been argued that amnesty deals are a necessary element in peace negotiations. Governments have used this tool in order to raise the probability of stopping an ongoing conflict or to secure the transition from a dictatorial regime to a democratic rule of law. The argument is that the prospect of prosecution only creates a “nothing-to-lose”-attitude among the leaders of belligerent groups, with the result that conflicts last longer than they would have to. Spokespersons of peace initiatives in northern Uganda, for instance, have broadly condemned the “interference” of the ICC. They fear that peace will be even more difficult to reach: “Obviously, nobody can convince the leaders of a rebel movement to come to the negotiating table and at the same time tell them that they will appear in courts to be prosecuted.” Furthermore, the LRA is well-known for committing revenge massacres among the civilian population for alleged cooperation with the

Ugandan government. As a result, many commentators and peace organizations condemned the referral to the ICC and argued that an unconditional amnesty for Joseph Kony and other LRA commanders would be an indispensable requirement for peace negotiations and therefore the only possibility for bringing peace to northern Uganda. Even the government of Uganda itself, having referred the situation to the ICC to raise international awareness about the conflict on the international scene, has been trying to convince the OTP to suspend the indictments in order to enable a peace deal and traditional forms of reconciliation.

Achieving peace in northern Uganda and in Darfur will not be possible through the same means. The frontlines in northern Uganda where relatively promising peace negotiations were made in 2006 are clear; the LRA versus President Museveni’s government. Negotiations are marked by clear bargaining chips, such as amnesty for members of the LRA. Compared to this long-lasting duel, the situation in Darfur is chaotic. The Abuja peace agreement must be considered to have failed; a completely new process, which brings together the GoS, the numerous rebel groups, as well as militia leaders, will be necessary. Clearly, there is still a long way to go. For these reasons, ICC indictments will not affect peace negotiations in the same way as in northern Uganda. However, the basic assumption remains valid; negotiating peace with individuals who are facing trials is a problematical matter. Possible prosecutions are likely to represent an obstacle to a peace deal. In the case of Darfur, if the OTP continues a consistent policy, precisely those individuals that will be needed to settle the conflict can be

Allen, supra note 33 at 103.

See e.g. Branch, supra note 177. Di Giovanni comes to the conclusion that, “[t]hrough prosecution or eventual reparations, the Court could threaten any transitional justice process in Uganda by playing into the government’s political strategies;” Adrian Di Giovanni, “The Prospect of ICC Reparations in the Case Concerning Northern Uganda: On a Collision Course with Incoherence?” (2006) 2 Journal of International Law and International Relations 25 at 62.

expected to be targeted by the OTP: government officials as well as leaders of rebel groups and the *Janjaweed*.

3.4.2.2. Endanger the deployment of a UN peacekeeping force

The humanitarian situation in Darfur has been deteriorating drastically since the outbreak of protracted violence in 2003; humanitarian relief is badly needed. Numerous NGOs operating in the area had to pull out or limit their activities due to security concerns.260 Although a UN mission would not solve the problem immediately,261 it would certainly improve security significantly through its presence in buffer zones and internally displaced persons camps. Although the international community did not react as quickly as it should have, there is now a broad international consensus that the 7,000 troops of the African Union Mission in Sudan (AMIS), which cannot cope with the situation,262 should be supplemented by a stronger UN mission. As a result, the Security Council decided in August 2006 that the United Nations Mission in Sudan (UNMIS) shall be strengthened by up to 20,000 troops and its mandate be extended from southern Sudan to Darfur.263 The GoS, however, blocked the deployment of a UN mission or even a combined UN-AU mission. In June 2007, Khartoum started to show more willingness to admit a hybrid UN-AU peacekeeping force for Darfur, which

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261 According to Médecins Sans Frontières, one of the major NGOs operating in Darfur, a military intervention would face many difficulties, because any foreign troops would have to fight against the Sudanese army; due to the current position of the GoS, the situation would be hardly different for a UN mission. See Médecins Sans Frontières, “De mauvaises réponses à de bonnes questions” (23 March 2007), online: Médecins Sans Frontières <http://www.msf.fr/site/actus.nsf/actus/darfouritwgb230307>.


was authorized by the Security Council on July 31, 2007.\textsuperscript{264} While this is an important step, diplomats remain skeptical due to the frequent policy of the GoS not to keep its promises. Moreover, experts affirm that a deployment would not take place before 2008.\textsuperscript{265}

