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ABSTRACT

The Darfur referral to the International Criminal Court demonstrates the limits of international criminal justice as an agent of wartime deterrence evident in the experience of the ICTY in Bosnia. First, international tribunals cannot deter criminal violence as long as states and international institutions are unwilling to take enforcement actions against perpetrators. Second, the key to ending impunity in an ongoing war lies less in legal deterrence than in political strategies of diplomacy, coercion, or force. Third, the contribution of criminal justice in aftermath of mass atrocity is dependent on which strategies are used to put it to an end.

I. INTRODUCTION

On 27 February 2007, the chief prosecutor at the International Criminal Court (ICC) identified a former interior minister and a militia leader as the first two individuals he planned to try for atrocity crimes committed in the Darfur region of western Sudan.[1] The case had been referred to the court by the UN Security Council almost two years earlier, due in large part to

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1. *Prosecutor's Application Under Article 58(7) of the Rome Statute*, 27 Feb. 2007.

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intense lobbying from the human rights community. Among the arguments made on behalf of the referral was the ability of the court to deter violence against civilians in an ongoing war. This was the conclusion of the UN International Commission of Inquiry on Darfur, which had recommended the referral to "take on the responsibility to . . . end the rampant impunity prevailing there."[2] Following the referral, Richard Dicker of Human Rights Watch applauded it as a "historic step" that "offers real hope of protection for people in Darfur."[3] When the prosecutor announced his first two cases, David Mozersky of the International Crisis Group expressed the hope that this might prove to be a turning point in the conflict: "the ICC may be able to succeed in Darfur, where there is little international political will for tough action and the UN Security Council is deadlocked."[4]

Despite these predictions, subjecting the Sudanese government to criminal scrutiny has had no discernible impact on the level of violence against civilians in Darfur and, if the past is any indication, is unlikely to do so unless there is international political will for tough action, either within or outside the Security Council. This was the experience in Bosnia where, as in Darfur, a criminal justice mechanism—the International Criminal Tribunal for the Former Yugoslavia (ICTY)—was established with the goal of combating impunity before the war had ended. However, it was only able to play a meaningful role after Western powers took coercive actions to end the war. This article draws on the strategic studies scholarship on deterrence and coercion by Thomas Schelling and Alexander George[5] to distill from the Bosnian experience three lessons as to the relationship between international criminal justice and wartime impunity, which are then applied to the current situation in Darfur.

First, international criminal justice cannot end impunity in an ongoing war as long as states and intergovernmental organizations are unwilling to take enforcement actions. In Bosnia, the ICTY had little impact on the murder and forced displacement of civilians when the UN and NATO were unwilling to move beyond neutral peacekeeping and mediation—a condition that characterizes international involvement in Darfur today, notwithstanding the referral to the ICC. It was only when NATO was willing to use force, both

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2. Report of the International Commission of Inquiry on Darfur to the United Nations Secretary General, Pursuant to Security Council Resolution 1564 of 18 Sept. 2004, 25 Jan. 2005, ¶ 569.
3. Press Release, Human Rights Watch, U.N. Security Council Refers Darfur to the ICC Historic Step Toward Justice; Further Protection Measures Needed (31 Mar. 2005), *available at* http://hrw.org/english/docs/2005/03/31/sudan10408.htm.
4. David Mozersky, *Accountability in Darfur*, Institute of War & Peace Reporting (27 Feb. 2007), *available at* http://www.iwpr.net.
5. *See* Thomas C. Schelling, Arms and Influence (1966); Alexander L. George, David K. Hall & William E. Simons, The Limits of Coercive Diplomacy (1971); Alexander L. George, Forceful Persuasion: Coercive Diplomacy as an Alternative to War (1991).

directly and via proxy, that the attacks on civilians ended and the ICTY was able to prosecute anyone of significance.

Second, the key to ending criminal violence in an ongoing war is not *deterrence*, which is aimed at dissuading someone from initiating proscribed behavior, but rather *compellence*, the act of preventing someone from continuing actions on which he has already embarked.[6] The threat of prosecution is unlikely to deter because, by the time a tribunal asserts jurisdiction, large-scale crimes have already taken place and in most cases, as was the case in Bosnia and is the case in Darfur, responsibility lies with top political and military leaders. As a result, attaching legal liability does not create an incentive to refrain from criminal activity. The challenge is to prevent the continuation of crimes that have already been set in motion, and that requires compelling the target to change its behavior.

