THE ICC IN DARFUR—SAVIOR OR SPOILER?

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I. 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.

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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 article attempts a different approach which follows none of the aforementioned concepts and focuses on the impact 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 part, 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 a significant impact 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 part. 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 impact 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 part examines the role of the ICC in the conflict, beginning with the activation of the Court and admissibility issues. 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 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.

II. INTERNATIONAL CRIMINAL JUSTICE AND ARMED CONFLICTS

A. 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

The tendency towards implementing international criminal justice manifested itself in another major step in 1998 when the Rome Statute was adopted. It established the 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 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.

B. 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. 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. Only eight arrests were made by the end of 1996. Moreover, most of those who were indicted until 2000 were lower-rank officials.

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:

5. ROPER & BARRIA, supra note 3, at 83.
7. ROPER & BARRIA, supra note 3, at 86.
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.9

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.10 The goal of national reconciliation was even specifically mentioned in Security Council Resolution 955 and is therefore an integral part of the ICTRs 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\textsuperscript{12} or claim that the fragile peace in the Balkans is chiefly a product of international troops, and not of the ICTY.\textsuperscript{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 South African’s Truth and Reconciliation Commission, 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.\textsuperscript{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 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.\textsuperscript{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

\begin{enumerate}
\item Cobban, \textit{Think, supra} note 9, at 22.
\item HELENA COBBAN, \textit{AMNESTY AFTER ATROCITY?: HEALING NATIONS AFTER GENOCIDE AND WAR CRIMES} 194 (2007).
\item The paradigm that "trials work best when they are needed least" can be extended to other mechanisms; weak democratic structures will always lower the positive effects of trials, TRCs and amnesty programs. \textit{See} Jack Snyder & Leslie Vinjamuri, \textit{Trials and Errors, Principle and Pragmatism in Strategies of International Justice}, 28 \textit{Int'l Security} 5, 20 (2004).
\end{enumerate}
to send a message to other perpetrators of international crimes that the international community would no longer tolerate impunity. However, in the context of large-scale crimes, specific deterrence cannot easily be ascertained. 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 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; there is scant evidence for direct deterrent effects of international prosecutions on future criminals. However, the potential long-term influence of international trials to discourage future offenders is 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.”

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."

It has been argued that the international community should only insist on holding individuals accountable “if the benefits of accountability over the long

18. See Snyder & Vinjamuri, supra note 15, at 20. See also, Akhavan, Hague, supra note 17, at 748–49 (focusing on the tribunals’ effect on altering the calculations of combatants in conflicts world-wide).
20. Akhavan, Hague, supra note 17, at 748.
term are likely to outweigh the costs on the short term of prolonging an ongoing conflict."\textsuperscript{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 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."\textsuperscript{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.\textsuperscript{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 \textit{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 Security Council. Therefore, expectations that hybrid tribunals will have an immediate impact on future ongoing conflicts do not seem realistic.

\textsuperscript{22} Akhavan, \textit{Hague}, supra note 17, at 744; see also Smith, supra note 3, at 185.
\textsuperscript{23} \textit{See} Akhavan, \textit{Impunity}, supra note 11, at 9.
C. 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.\(^{24}\) As a supranational authority, the ICC can also assume jurisdiction over nationals of non-States Parties.\(^{25}\)

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\(^{26}\) which only starts to work when national jurisdictions are unable or unwilling to deal with the crimes committed.\(^{27}\) 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 law coercively, which often falls short in countries where abuses take place.\(^{28}\) 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 \textit{ad hoc} tribunals, which have shown to have many political and legal difficulties,\(^{29}\) are very costly, and, most importantly, in order to have a realistic impact on an ongoing conflict, take important time to become functional. The

\(^{24}\) KINGSLEY CHIEDU MOGHALU, GLOBAL JUSTICE: THE POLITICS OF WAR CRIMES TRIALS 135 (2006) (arguing that unanimity has never been the basis for democratic legitimacy).