One should thus question why the GoS has been so reluctant to admit a UN force into Darfur, considering the fact that there is already a UN mission in southern Sudan. One issue is Khartoum’s fear that a UN mission in Darfur would cooperate with the ICC, for instance by arresting members of its armed forces and transferring them to The Hague.\textsuperscript{266} Strongly opposing the ICC, the GoS objects, therefore, to any means which might potentially support the OTP’s activity. Although there is no empirical evidence that a UN mission would really arrest persons wanted by the ICC, the OTP already showed that it takes advantage from a UN mission on the ground. To pursue investigations in the Democratic Republic of Congo (DRC), the OTP affirmed that it relied heavily on the cooperation of the UN mission in the DRC (MONUC), in particular due to the security situation. Logistical assistance, such as flight transportation, has also been essential. “And while we are striving to become as autonomous as possible in the circumstances, in some areas we will simply not be able to operate without such support.”\textsuperscript{267}

Moreover, attempts have been made by the Ugandan government in mid-2006 to carry out a joint operation between the Congolese and MONUC in order to execute the arrest warrants against the leaders of the LRA,\textsuperscript{268} which is now believed to be based in the northeast of the DRC.\textsuperscript{269} Even if such cooperation is

\begin{itemize}
\item \textsuperscript{264} S/RES 1769 (2007).
\item \textsuperscript{265} “Sudan ‘Backs UN-led Darfur Force’”, \textit{supra} note 237.
\item \textsuperscript{266} “Le Soudan rejette la légitimité de la CPI sur le Darfour” \textit{Le Monde} (27 February 2007), online: Le Monde \textltt{http://www.lemonde.fr}.
\item \textsuperscript{268} International Crisis Group, “Northern Uganda: Seizing the Opportunity for Peace”, \textit{supra} note 244 at 7.
\item \textsuperscript{269} \textit{Ibid.} at 8.
\end{itemize}
unlikely at the moment, the possibility that MONUC or UNMIS will play a considerable role in apprehending Joseph Kony and his allies still exists.

The missions in Bosnia and Liberia are good examples to show that peacekeeping forces can be important players to deliver war criminals to international tribunals. With Resolution 1638, adopted unanimously, the Security Council took an important step to reform UN practice by expanding the mandate of the UN mission in Liberia (UNMIL) to “apprehend and detain former President Charles Taylor in the event of a return to Liberia and to transfer him or facilitate his transfer to Sierra Leone for prosecution before the Special Court for Sierra Leone.” Charles Taylor was subsequently arrested by Nigerian officials, when he tried to flee Nigeria in March 2006; after Taylor had been repatriated to Liberia, UN peacekeepers transferred him to Freetown. With this new policy, the Security Council underlined the importance of fighting impunity, extending the means to do so by Resolution 1638.

After the establishment of the tribunals for ex-Yugoslavia and Rwanda as well as the support for other bodies, such as the SCSL, the Security Council, therefore, made further efforts to sponsor international criminal justice, in the case of Resolution 1638 on the level of enforcement. The non-coercive nature of the peacekeeping force is not an obstacle, in particular if the host government approves the extension of the mission’s mandate; Resolution 1638 did not shift UNMIL towards a peace-enforcement mission. However, if the Liberian government had not given its consent, the task, which arguably amounts to a duty, to apprehend Taylor could hardly have been reconciled with the mandate of a peacekeeping force.

271 Ibid. at 351.
272 Ibid. at 359.
273 In the wording of Security Council Resolution 1638, the mandate “shall include”; see S/RES 1638 (2005).
The NATO-led force (IFOR/SFOR) in Bosnia-Herzegovina did not receive an explicit authorization by the Security Council to apprehend war crimes suspects, but it is mandated to ensure the implementation of the Dayton Peace Accord, including the clause that the parties must cooperate with the ICTY. One can therefore conclude that, by arresting indictees, the international force only enforces compliance with the Peace Accord.\textsuperscript{274} The North Atlantic Council, using non-mandatory language, specified that “IFOR should detain any persons indicted by the International Criminal Tribunal who come into contact with IFOR in its execution of assigned tasks, in order to assure the transfer of these persons to the International Criminal Tribunal,”\textsuperscript{275} thus expressly mandating the multinational force to execute arrest warrants issued by the ICTY. Indeed, several indictees were subsequently arrested and transferred to The Hague by SFOR.

In sum, the fact that peacekeeping forces in Liberia and Bosnia played a substantial role in arresting war criminals is an important development towards the enforcement of international criminal law. In the case of Darfur, it has been argued that the GoS had been opposed to a peacekeeping force in Darfur long before the referral to the ICC, since it is “determined to wipe out the rebel groups in Darfur, at almost any cost”.\textsuperscript{276} It is also evident that, similar to UNMIS, the mandate of a peacekeeping mission would be limited to a clearly defined region and would not include the arrest of government officials.\textsuperscript{277} However, as the case of Liberia has shown, mandates can be extended once a force is on the ground; a general tendency towards implementing international law, including international


\textsuperscript{275} Resolution cited in Gaeta, \textit{supra} note 274 at 3. To facilitate the arrest of indictees by the peacekeeping force, the ICTY amended its Rules of Procedure and Evidence in 1996 by adopting Rule 59\textit{bis}, allowing the ICTY to transmit a warrant of arrest to an “appropriate authority or international body”; see ICTY, \textit{Rules of Procedure and Evidence} (adopted 11 February 1994, as amended on 25 June and 5 July 1996), UN Doc. IT/32/Rev.9 (1996).