According to Schelling, compellence can take one of two forms.[7] First, it can involve *brute force* to defeat the perpetrators. This can take place through internal forces, as when the Rwandan Patriotic Front ousted the genocidal Hutu regime, or through external intervention, as when British troops assisted a UN force in defeating the Revolutionary United Front (RUF) in Sierra Leone. Second, it can involve *coercion* where the goal is not to defeat the perpetrators, but to use the threat or the demonstrative infliction of punishment to change their behavior by convincing them that it is in their interest to comply with the coercer's demands.[8] The purpose of the NATO bombing campaign against the Bosnian Serbs, initiated in late August 1995, was to raise the costs and risks of continued criminal violence for Milošević to a point where he believed that maintaining his power required him to rein in his allies and to put an end to the war. Comparable arguments are made today vis-à-vis Sudan, whereby oil sanctions or the enforcement of a no-fly zone are proposed as levers to get Khartoum to disarm the militias and accept deployment of a robust UN force to protect civilians in Darfur.

Third, the kind of criminal justice approach that is feasible in the aftermath of mass atrocity is dependent on the strategies that are used to put it to an end. If the perpetrators have been physically defeated, their leaders can be put on trial because they lack the power to prevent it. If one relies instead on coercion, this is more problematic because success involves persuading leaders to put an end to criminal violence for which they are probably complicit. The strategic studies literature indicates that coercion is likely to be successful if threats are accompanied by reassurances and if the coercer's demands do not impinge on the vital security or survival interests of the regime.[9] This means that a strategy of coercive conflict resolution would have

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6. *See* Schelling, *supra* note 5, at 69–86.
7. *Id.* at ch. 1.
8. *Id. at 4*
9. George, Hall & Simons, *supra* note 5, at 288.

to refrain from the prosecution of leaders whose cooperation is needed to make the strategy work—at least until conditions change. In Bosnia, indicting Milošević in 1995, as some international lawyers recommended, would have been counterproductive to ending the war because NATO's strategy was premised on Milošević's cooperation in signing and maintaining a peace agreement. Indicting Milošević during the Kosovo war did not create comparable problems because NATO's strategy was to coerce the withdrawal of the Yugoslav army and did not anticipate a continuing relationship with Milošević. The lesson that should be drawn from these episodes is that if the international community moves toward a policy of humanitarian coercion to stop the political violence in Darfur, who can be prosecuted will depend on whose cooperation is needed for a political settlement.

II. LEGAL DETERRENCE VERSUS COERCIVE DIPLOMACY: THE LESSONS OF BOSNIA

One of the central goals of the ICC is the deterrence of "the most serious crimes of concern to the international community." This mission is laid out in the preamble to its founding Rome Statute: "to put an end to impunity for perpetrators of these crimes and thus to contribute to the prevention of such crimes."[10] Central to its deterrent potential is the fact that the ICC is a permanent institution, independent of the warring parties, and not subject to the changing national interests of the states that created it. In theory, this enhances not only its general deterrence vis-à-vis international society as a whole, but also specific deterrence on the parties to an existing armed conflict, such as the one in Darfur.[11] As one non-governmental organization (NGO) study put it, the ICC is "in the unique position to serve as a potential deterrent for future incidents of war crimes, crimes against humanity, and genocide in Darfur. Because it is a permanent international criminal court and can investigate ongoing incidents, an indictment or conviction from the ICC can send a clear message to human rights violators that such acts will be met with swift justice."[12] This is also why many NGOs oppose proposals

10. Rome Statute of the International Criminal Court, pmbl., U.N. Doc. A/Conf.183/9 (1998).
11. On the distinction between general and specific deterrence, see Payam Akhavan, *Justice in The Hague, Peace in the Former Yugoslavia? A Commentary on the United Nations War Crimes Tribunal*, 20 Hum. Rts. Q. 746 (1998).
12. *See* Citizens for Global Solutions, *Darfur and the ICC: Justice is the Key to Recovery,* Global Solutions Q. 4 (2006), *available at* http://www.globalsolutions.org/publications/publications_darfur_and_icc; *see generally* Citizens for Global Solutions, *In Uncharted Waters: Seeking Justice Before The Atrocities Have Stopped, The International Criminal Court in Uganda and the Democratic Republic of the Congo,* Global Solutions Q. 9 (2004), *available at* http://www.globalsolutions.org/files/general/press/pdfs/uncharted_waters.pdf.