\(^{28}\) Snyder & Vinjamuri, \textit{supra} note 15, at 11–12.

\(^{29}\) See McGoldrick, \textit{supra} note 8, at 454.
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\(^3\) 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 \textit{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 \textit{ad hoc} tribunals would be established through Security Council resolutions for every situation 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,\(^3\) 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 \textit{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

\footnote{30. See Bassiouni, \textit{supra} note 26, at 423 (discussing the difficulties for the International Criminal Court to conduct investigations and prosecutions without delay, on the possibility for the Office of the Prosecutor to start investigations on its own initiative, pursuant to the Rome Statute, \textit{supra}, note 27, art. 15(1), is an important asset for the International Criminal Court in order to act politically independent from the Security Council and states’ parties).}

\footnote{31. Peter Barcroft & David Donat Cattin, Parliamentarians for Global Action, A Deterrent International Criminal Court—The Ultimate Objective (Dec. 6, 2004) (Parliament of New Zealand), \textit{available at} http://www.pgaction.org/uploadedfiles/deterren%20paper%20for%20NZ_panel%201_.pdf (last visited Jan. 4, 2008). However, the International Criminal Court will have difficulty in building a true threat for perpetrators worldwide due to its lack of coercive enforcement mechanisms.)
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 the long-lasting armed conflict between the Lord’s Resistance Army (LRA) 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. 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. 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.

III. THE CONFLICT IN DARFUR

A. 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

35. Darfur had been an independent sultanate for centuries, before it was annexed to the Anglo-
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.\textsuperscript{36} Darfur of the late 1990s has been described as an "increasingly marginalized, violent and frustrated place".\textsuperscript{37}

In addition to this policy of marginalization, the ever-present cleavage between farmers and herdsman, which had largely become equivalent to a distinction of Africans versus Arabs in the mid-twentieth century, was increasingly exploited.\textsuperscript{38} 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{39} 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{40} 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{41} 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{42} but can be considered as armed bandits that were tolerated to some extent by the government because of their Arabic correlation.\textsuperscript{43}

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{44} The fact that these disputes are

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\textsuperscript{36} G\textsc{erard} P\textsc{runier}, \textsc{Darfur: The Ambiguous Genocide} 56 (2005) [hereinafter P\textsc{runier, Ambiguous}).

\textsuperscript{37} \textit{Id.} at 81.

\textsuperscript{38} See Robert O. Collins, Disaster in Darfur: Historical Overview, in \textsc{Genocide in Darfur: Investigating the Atrocities in the Sudan} 3 (2006) (explaining 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 also P\textsc{runier, Ambiguous}, supra note 36, at 5 (emphasizing that the ambivalence is not grounded on biological or cultural reasons, but largely on a different way of life).

\textsuperscript{39} J\textsc{erome} T\textsc{ubiana}, \textit{Le Darfour, un conflit pour la terre?} 101 \textsc{Politique Africaine} 111, 113 (2006).

\textsuperscript{40} Collins, supra note 38, at 9 (discussing 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 also R\textsc{uth} I\textsc{yob} & G\textsc{ilbert M. K\textsc{hadiagala}, \textsc{Sudan: The Elusive Quest for Peace} 31 (2006).

\textsuperscript{41} T\textsc{ubiana}, supra note 39, at 113. Darfur literally means "land of the Fur."

\textsuperscript{42} See P\textsc{runier, Ambiguous}, supra note 36, at 97 (comparing the \textit{Janjaweed} to the Rwandan \textit{Interahamwe}, who were not a natural expression of the Hutu in Rwanda either).

\textsuperscript{43} \textit{Id.}

\textsuperscript{44} Collins, supra note 38, at 6. The easy availability of weapons was largely due to the war in
another major source of the conflict has been viciously exploited by the
government who has been presenting the whole 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.