\textsuperscript{276} Grono & Mozersky, \textit{supra} note 255.

\textsuperscript{277} \textit{Ibid}.
criminal law, seems to be emerging. Even if executing ICC arrest warrants would not be one of the primary tasks of a peacekeeping force in Darfur, international forces, as evidenced in the cases of Liberia and Bosnia, are increasingly sought to cooperate with international criminal tribunals.

Moreover, in the case of Darfur, the OTP has already shown that peacekeeping troops on the ground are considered an important source of information for its investigations. In its reports to the Security Council, Luis Moreno-Ocampo revealed that contacts with AMIS had been made and underlined the importance of expeditious assistance of the AU to the work of the OTP.²⁷⁸ A possible cooperation of a UN mission with the ICC is also on the table. Prominent NGOs, such as Human Rights Watch and the International Crisis Group, have openly pressured the Security Council to explicitly mandate a UN peacekeeping mission to support the work of the ICC in Darfur: “The mission should also be specifically empowered to provide appropriate assistance to the International Criminal Court's investigations in Darfur including the arrest of individuals indicted for crimes against humanity and war crimes.”²⁷⁹

Whether or not Khartoum’s fear that a UN mission in Darfur might start to arrest members of the Sudanese army and the militias is justified, there is a realistic possibility that a UN mission would at least facilitate the work of the OTP on the ground, as it has been the case in the DRC. Due to this scenario, the ICC has not been a supporting factor in persuading the GoS to approve a UN mission for Darfur.

3.4.3. Evaluation and suggested further proceedings

The two important dangers of the ICC activity in the Darfur conflict must be considered seriously, although they should not fuel doubts neither on the involvement itself nor the ICC as an institution. It has been argued above that article 53 of the Rome Statute obliges the Prosecutor to take into account the interests of the victims. Therefore, the potentially negative impacts of indictments and arrest warrants must not be ignored but rather clearly addressed. Being an obstacle to a peace agreement or the deployment of a peacekeeping mission are serious challenges. However, long-lasting peace cannot be achieved through impunity. The above-mentioned examples of Sankoh and Milosevic show that removing criminal leaders is a necessary prerequisite to durable peace.

In addition to these arguments favoring long-term peace over a short-term ceasefire, the example of Darfur underlines the validity of the premise that peace and justice do not have to contradict each other and are not mutually exclusive concepts. Since the ICC entered the scene when a reliable peace process was still out of sight, its potential impacts on pressuring key actors to change their policy and attitude are much more important than the risk that peace negotiations are, in the end, prolonged because the question of individual accountability must be addressed. In other words, the ICC is a player that can help to bring about peace through profounder means than what the “peace versus justice” debate can offer.

For these reasons, the above-mentioned prospects of the ICC involvement in the Darfur conflict, in particular the potential to make the GoS change its policy in Darfur, clearly outweigh the dangers that come with international indictments. Even if indicting government officials is always a delicate matter, since their cooperation is essential to deal with the humanitarian situation and the resolution of the conflict, government officials should not be shielded against prosecutions. Since the negative impacts for the victims of the conflict are potentially more serious when the actors still in power are targeted, evidence must be carefully
collected. The more risky a case is from a political point of view, the stronger is has to be. If there are “reasonable grounds to believe”\textsuperscript{280} that the top of the Sudanese government is responsible for crimes committed within the jurisdiction of the ICC, which means in concreto that, besides individual criminal responsibility, superior responsibility can be established by the Prosecutor according to article 28(b) of the Rome Statute, then the OTP and the Pre-Trial-Chamber should not restrain themselves from taking similar steps, as in the case of Harun and Kushayb. The prospect of weakening the GoS outweighs the risk that the subsequent lack of cooperation of the GoS with international players will aggravate the situation of Darfurians.