to suspend criminal proceedings during peace negotiations, either through Security Council intervention or through the prosecutor exercising discretion. According to Human Rights Watch, such an approach would "mean that prosecutions should only occur well after the crimes have been committed, long after instability has ceased. This would completely undermine any short-term deterrent value that the court might have through investigating current crimes."[13]

The assumption that investigating crimes in an ongoing war could play a deterrent role was also one of the official rationales for the creation of the ICTY. In the past, war crimes tribunals had been established at the end of armed conflicts, but the ICTY was created on 25 May 1993, roughly one year after the outbreak of the war in Bosnia. Among its goals, as spelled out in Security Council Resolution 827, was "the maintenance and the restoration of peace," a novel objective for such a tribunal.[14] One of the ways in which it would do so was through its deterrent impact on the commission of future atrocities. This goal was expressed in the public diplomacy of several members of the Security Council, including the French ambassador, who asserted that it "would send a clear message to those who continue to commit these crimes that they will be held accountable for their acts."[15]

As an instrument for deterring atrocities during the Bosnian War, the ICTY had no meaningful impact. Ethnic cleansing, led principally by Serb and Croat forces whose leaders were under investigation, continued unabated, as did interference with humanitarian relief operations and attacks on UN peacekeepers.[16] In fact, on 7 July 1995, more than two years after the creation of the ICTY, General Ratko Mladić's forces perpetrated the worst single atrocity of the Bosnian war when they overran and ethnically cleansed the UN-protected safe area of Srebrenica, murdering more than 7,000 Muslim men and boys, despite the fact that less than three months earlier, ICTY prosecutor Richard Goldstone had asked the Bosnian government to defer to his investigation of Mladić. On the day of Mladić's indictment two weeks later, his forces invaded Zepa, another UN-protected safe area, and shortly thereafter, they resumed the shelling of Sarajevo.[17]

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13. *Human Rights Watch Policy Paper: The Meaning of "The Interests of Justice" in Article 53 of the Rome Statute*, 15 (June 2005), *available at* www.hrw.org/campaigns/icc/docs/ij070505.pdf.
14. *See* Ruti Teitel, *Bringing the Messiah Through the Law, in* Human Rights in Political Transitions: Gettysburg to Bosnia 177–80 (Carla Hesse & Robert Post eds., 1999).
15. *Cited in* Paul R. Williams & Michael P. Scharf, Peace with Justice? War Crimes and Accountability in the Former Yugoslavia 99 (2002). This followed warnings from the Security Council of criminal prosecution for criminal acts going back to July 1992. Rachel Kerr, The International Criminal Tribunal for the Former Yugoslavia: An Exercise in Law, Politics, and Diplomacy 33 (2004).
16. David Wippman, *Atrocities, Deterrence, and the Limits of International Justice*, 23 Fordham Int'l L. J. 479–80 (1999).
17. Gary Jonathan Bass, Stay the Hand of Vengeance: The Politics of War Crimes Tribunals 229–31 (2000).

One of the reasons why the threat of prosecution had little influence during the Bosnian war was the failure to meet the formal requirements for effective deterrence. In a study of the impact of war crimes tribunals on state behavior, Christopher Rudolph identified those requirements as capability, commitment, and credibility.[18] The ICTY lacked the capability to enforce its own decisions because it had no police force to stop and arrest those indicted. The NATO forces working with the UN in Bosnia did have that capability, though they were under the control of the UN and national governments which would have had to consent to their use as an enforcement arm of the court. In theory, they should have been obligated to enforce the law since the Security Council had invoked Chapter VII, both in declaring the ethnic cleansing to be a threat to international peace and security and in subjecting its architects to criminal scrutiny.[19] What followed, however, indicated that the creation of the ICTY was more a means of deflecting pressure for tough action than it was a commitment to stopping criminal violence.[20] If that commitment were genuine, one should have expected enforcement actions against perpetrators and in defense of victims. Instead, the principal conflict resolution strategy was impartial mediation, and many diplomats were either dismissive of the ICTY or believed that it would complicate the peace process.[21] The same even-handedness informed the imposition of an arms embargo on all the parties in Bosnia, effectively favoring the Serbs because they were supported by the Yugoslav National Army.[22] The Security Council authorized the deployment of a UN Protection Force (UNPROFOR) in Bosnia, but its initial mandate was the neutral protection of humanitarian relief operations—i.e., addressing the symptoms of ethnic cleansing rather than its causes. Even when that mandate was augmented to include the protection of safe areas, member states were unwilling to deploy enough troops to make it credible, and UN and NATO officials were often reluctant to make good on those commitments because of the risks to peacekeepers.[23] This was well understood in Pale and Belgrade, which meant that UN and NATO threats lacked credibility. As Ruti Teitel observed, the ICTY was "forced to seek criminal punishment within a political vacuum."[24]