B. Escalation in 2003

In February 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 new practice, since the GoS increasingly armed Arab tribes and
their militias and disarmed non-Arab tribes with the purpose of intensifying the
southern Sudan and the use of Darfur as a basis for Chadian rebels who, supported by Libya, launched their attacks from Darfur. See U.N. SCOR, Report of the International Commission of Inquiry on Darfur to the Secretary-General, delivered to the Secretary-General Pursuant to Security Council resolution 1564 at 24, U.N. Doc. S/2005/60 (Sept. 18, 2004), [hereinafter UNCOI].

46. René Lemarchand, Un simplify ing Dafur, 1 GENOCIDE STUDIES & PREVENTION 1, 5 (2006).
48. Collins, supra note 38, at 9 (the SLA's manifesto largely resembles the SPLA's vision of a united, but decentralized Sudan); see also FLINT & DE WAAL, supra note 35, at 82 (claiming that senior SPLA members coauthored the political declaration of the SLA).
49. PRUNIER, AMBIGUOUS, supra note 36, at 97.
50. See id. (discussing an overview of the origins of the Janjaweed).
51. UNCOI, supra note 44, at 26.
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 Sudan People’s Liberation Army (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.

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. 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. Although several ceasefire agreements were

52. ARMIN MEKKI MEDANI, CRIMES AGAINST INTERNATIONAL HUMANITARIAN LAW IN SUDAN 1989-2000 204 (2001). For more details on the attacks of Arab militias on hundreds of Masalit villages in 1997 and 1998, see also id. at 206.
53. FLINT & DE WAAL, supra note 35, at 102 (the PDF emerged in the 1980s, its members being associated with the Muslim Brotherhood); see also Pablo Castillo, Rethinking Deterrence: The International Criminal Court in Sudan, 13 UNISCI DISCUSSION PAPERS 167, 172 (2007).
55. Id.
58. FLINT & DE WAAL, supra note 35, at 85.
59. See id. at 89, 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.
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\(^6\) have led to at least 200,000 deaths and two million displaced persons.\(^6\) 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.\(^6\)

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60. See generally International Criminal Court, Fourth Report of the Prosecutor of the International Criminal Court, Mr. Luis Moreno Ocampo, to the U.N. Security Council Pursuant to U.N. SCR 1593 (2005), delivered to the U.N. Security Council, Dec. 14, 2006, available at http://www.icc-cpi.int/library/organs/otp/OTP_ReportUNSC4-Darfur_English.pdf (last visited January 16, 2008); see also Martin Mennecke, What’s in a Name? Reflections on Using, Not Using, and Overusing the “G-Word,” 2 GENOCIDE STUDIES & PREVENTION 57, 60 (2007). 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.” 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.” DON CHEADLE & JOHN PRENDERGAST, NOT ON OUR WATCH, THE MISSION TO END GENOCIDE IN DARFUR AND BEYOND 2 (2007). On the genocide debate, see generally William A. Schabas, Darfur and the ‘Odious Scourge’: The Commission of Inquiry’s Findings on Genocide, 18 LEIDEN J. INT’L L. 871 (2005); Scott Strauss, Darfur and the Genocide Debate 84 FOREIGN AFF. 123 (2005); Jerry Fowler, A New Chapter of Irony: The Legal Definition of Genocide and the Implications of Powell’s Determination, in GENOCIDE IN DARFUR, INVESTIGATING THE ATROCITIES IN THE SUDAN 127 (2006). See William F.S. Miles, Labeling “Genocide” in Sudan: A Constructionist Analysis of Darfur GENOCIDE STUDIES & PREVENTION 251 (2006), for social impact of applying the term genocide.