In any case, it is important that the ICC remains impartial and, equally important, that it also appears impartial in the eyes of the warring parties. Otherwise, the ICC will be considered as an instrument of one party, which was only activated to abet the party’s victory, if not in the battlefield, then in the courtroom. The danger of becoming a political instrument exists; in the case of northern Uganda, the ICC has been harshly criticized and branded as a tool of President Museveni to exercise political pressure. The activation of the ICC by the Ugandan government itself, which has a strong interest in putting as much pressure as possible on its military opponents, stands in sharp contrast to the situation in Darfur. Nonetheless, the ICC also risks being criticized as a political instrument regarding its involvement in the Darfur conflict. It has been argued that, through the Darfur referral, the Security Council “a pris le risque de confondre l’ordre juridique et la tactique politique.”\textsuperscript{281} The question is how the ICC can show its willingness and capability to act independently and impartially in Darfur and emphasize that it is not a mere instrument of Western governments to exercise pressure on the generally unloved Islamist GoS.

\textsuperscript{280} Article 58(1)(a) of the Rome Statute.
\textsuperscript{281} Marchal, supra note 78 at 36.
One possibility to face this challenge is the “initial proportion” strategy, a pragmatic approach that takes into account the political effects of indictments. According to this strategy, the prosecutor should start by selecting a similar amount of individuals of the various warring parties in order to avoid appearing partial. Once a settlement of the conflict is reached and another outbreak of violence is unlikely, the prosecutor will be able to do his work more freely at lower political risks.

Applied to the Darfur conflict, the OTP should not only target the Haruns and Kushaybs, but also rebel leaders. Thanks to the large prosecutorial discretion and due to the substantial violations of international humanitarian law by various rebel groups, the question of sufficient gravity is not an obstacle. If the OTP pursues a consistent procedure, at least one or two leaders of rebel groups should be targeted next. This would also facilitate a rectification of the perception of the conflict which is largely still reduced to an oversimplifying black-and-white offenders-victims scheme in the world opinion. The OTP would have to maintain this equilibrium as long as necessary in order not to appear as an instrument of one side. Subsequently, the OTP could return to a policy that is marked by article 17(1)(d) considerations and the preamble of the Rome Statute; in other words it could then set up a clear list of those who are allegedly most responsible for the worst crimes committed in Darfur, regardless of their affiliation with a certain group.

It is important to mention that the ICC is limited in its possible impacts on ending the Darfur conflict due to two factors: time and enforcement. First, the question of time is decisive because the ICC could have even more immediate impacts on an ongoing conflict if it could react faster. Clearly, political considerations must not be disregarded; rushing into indictments is not advisable. The question of the right timing in order to exercise a genuine threat while minimizing potential political

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282 A strategy proposed by Aleksandar Fatić in the context of the ICTY; see Aleksandar Fatić, *Reconciliation via the War Crimes Tribunal?* (Aldershot: Ashgate, 2000) at 84.
risks will always be crucial. It would not make sense to release the decision of numerous indictments of central political figures when an important peace agreement is about to be concluded; or to scare Darfurian rebel leaders with indictments when long-awaited negotiations to unite the splintered rebel groups, which would be a first fundamental step to refuel the peace process, come to a critical point. The ICC’s commitment to bringing perpetrators of international crimes to justice does not hold the OTP back from postponing the publication of indictments a few weeks or months in order to show itself politically sensitive and in line with the requirements of article 53 analyzed above.

In the case of Darfur, however, it would have been important to have the option of targeting members of the GoS and militia leaders earlier in the conflict. The positive impact of the ICC involvement could have been even more beneficial at an earlier stage. Means to reduce the popular and international support for a criminal government as well as ways to stigmatize brutal militias who have been exploited by the government cannot be seized early enough. Therefore, finding ways how the ICC can react more quickly will be crucial to deal with future situations of escalating mass atrocities. Second, without the expectation that its decisions be enforced, the ICC will not be able to increase its level of influence on ongoing conflicts. The next chapter examines these questions and proposes ways to react faster and more effectively.
4. The procedural capacity to influence ongoing conflicts – the need to react fast and effectively

4.1. The constraint of time

The ICC has been criticized from the very beginning for its failure to address the “real” problem: “Justice is an attempt to set things right, after the crime has been committed. Any genocide, ethnic cleansing, and mass rapes are committed long before the judicial process can begin.”

Punishment is a useful, but still a poor relief for victims of mass atrocities. General prevention is not a strong argument for those who suffer from a brutal conflict either. Obviously, time is an important factor in order to move post bellum justice as far as possible towards in bello justice. If international criminal justice values the interests of victims and is concerned about having an impact on ongoing conflicts, then it must find ways to react rapidly and as early as possible when facing a situation like the one in Darfur. There are several obstacles that constrain a quick reaction of the ICC.

First, it is unlikely that ICC jurisdiction will be triggered by a State Party, the Security Council or the OTP itself immediately after the first international crimes have been committed in a conflict. Some time will always elapse before atrocities are publicly identified. In the case of a State Party or a Security Council referral, civil society in the form of NGOs plays an important role in pressuring the political organs to take action. Even if the OTP might be able to act more quickly vis-à-vis an unfolding conflict, evidence must be gathered and a formal investigation must be opened before the ICC can begin to have an impact on an ongoing conflict.