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18. Christopher Rudolph, *Constructing an Atrocities Regime: The Politics of War Crimes Tribunals,* 55 Int'l Org. 655, 684 (2001).
19. Teitel, *supra* note 14, at 178.
20. For an analysis of the political motives of Western governments in creating the ICTY, see David P. Forsythe, *International Criminal Courts: A Political View*, 15 Neth. Q. Hum. Rts. 5 (1997).
21. Anonymous, *Human Rights in Peace Negotiations*, 18 Hum. Rts. Q. 249 (1996).
22. James Gow, Triumph of the Lack of Will: International Diplomacy and the Yugoslav War 37–38 (1997).
23. *Id.* at 145–55.
24. Teitel, *supra* note 14, at 180.

Some proponents of international criminal justice acknowledge that the ICTY had limited deterrent impact during the Bosnian war, but attributed that to the exceptional nature of war crimes tribunals at that time—a problem that could be remedied if there was a stronger commitment to national and international prosecutions.[25] Others, such as Goldstone, pointed to the "lack of political will on the part of leading Western nations to support and enforce the orders of the tribunal."[26] As a means of preventing mass atrocity in an ongoing war, these arguments conflate the strategic concepts of deterrence and compellence. Deterrence is designed to prevent someone from initiating criminal activity. Yet, by the time an international criminal tribunal asserts jurisdiction in an ongoing conflict, large-scale atrocities have already occurred and responsibility almost certainly resides in the top leadership of governments and rebel groups. In other words, those one would like to deter, such as General Mladić, have already committed the crimes that would get them "sent to The Hague." Judicial scrutiny does not create any new incentive to desist. In these circumstances, what is required to end impunity is not deterrence, but compellence—i.e., stopping or reversing actions already taken.[27] This is because the real source of impunity in places like Bosnia (or Darfur) is that the perpetrators believe that the internal balance of forces on the ground enables them to impose their will without meaningful resistance, and the lack of international political will to stop them means that they can do so without incurring significant external costs.

A strategy of compellence can change these calculations either through: (1) brute force, to physically defeat the target or (2) coercion, to convince the target to change its behavior through the threat of punishment. The second strategy could involve both non-military measures, such as economic sanctions, or military force. If force is used, the distinction from the first strategy is its purpose. Brute force is designed to defeat the adversary or reduce its capability to a point where its cooperation is unnecessary. Coercion seeks to elicit its cooperation through the threat or limited use of violence.[28]

A recent illustration of the role of brute force in ending impunity—and the limits of legal mechanisms in its absence—is the British intervention in Sierra Leone in the summer of 2000 to assist UN forces in defeating the RUF, a rebel group that had abducted thousands of children as soldiers and had terrorized civilians through a campaign of mutilation, rape, and murder. This followed the RUF's violation of the 1999 Lomé Peace Accord, when it returned to political violence and took UN peacekeepers hostage. Some in

25. Theodor Meron, *From Nuremberg to The Hague*, 149 Military L. Rev. 107, 111 (1995).
26. Richard Goldstone, *Bringing War Criminals to Justice during an Ongoing War in* Hard Choices: Moral Dilemmas in Humanitarian Intervention 202 (Jonathan Moore ed., 1998).
27. Schelling, *supra* note 5, at 69.
28. On the distinction between brute force and coercion, see *id.* ch. 1.

the human rights community attributed the breakdown of Lomé to its blanket amnesty, a decision that reinforced the RUF's belief in its own impunity by ignoring the deterrent contribution of prosecution.[29] This argument mistakes symptoms for causes. What made for the RUF's impunity after Lomé was the fact that it had not been defeated militarily, that Nigeria, which led the West African peacekeeping force that had kept it at bay, wanted to pull out of Sierra Leone, and that the UN was only willing to replace that force with neutral peacekeepers. That impunity only ended with the British intervention, without which the RUF would not have been defeated and there would never have been a Special Court for Sierra Leone to try those most responsible for atrocities during that country's brutal civil war.[30]