Although the GoS hesitates to admit any link with the Janjaweed and usually labels them "armed bandits,"\textsuperscript{63} many sources show that the GoS has been arming, training and funding the militias, as well as coordinating the attacks on civilians.\textsuperscript{64} 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.\textsuperscript{65} Recent documents show that the violence, including indiscriminate and disproportionate air strikes by the GoS, continues without interruption.\textsuperscript{66}

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 neighborly relations over racial divides, which are, moreover, seldom absolute.\textsuperscript{67} In addition, it seems that members of the SLA/M do not consider the Arab tribes as their enemies.\textsuperscript{68} Experts have even argued that, "[f]or the people involved, this is a political, not an ethnic or racial conflict."\textsuperscript{69} 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.\textsuperscript{70} 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.\textsuperscript{71}

\begin{footnotesize}
\begin{enumerate}
\item UNCOI, \textit{supra} note 44, at 37.\textsuperscript{63}
\item \textit{Id.} at 34; \textit{HUMAN RIGHTS WATCH, Impunity, supra} note 61.\textsuperscript{64}
\item \textit{See International Criminal Court, Situation in Darfur, the Sudan, Prosecutor’s Application under Article 58(7) 48-49, Feb. 27, 2007, available at} \url{http://www.icc-cpi.int/library/cases/ICC-02-05-56_English.pdf} \textit{(last visited Jan. 4, 2008).}\textsuperscript{65}
\item FLINT & DE WAAL, \textit{supra} note 35, at 124.\textsuperscript{67}
\item Res Publica, \textit{supra} note 34, at 17.\textsuperscript{68}
\item Khalid Medani, \textit{The Darfur Crisis and the Challenge of Democracy in Sudan, reprinted in} \textit{THE CHALLENGE OF DEVELOPMENT IN SUB-SAHARAN AFRICA: CONFLICT RESOLUTION, DEMOCRATIC GOVERNANCE AND EDUCATION, PAPERS PRESENTED TO MCGILL UNIVERSITY CENTRE FOR DEVELOPING-AREA STUDIES 19} (Monica Treviño Gonzalez, 2007).\textsuperscript{69}
\item Tubiana, \textit{supra} note 39, at 112.\textsuperscript{70}
\item INTERNATIONAL CRISIS GROUP, \textit{AFRICA REPORT NO. 125, DARFUR: REVITALISING THE PEACE PROCESS} 13 (Apr. 30, 2007), \textit{available at} \url{http://www.crisisgroup.org/home/index.cfm?id=4769} \textit{(last visited Dec. 28, 2007) [hereinafter ICG, PEACE PROCESS].}\textsuperscript{71}
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C. *The response of the international community*

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."\(^73\) Gérard Prunier, a historian and eminent Darfur specialist, argues that the whole year of 2003 and the first half of 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.\(^74\) 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.\(^75\)

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.\(^76\) However, the Bush administration, the U.N., and the European Union

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72. The Security Council resolutions concerning the ICC will be discussed in more detail below.
74. *PRUNIER, AMBIGUOUS, supra* note 36, at 122; see also FLINT & DE WAAL, supra note 35, at 128.
75. *See Gérard Prunier, Nord/Sud. La Paix Reste Incertaine, 14 ENJEUX INTERNATIONAUX 28, 29 (2006). Others emphasize the relationship between the elites and their population over a struggle of the periphery against the center. See Roland Marchal, Le Conflit de Toutes les Ambivalences, 14 ENJEUX INTERNATIONAUX 34, 37 (2006).*
76. President Bush waited three more months before declaring that genocide was happening in Darfur. *See Press Release, The White House, President’s Statement on Violence in Darfur, Sudan (Sept. 9, 2004), available at http://www.whitehouse.gov/news/releases/2004/09/20040909-10.html (last visited Dec. 28, 2007).* The United States has, however, played a very ambiguous role. Although Khartoum’s policy in Darfur has been heavily criticized, the United States has benefited from increasing Sudanese support to fight international terrorism. This has been suggested as the main reason why the new anti-Al Qaeda ally has not been seriously challenged. *See Res Publica, supra note 34, at 28; Greg Miller & Josh Meyer, U.S. Relies on Sudan Despite Condemning It, LOS ANGELES TIMES, June 11, 2007, at 1 (discussing the intelligence collaboration of the CIA with Sudanese authorities to spy on the Iraqi insurgency and al Qaeda).*
showed themselves more reserved; Jan Egeland, the personal representative of the U.N. 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.