Second, investigations leading to international criminal trials will typically be lengthier and more complex than in a purely domestic context. Investigations will usually have to be carried out far away from The Hague and with an unpredictable degree of cooperation on the part of the respective states. According to article

283 Maogoto, supra note 193 at 222.
54(1)(a) of the Rome Statute, the ICC Prosecutor must also collect exonerating evidence. In addition to these factors, the OTP needs the authorization of the Pre-Trial Chamber to open an investigation, according to article 15(4) of the Rome Statute, in case of an investigation *proprio motu*. During the time it takes the Pre-Trial Chamber to issue arrest warrants or summonses to appear on the application of the Prosecutor, more crimes are likely being committed. Although these control mechanisms lengthen the process of stigmatizing offenders who are responsible for crimes recently or currently committed, they are, however, unavoidable to guarantee the fairness of the proceedings.

Nevertheless, there lies a great potential in shortening the time between the activation of the Court and the issuance of arrest warrants, which took 25 months in the case of Darfur, by carrying out investigations more expeditiously. Changes can be made, which I will go on to discuss, that would enhance a rapid response of the OTP to conflict situations.

4.2. The potential to react faster

Since time is precious, investigations into a situation like Darfur must be carried out as fast as possible. Thorough investigations are the first step in influencing the key players of an ongoing conflict. The work of the Commission of Inquiry shows that collecting data and evidence of ongoing atrocities does not have to take years in order to single out dozens of alleged perpetrators; four months were sufficient to deliver a comprehensive report. Reacting quickly to urgent situations should be possible for the OTP; the effectiveness of the Prosecutor’s work is, however, linked to the political will of the States Parties who decide on the budget of the Court and can endorse additional resources for specific situations. The financial scheme of the Court provides a relatively small basic-related amount in comparison to the amount dedicated to situations; for the investigations division

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284 Article 58 of the Rome Statute.
285 Article 112(2)(d) of the Rome Statute.
of the OTP, for instance, the ratio for 2007 was under half a million euros basic-related compared to more than six million euros situation-related. Generally, this makes sense. Nevertheless, this budgetary framework constrains quick reactions of the OTP to urgent needs, since the greater part of its budget is already bound to existing situations. It would be desirable to reserve a certain amount of the budget of the OTP to be able to respond more quickly to urgent needs. This amount, which would correspond to an “emergency fund”, should cover the initial costs of an investigation into a major situation, thus enabling the OTP to maximize the probability of having an immediate impact on an ongoing conflict. Moreover, the Financial Regulations and Rules, adopted by the Assembly of States Parties in 2002, already acknowledge the possibility of establishing special funds: “Reserve accounts and special accounts funded wholly or in part by assessed contributions may be established by the Assembly of States Parties.”

Such an “emergency fund” would have eliminated one of the OTP’s major obstacles in responding more quickly to the crisis in Darfur. Having more independence in regard to the budget would have been particularly important in the case of Darfur, since the Security Council stipulated in Resolution 1591 that the costs of the investigations and prosecutions in connection with the referral would not be borne by the UN. This was one of the disappointing clauses of the referral, given that article 115(b) of the Rome Statute states that the expenses of the Court shall be provided, in addition to contributions made by States Parties, by the UN, “in particular in relation to the expenses incurred due to referrals by the Security Council.” One could therefore reasonably have expected that the UN would pay at least for expenses arising from a Security Council referral.


For the ICC to exercise any influence in situations of ongoing conflict, it must not have its hands tied by budgetary constraints. Since the Court cannot rely on financial assistance from the UN, even in the case of a Security Council referral, and should not have to depend on unpredictable voluntary contributions, it is the responsibility of all States Parties to provide the financial means necessary to allow the Court to act in matters of urgency. Thus, establishing an “emergency fund” would send a signal to potential perpetrators that the OTP is truly ready to take fast and efficient action.

4.3. The problem of enforcement of ICC requests

In addition to the aspect of time, the difficulty of implementing decisions of the ICC is another major obstacle to a more direct political impact on ongoing conflicts. In this respect, the Rome Statute has created a system that generally resembles the structure of inter-state cooperation, rather than that of the ad hoc tribunals. Although article 86 of the Rome Statute stipulates that “States Parties shall ... cooperate fully with the Court in its investigations and prosecutions of crimes within the jurisdiction of the Court,” decisions of the ICC cannot be executed by the Court itself; it has no coercive powers. If the ICC does not want to become a toothless judicial body, it must find ways to enforce its decisions. Realistic sanctions for the case of non-compliance with ICC requests must be set up by the supportive community of international criminal justice. Otherwise, ICC indictments will not put any pressure on future perpetrators.

University Press, 2002) 315 at 325, n. 39. However, the language of article 115 does not oblige the United Nations to bear the costs of such referrals, ibid. These contributions could lead to a certain dependence of the ICC on particularly “generous” governments, organizations, corporations or even individuals. In order to assure the independence of the Court, the Assembly of States Parties, by specifying article 116 of the Rome Statute, stipulated that voluntary contributions shall be under the supervision of the Registrar, who shall also report all offered contributions to the Assembly of States Parties; see ICC, Assembly of States Parties, 1st Sess., “Relevant Criteria for Voluntary Contributions to the International Criminal Court”, ICC-ASP/1/Res.11 (2002), online: International Criminal Court <http://www.icc-cpi.int/library/about/officialjournal/basicdocuments/asp_records(e).pdf>.

The current legal regime deals insufficiently with non-compliance. Non-States Parties to the Rome Statute are generally not obliged to cooperate with the Court. If a State Party to the Rome Statute does not comply with ICC decisions, it breaks international law by not respecting article 86 of the Rome Treaty, which stipulates that States Parties must cooperate fully with the Court. If a State Party fails to comply with a request to cooperate, the Court can refer the matter to the Assembly of States Parties or, in case of a Security Council referral, to the Security Council. 292 Article 112(2)(f) only states that the Assembly of States Parties shall “consider … any question relating to non-cooperation.” It has been suggested that the Assembly of States Parties could go as far as taking collective countermeasures, such as economic sanctions, against the non-compliant state, 293 which is a rather unlikely scenario. Moreover, under general public international law, a material breach of a multilateral treaty only allows the other states to suspend the operation of the treaty. 294 Such a measure will obviously not make uncooperative governments comply with the Rome Statute and transfer its war criminals to The Hague.

In other words, the ICC is dependent on the willingness of national governments to cooperate; arrest warrants will usually not be enforceable without the approval of national authorities. This cooperation, that worked well in the case of Thomas Lubanga, who was arrested by officials of the DRC and transferred to The Hague in March 2006, 295 has been a major obstacle in Darfur. Since Sudan is not a State Party to the Rome Statute and vigorously rejects ICC jurisdiction over crimes committed on its territory, no substantial cooperation of the GoS with the ICC can be expected. However, the Security Council obliged the GoS in Resolution 1593 to cooperate fully with the ICC. The cooperation regime in Darfur is therefore

292 Article 87(7) of the Rome Statute.
similar to the one imposed by the Security Council regarding the *ad hoc* tribunals. As these precedents have shown, the enforcement of decisions of international criminal tribunals, in particular of arrest warrants, can be frustrating and time-consuming even if a general collaboration of the respective states is assured. Under these circumstances, it is obvious that the chance of those Sudanese who have been indicted being surrendered to the Court is minimal, which seriously endangers the ICC’s potential impact on the Darfur conflict.

Another obstacle for the ICC regarding the enforcement of its requests is that Security Council resolution 1593 stipulates an obligation to cooperate with the ICC only for Sudan but not for all UN member states.\(^{296}\) With the exception of Sudan, non-States Parties to the Rome Statute can, therefore, ignore any requests of the ICC. Since the Rome Statute is not universally ratified, the limited obligation of non-States Parties to cooperate is a political backlash for international criminal justice. However, in the case of Darfur, it will not have important practical effects. Those states that are likely to be significant for the ICC, either in the course of investigations or regarding the surrender of indictees, have ratified the Rome Statute: the Central African Republic, the DRC, Uganda, and, most importantly, Chad, which ratified the Statute in November 2006. The only state in the region that has not ratified the Statute and is, somehow, linked to the conflict is Libya.\(^{297}\)

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\(^{296}\) S/RES 1593 (2005) at para. 2.

\(^{297}\) For Libya’s policy regarding Darfur, see Prunier, *The Ambiguous Genocide*, supra note 38 at 68. International players have repeatedly tried to encourage Libya to exercise pressure on Sudan, for instance to allow the deployment of a joint UN-AU force, which underlines Libya’s important role; see “US Seeks Libyan Help on Darfur force” *Sudan Tribune* (10 March 2007), online: Sudan Tribune <http://www.sudantribune.com/spip.php?article20692>; in 2007, several international meetings on the situation in Darfur took place in Tripoli. Egypt, Eritrea and Ethiopia are not States Parties to the Rome Statute either; their role regarding cooperation with the Court is, however, less significant for Darfur.
4.4. Political support for the judicial institution to enforce its decisions

The problem of enforcement can only be solved by strong diplomatic pressure by governments and, in particular, by the Security Council. The ICC needs the political assistance to enforce its decisions and arrest warrants. Since the GoS does not comply with its obligations and is unlikely to abide in the future by the requests of the ICC and past Security Council resolutions, the Court should not be abandoned to “stand alone in splendid judicial isolation.”