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 decided that

All states shall 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.

This embargo was a first step of the international community to face the conflict in Darfur, but it overlooked the fact that many 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.

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

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

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78. 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 8, 12–14 (May 8, 2007), available at http://web.amnesty.org/library/pdf/AFR540192007ENGLISH/SFile/AFR5401907.pdf (last visited Jan. 4, 2008).


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 . . . . 81

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 African Union Mission in Sudan (AMIS), the 7,000 strong personnel mission in Sudan 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." 82

D. 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 83 which are fighting without common goals due to different political, tribal and individual interests. 84 The Darfur Peace Agreement (DPA), concluded in Abuja in May 2006, could not end the conflict. Weak on the subject of power sharing, 85 the DPA was only signed by a faction of the SLA led by Minni Minawi; the SLA branch led by Abdel Wahid Mohamed Nur 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;

83. For more information on the splintered groups, see Gérard Prunier, Darfour, la Chronique d'un Genocide Ambigu, Le MONDE DIPLOMATIQUE, Mar. 2007, at 16.
85. Since the DPA was not supposed to affect the 2005 power sharing agreement between the North and the South, the DPA gave the Darfurian insurgents only twelve of 450 seats in the national assembly. See ICG, PEACE PROCESS, supra note 71, at 26–7.
as early as in October 2005, for instance, several members of the JEM were killed in an attack of a dissident JEM faction.\(^8\)

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.\(^7\) Civilians who are suspected of cooperation with the NRF are now not only suffering under \textit{Janjaweed} and army attacks, which are still ongoing in Darfur and which recently started in Eastern Chad,\(^8\) but also under attacks by the SLA-MM. Rebel groups have added to the crisis by diverting international aid for their own purposes.\(^9\) On the other hand, some \textit{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.\(^9\)

IV. \textsc{The Role of the ICC in the Conflict}

A. \textit{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.\(^9\) 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,\(^9\) the Security Council, acting under Chapter VII of the U.N. Charter, followed this recommendation on March 31, 2005. Resolution 1593 triggered ICC jurisdiction for crimes committed in Darfur since July 1, 2002, states 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." 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 U.N.-AU peacekeeping mission, only major reaction of the international community to the Darfur crisis. 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. However, the expectations following the Security Council referral were mixed; the referral has been criticized for focusing too much on the future punishment of perpetrators rather 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 fifty-one individuals, which are on the list of the Commission of Inquiry, would already stigmatize and de-legitimize the GoS.

B. 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 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

95. See Res Publica, supra note 34, at 30.
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.97 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.98 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.99 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 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.”100 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

100. Rome Statute, supra note 27, art. 17(2)(c).
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."\textsuperscript{101}

C. Effects of the ICC activity on the Darfur conflict

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.\textsuperscript{102} 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.\textsuperscript{103} 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.

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 are directly attributable to government officials.\textsuperscript{104} As individual criminal

\textsuperscript{101} Fact Sheet, International Criminal Court, The Situation in Darfur, the Sudan (Feb. 27, 2007), available at http://www.icc-cpi.int/library/organs/otp/ICC-OTP_Fact-Sheet-Darfur-20070227_en.pdf (last visited Jan. 4, 2008). The warrants of arrest were issued by the Pre-Trial Chamber two months later, on April 27, 2007.


\textsuperscript{103} MOGHALU, supra note 24, at 154.

\textsuperscript{104} 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.
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.

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*: "[i]n 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." 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.