The precedents are not encouraging. The ICTY concluded in several cases, among others concerning Radovan Karadzic and Ratko Mladic, that a state had failed to execute arrest warrants and subsequently notified the Security Council; nevertheless, the Security Council never took further measures. The situation in Darfur is even more urgent than in the case of the failure of states to execute ICTY arrest warrants. The reluctance of the GoS to incapacitate those individuals most responsible for the crimes committed in Darfur, ideally by surrendering them to the ICC, prolongs the conflict and makes new offences possible. The Security Council should therefore use its powers under Chapter VII by stipulating that the failure of the GoS to cooperate with the ICC represents a threat to peace and security. This would be the next logical step, which would then be the basis for further collective measures. The mere threat of collective diplomatic sanctions or of divestments from Sudan could have positive effects. Lord David Triesman, Britain’s minister for African affairs, named a travel ban on members of the GoS

298 McGoldrick, supra note 8 at 470.
300 Dan Sarooshi, “The Peace and Justice Paradox: The International Criminal Court and the UN Security Council” in Dominic McGoldrick, Peter Rowe & Eric Donnelly, eds., The Permanent International Criminal Court, Legal and Policy Issues (Portland: Hart, 2004) 95 at 103, arguing that the Security Council has broad political discretion to make Article 39 determinations, the only obstacle being the lack of political will of members of the Security Council.
and an arms embargo for the entire Sudan as possible sanctions.\textsuperscript{301} Since China has been showing more willingness to exercise diplomatic pressure on its protégé,\textsuperscript{302} it has become more realistic to envisage such steps. Without political measures making the GoS truly act in accordance with its obligations, the ICC represents a rather theoretical and abstract threat for the wanted offenders. Regrettably, the Security Council only reiterated the “need to bring to justice the perpetrators” of attacks on the civilian population and humanitarian workers in Darfur in its resolution authorizing the hybrid UN-AU peace operation,\textsuperscript{303} but failed to address the lack of cooperation of the GoS with the ICC.

Although the ICC must be committed to acting as independently as possible,\textsuperscript{304} the Darfur case shows that international criminal justice needs political support, in particular from the permanent members of the Security Council. Generally speaking, the Security Council must maintain its proactive role after an article 13(b) referral, when non-Sta tes Parties to the Rome Statute do not comply with their legal obligation to cooperate.

\textsuperscript{301} “China Wouldn’t Block UN Sanctions on Sudan – UK” \textit{Sudan Tribune} (5 June 2007), online: Sudantribune.com <http://www.sudantribune.com/spip.php?article22219&var_recherche=\%22china\%20wouldn\%27t\%20block\%22>.
\textsuperscript{302} \textit{Ibid.} See also Wolfe, “China Claims Success”, \textit{supra} note 233.
\textsuperscript{303} S/RES 1769 (2007).
Conclusion

This thesis has shown that the work of the ICC can have impacts on ongoing conflicts like the one in Darfur. As a result of its permanent character, the ICC is able to react more quickly than ad hoc tribunals vis-à-vis an unfolding conflict and therefore represents a constant threat to potential perpetrators worldwide. The Court also commits international criminal justice to a new task, namely to deal with ongoing mass atrocities. The main challenge of the ad hoc tribunals has been to deliver post-conflict justice; one of the main challenges of the ICC will be to have beneficial effects on ongoing conflicts.

Dealing with the Darfur conflict is and will remain a difficult and complex issue for the ICC. Although the Court could have reacted more quickly after its activation through the Security Council referral in order to have a more immediate impact on the conflict, it must also proceed with awareness of possible damaging effects. While it can be useful to target high political figures or rebel leaders, the ICC should not overlook that its activity may, for instance, delay the deployment of a peacekeeping mission or the conclusion of a peace agreement. It is mainly the task of the OTP to balance the positive and potentially negative impacts of its actions. The analysis of general international law and state practice as well as of the Rome Statute, in particular its article 53, has evidenced that the OTP has the legal discretion and also obligation to consider these issues. It must therefore act in the interests of the victims, which means being politically responsible.

By issuing arrest warrants against Ahmad Harun, a member of the GoS, and Ali Kushayb, a militia leader, the ICC began to genuinely influence the conflict in Darfur. Although the GoS continues to reject ICC jurisdiction over crimes committed on its territory and will probably not change its non-cooperative policy towards the ICC in the near future, the indictments have had political impacts; Sudanese officials have clearly become more nervous. The effects of the ICC could, however, be more substantial. Even though it is unlikely that those most
responsible for the crimes committed in Darfur can be incapacitated by ICC indictments in the near future, the ICC can stigmatize political and military leaders. As a result, the ICC activity is likely to influence the upcoming elections in 2009, thus forcing Khartoum to change its Darfur policy.

Despite these desirable possible effects, the ICC must proceed carefully until it can benefit from unconditional support of the international community, and particularly as long as the position of the GoS is strong enough to block or substantially delay the deployment of a peacekeeping mission. At the moment, the international community, including the ICC, should mainly be concerned about the successful deployment of the joint UN-AU mission. The Court must not be blind on the political eye and endanger a peacekeeping mission, which would clearly not be in the interests of the victims in Darfur. Under the current circumstances, meetings of OTP staff with representatives of the UN and the AU send the unhelpful signal to the GoS that the OTP will effectively try to cooperate as much as possible with a peacekeeping mission. However, once basic security can be guaranteed, the ICC will be able to act more freely.

Although the deployment of a peacekeeping mission is of utmost importance, it will not bring about a political solution for Darfur. In the course of renegotiating the Darfur Peace Agreement, holding individuals criminally responsible in The Hague will also become an issue. It is important that the OTP avoids becoming a bargaining chip for various players during these peace negotiations. Following the concept of the initial proportion strategy, the OTP should target individuals of all sides of the conflict. As a consequence, addressing the question of cooperating with the Court would become inevitable for the GoS and the militia leaders as

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305 The ICC Deputy Prosecutor, Fatou Bensouda, met with the UN Deputy Secretary General, Asha-Rose Migiro, and with Ambassador Pascal Gayama, Deputy Permanent Representative of the Congo to the UN and President of the Security Council for the month of August in August 2007, to discuss the cooperation of the UN and other organizations with the Court as well as the need to enforce the Court’s decisions; see ICC, Press Release, “Deputy Prosecutor of the ICC to meet UN Deputy Secretary General and President of UN Security Council”, 17 August 2007, online: International Criminal Court <http://www.icc-cpi.int/press/pressreleases/265.html>.
well as for the rebel leaders. This would significantly strengthen the credibility and the political weight of the ICC.

Under the current circumstances, a successful scenario, including the enforcement of arrest warrants and the surrender of Sudanese indictees to The Hague, is only conceivable if and when the advocates of international criminal justice will be able to exercise enough political pressure on the GoS to make cooperation with the ICC unavoidable. Since China began to pressure the GoS towards more international cooperation, tougher measures, such as political or economic sanctions, have become a realistic threat for Khartoum in case of non-compliance with its international obligations.

It seems that the ICC will have to break a circle. If the ICC does not receive the necessary support from the international community, it will not be powerful enough to effectively target high political leaders; but if the Court does not make a meaningful step, some important political players, such as permanent members of the Security Council or the AU, will not seriously take into consideration the possible contribution of the ICC to bring peace to the region. Therefore, more individuals will have to be targeted, including rebel leaders and higher government officials in Khartoum. Sooner or later, the GoS will have to “sacrifice” at least the Minister of State for Humanitarian Affairs, Ahmad Harun. Unfortunately, trying those most responsible for the international crimes committed in Darfur will not be possible in the short run but only after a regime change in Khartoum.  

More generally, international support for the ICC is crucial, above all by the permanent members of the Security Council, in order to increase the effectiveness of the Court. The Security Council has the power to determine that the refusal of a

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306 In this context, it is interesting to note that Sudan already has experience with trials of former political figures. The leaders of the 1969 coup, including Colonel Jaafar al-Nimeiri, were successfully prosecuted during the 1985-86 transitional period for overthrowing a democratically elected government; see Ajawin, supra note 170 at 121.
national government to cooperate with the ICC represents a threat to international peace and security, thus ensuring the enforcement of ICC requests for cooperation and arrest warrants. With this political support, the ICC will become a significant player when the international community faces situations of mass atrocities, therefore successfully developing into “an instrument for maintaining international peace and security by the pursuit of justice.”

However, there is an important caveat: the ICC should not be used as a fig leaf by the international community. In the case of Darfur, the Security Council seemed to consider the ICC referral as a “halfway measure from the humanitarian military intervention.” If more stringent measures, such as political or economic sanctions or, as a last resort, a military intervention, are urgently needed to halt mass atrocities, the ICC activity cannot be used as an excuse by the international community not to take action.

The Darfur conflict has shown that the international community, including the ICC, must urgently increase its efforts to be able to deal with mass atrocities without delay. The analysis of the ICC involvement in the situation of Darfur should also be helpful to determine a generally valid, constructive approach of international criminal justice regarding future armed conflicts and in bello justice.

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307 McGoldrick, supra note 8 at 471.
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