105. However, contribution to the commission of crimes according to article 25(3)(d) might be conceivable.
108. The ICTY held in the *Delalic* 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. Zejin Delalic & Hazim Delic, Case No. IT-96-21-T, Judgment, ¶ 370 (Nov. 16, 1998).
111. See UNCOI, *supra* note 44, at 38.
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. \textsuperscript{112} 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. \textsuperscript{113} 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. \textsuperscript{114} The situation in Sudan is radically different. At the moment, nothing indicates a possible regime change or overthrow of the Islamist government, \textsuperscript{115} which is in power since the 1989 coup. Its position can even be 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. \textsuperscript{116} 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.” \textsuperscript{117} 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

\footnotesize{\textsuperscript{112} ICG, PEACE PROCESS, supra note 71, at 15.}
\footnotesize{\textsuperscript{113} Rosanna Lipscomb, Restructuring the ICC Framework to Advance Transitional Justice: A Search for a Permanent Solution in Sudan, 106 COLUM. L. REV. 182, 191 (2006).}
\footnotesize{\textsuperscript{114} Although established while the conflict was still going on in Bosnia, the ICTY also delivered mainly ex post facto justice. Id. at 196–97.}
\footnotesize{\textsuperscript{115} 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 1999/2000. Despite this transformation, it is clear that the Sudanese state remains devoted to an Islamist neofundamentalism. See Alex de Waal & A.H. Abdel Salam, Islamism, State Power and Jihad in Sudan, in ISLAMISM AND ITS ENEMIES IN THE HORN OF AFRICA 71, 113 (Alex de Waal ed., 2004). Therefore, the term “Islamist” seems appropriate, although the Islamist model of the current government is radically different from the model of political Islam conceived by Turabi. For more information on the important influence of Turabi on Sudanese politics in the 1980s and 1990s, see id. at 75.}
\footnotesize{\textsuperscript{116} Lipscomb, supra note 113, at 192.}
\footnotesize{\textsuperscript{117} Akhavan, The Yugoslav Tribunal, supra note 10, at 272–73.}
international condemnation of the regime. Its discourse was rather marked by important efforts to avoid such a condemnation.118 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 "[s]ignificantly reduce the number and the level of the staff at Sudanese diplomatic missions and consular posts and restrict or control the movement within their territory of all such staff who remain,"119 in order to pressure the GoS to surrender the three men suspected of attempting to assassinate Egyptian president Hosni Mubarak.120 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.121 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.122 One can therefore conclude that actions by the international community, even in the form of light diplomatic sanctions, could be helpful in the case of Darfur.123

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 ICCs potential is therefore extremely valuable, the inability to apprehend the indicted persons might be the most important obstacle for the 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

118. Castillo, supra note 53, at 175.
120. For more information on these sanctions, see Niblock, supra note 119, at 204.
121. Id. at 212.
122. Id. at 217.
123. See Didar Fawzy-Rossano, Le Soudan en Question 262 (2002), arguing that the international sanctions did not only provoke the expulsion of Islamist leaders, such as Osama bin Laden, but also stopped Sudan's project of an international Islamism. For a different, and probably more accurate, view of the failure of Hassan al Turabi's political Islam in Sudan, see de Waal & Abdel, supra note 115, at 106, who argue that divisions between Turabi and Bashir were insinuated throughout the 1990s. In short, de Waal and Abdel describe the split of 1999/2000 between Turabi and Bashir as "entirely self-inflicted" and the dispute as "simply over power." Id. at 108.
Harun enjoys 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.²⁴

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."¹²⁵ 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.¹²⁶ 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 2009.¹²⁷

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 U.N. 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

125. REPORTERS WITHOUT BORDERS, supra note 84, at 8.
127. “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. THE DRAFT CONST. OF THE REPUBLIC OF SUDAN, supra note 107, pt. 14, ch. II, § 216. 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 with Annette Weber, Researcher, German Institute for International and Security Affairs (July 3, 2007).
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."

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.

2. Pressure the Sudanese government to cut support for the 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 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

128. Collins, supra note 38, at 22.
129. 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, 14 ENJEUX INTERNATIONAUX 13, 14 (2006).
130. [Les Européens ne sont pas prêts à mourir pour le Darfur. Id. at 15.
132. Interview of Annette Weber, supra note 127.
Kastner

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 *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."133 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.134

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*.135 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,


134. PERRY, supra note 90.

thus making it impossible to disarm the *Janjaweed*. 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." 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. 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, as well as attacked and raped aid workers, thus committing war crimes and crimes against humanity. Civilians reportedly call Minni Minawi's troops "Janjaweed 2." 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.

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 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 government or had been educated in Europe. They

136. See, e.g., FLINT & DE WAAL, supra note 35, at 122. "Forcible disarmament of the *Janjaweed* is almost certainly impossible." *Id.* at 127.


140. ICG, PEACE PROCESS, supra note 71, at 8 n.45.

141. According to Flint and de Waal, seven of the fifty-one individuals named are rebel leaders; see FLINT & DE WAAL, supra note 35, at 132.

142. Tubiana, supra note 39, at 114.

143. FLINT & DE WAAL, supra note 35, at 66.

144. *Id.* at 91.
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."  

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

145. Payam Akhavan, The Lord's Resistance Army Case: Uganda's Submission of the First State Referral to the International Criminal Court, 99 A.J.I.L. 403, 404 (2005). 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 twenty years, and the Ugandan army, the Darfurian 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.


147. Id.

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.

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 OTPs 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 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, 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 vis-à-vis national governments as well as the Security Council. 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

149. Id.
150. FLINT & DE WAAL, supra note 35, at 70.
151. 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.
152. For instance, independence of the judges and of the OTP, as stipulated in articles 40 and 42 of the Rome Statute. See Rome Statute, supra note 27.
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;\(^{153}\) such measures could be enacted as a consequence of the work of the ICC.

**D. 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.\(^{154}\)

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

1. Fewer prospects of a peace agreement—
the ICC prolonging the conflict

"The pursuit of criminals is one thing. Making peace is another."\(^{155}\)

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 \textit{Janjaweed} and the Sudanese Army, the effects of the lasting conflict on the civilian population are not less invasive.

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\(^{153}\) 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 \textit{Médecins Sans Frontières}, for instance, affirm that a military intervention would aggravate the conflict. \textit{See} Agnès Gruda, \textit{Le Darfour n’est pas le Rwanda}, \textit{LA PRESSE}, Apr. 13, 2007.

\(^{154}\) Snyder & Vinjamuri, \textit{supra} note 15, at 5.

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 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;" promising any form of political influence to the rebels in addition to the North-South accord 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: "[o]bviously, 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


159. ALLEN, supra note 32, at 103.
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 expected to be targeted by the OTP: government officials as well as leaders of rebel groups and the Janjaweed.

2. Endanger the deployment of a U.N. 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. Although a U.N. mission would not solve

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the problem immediately,\textsuperscript{163} 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,\textsuperscript{164} should be supplemented by a stronger U.N. 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.\textsuperscript{165} The GoS, however, blocked the deployment of a U.N. mission or even a combined U.N.-AU mission. In June 2007, Khartoum started to show more willingness to admit a hybrid U.N.-AU peacekeeping force for Darfur, which was authorized by the Security Council on July 31, 2007.\textsuperscript{166} While this is an important step, diplomats remain skeptic 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{167}

One should thus question why the GoS has been so reluctant to admit a U.N. force into Darfur, considering the fact that there is already a U.N. mission in southern Sudan. One issue is Khartoum’s fear that a U.N. mission in Darfur would cooperate with the ICC, for instance by arresting members of its armed forces and transferring them to The Hague.\textsuperscript{168} 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 U.N. mission would really arrest persons wanted by the ICC, the OTP already showed that it takes advantage from a U.N. 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 U.N. 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

\begin{thebibliography}{9}
\bibitem{163} 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 U.N. mission. \textit{See De Mauvaises Réponses à de Bonnes Questions,} MéDECINS SANS FRONTÎÈRES, Mar. 23, 2007, http://www.msf.fr/site/actus/ntf/actus/darfourtwgab230307 (last visited Jan. 8, 2008).
\bibitem{167} \textit{Sudan 'Backs U.N.-Led Darfur Force,'} supra note 139.
\bibitem{168} \textit{Le Soudan rejette la légitimité de la CPI sur le Darfour,} LE MONDE, Feb. 27, 2007.
\end{thebibliography}
operate without such support."169 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,170 which is now believed to be based in the northeast of the DRC.171 Even if such cooperation is 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 U.N. practice by expanding the mandate of the U.N. 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.”172 Charles Taylor was subsequently arrested by Nigerian officials, when he tried to flee Nigeria in March 2006; after Taylor had been repatriated to Liberia, U.N. peacekeepers transferred him to Freetown.173 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.174 However, if the Liberian government had not given its consent, the task, which arguably amounts to a duty,175 to apprehend Taylor could hardly have been reconciled with the mandate of a peacekeeping force.

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170. See ICG, UGANDA, supra note 146, at 7.
171. Id. at 8.
173. Frulli, supra note 172, at 351.
174. Id. at 359.
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{176} 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{177} 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{178} 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{179} 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 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-

\textsuperscript{176} For a further discussion on this controversial point and the question whether the multinational force is obliged to execute arrest warrants, see Paula Gaeta, \textit{Is NATO Authorized or Obliged to Arrest Persons Indicted by the International Criminal Tribunal for the Former Yugoslavia?}, 9 E.J.I.L. 174 (1998). On the difficult relationship between the ICTY and IFOR, see Gary Jonathan Bass, \textit{Stay the Hand of Vengeance: The Politics of War Crimes Tribunals} 251 (2000).

\textsuperscript{177} Gaeta, \textit{supra} note 176, 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, allowing the ICTY to transmit a warrant of arrest to an “appropriate authority or international body.” See Rules of Procedure and Evidence, 1994 ICTY 59.

\textsuperscript{178} See Grono & Mozersky, \textit{supra} note 157.

\textsuperscript{179} See id.
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. A possible cooperation of a U.N. 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 U.N. 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."

Whether or not Khartoum's fear that a U.N. mission in Darfur might start to arrest members of the Sudanese army and the militias is justified, there is a realistic possibility that a U.N. 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 U.N. mission for Darfur.

**E. 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. However, the potentially negative impact 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.

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 to pressure key players 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 impact for the victims of the conflict is 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" 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 "took the risk to confuse the juridical order with political tactic." 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.

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

182. Rome Statute, supra note 27, art. 58(1)(a).
183. Marchal, supra note 75, at 36.
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, besides the problem of enforcement, is limited in its possible impact on ending the Darfur conflict due to another factor: time. The question of time is decisive because the ICC could have even more immediate effects 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 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 requirement of acting in accordance with the “interests of the victims,” as stipulated in article 53(1)(c) of the Rome Statute.

V. CONCLUSION

The work of the ICC can have effects 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 consequences. 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 effects; Sudanese officials have clearly become more nervous. The impact 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 U.N.-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 U.N. 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

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185. The ICC Deputy Prosecutor, Fatou Bensouda, met with the U.N. Deputy Secretary General, Asha-Rose Migiro, and with Ambassador Pascal Gayama, Deputy Permanent Representative of the Congo to the U.N. and President of the Security Council for the month of August in 2007, to discuss the cooperation of the U.N. and other organizations with the Court as well as the need to enforce the Court's decisions. See Press Release, International Criminal Court, Deputy Prosecutor of the ICC to meet U.N. Deputy Secretary General and President of U.N. Security Council (Aug. 17, 2007), available at http://www.icc-cpi.int/press/pressreleases/265.html (last visited Jan. 8, 2008).
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 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.\(^{186}\)

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 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."\(^{187}\)

\(^{186}\) 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. \(\text{See Yoanes Ajawin, Human Rights Violations and Transitional Justice, in THE PHOENIX STATE: CIVIL SOCIETY AND THE FUTURE OF SUDAN} 113, 121\) (A.H. Abdel Salam & Alex de Waal eds., 2001).

\(^{187}\) McGoldrick, \textit{supra} note 8, at 471.
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.