Strategies of coercion, by contrast, seek not to incapacitate an opponent, but rather to "erode his motivation to continue what he is doing" by the "expectation of costs of sufficient magnitude."[31] Such strategies can involve the use of non-forcible measures, such as economic sanctions. After East Timor's vote for independence from Indonesia in 1999, militias supported by the Indonesian army went on a rampage of looting and large-scale violence against civilians. In response, the Clinton administration threatened to link future IMF and World Bank loans to Indonesia's willingness to stop the violence.[32] Given Jakarta's vulnerability to such sanctions during the Asian Financial Crisis, it agreed to withdraw its forces and end its support for the militias, creating a permissive environment for the deployment of an Australian-led peacekeeping force.[33]

In the strategic studies literature, the military variant of this strategy is referred to as "coercive diplomacy," which is defined as the threat or "exemplary use of quite limited force to persuade the opponent to back down."[34] This was the United States-led NATO strategy from 28 August to 14 September 1995, when it initiated Operation Deliberate Force, a bombing campaign against Bosnian Serb military targets, pursued in combination with a Croatian offensive to retake the Krajina, which Serbia had conquered in 1991, and a joint Croat-Bosnian offensive in Western Bosnia. The purpose of force was not to defeat the Serbs militarily, but to convince Milošević that he was overextended, that time was not on the side of the Bosnian Serbs, and that

29. *See* Human Rights Watch, UN Role in Sierra Leone Peace Deal Condemned (8 July 1999); Confronting War Crimes in Africa, Subcomm. on Africa, H. Comm. on Int'l Relations, 108th Cong. 22–24 (2004) (statement of Corinne Dufka, Senior Researcher and West Africa Team Leader, Human Rights Watch).
30. James Traub, The Best Intentions: Kofi Annan and the UN in the Era of American World Power 117–22 (2006).
31. George, Forceful Persuasion, *supra* note 5, at 11.
32. Nicholas J. Wheeler & Tim Dunne, *East Timor and the New Humanitarian Interventionism*, 77 Int'l Aff. 818–20 (2001).
33. Traub, *supra* note 30, at 103–08.
34. George, Forceful Persuasion, *supra* note 5, at 5.

it was in his interest to compromise and end the war.[35] This, in turn, was a prerequisite to gaining the consent of all three warring parties to the Dayton Peace Agreement and the deployment of a NATO peacekeeping operation.

Coercive diplomacy, however, is problematic from the standpoint of international criminal justice because its purpose is to alter the way a target calculates its interests. The scholarly literature on coercive diplomacy indicates that this is most likely to be achieved if "the objective selected—and the demand made—by the coercing power reflects only the most important of its interests" rather than those that "infringe on the vital or very important interests of the adversary."[36] If the central goal of coercive bargaining with an abusive government is to end a war whose principal victims are civilians, success depends on whether threats and punishments can convince the target that compliance is necessary for its long-term security. If those goals are expanded to include the criminal prosecution of its leaders, then this amounts to a demand for regime change, making the target's compliance all but impossible. The coercer is then confronted with the choice of acquiescing to a morally intolerable status quo or escalating the use of force to a point where the target is defeated and its cooperation is no longer necessary. By the summer of 1995, neither of these options was palatable to the US and NATO in Bosnia. Hence, at Dayton, they dealt with Milošević through a bargaining paradigm rather than a criminal justice paradigm.[37]

Many NGOs and human rights lawyers opposed these compromises with criminal justice. One line of argument is that the conflict between justice and peace has been exaggerated.[38] Despite the warnings of some UN officials and international mediators, the indictments of Karadžić and Mladić did not derail the Dayton peace process. Nor did the 1999 indictment of Milošević prevent a resolution of the Kosovo war that enabled the refugees to return to their homes.[39] In fact, the indictments helped marginalize disruptive actors who would likely have threatened the postwar peace processes.[40]

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35. Steven L. Burg, *Coercive Diplomacy in the Balkans: The U.S. Use of Force in Bosnia and Kosovo, in* The United States and Coercive Diplomacy 65–66 (Robert J. Art & Patrick M. Cronin eds., 2003).
36. George, Forceful Persuasion, *supra* note 5, at 13.
37. During the peace negotiations, Hobrooke showed Milošević the CIA file documenting his communications with Arkan, one of the most vicious Serb paramilitary leaders, in order to press him to crack down on the Bosnian Serbs, over whom he had more control than he claimed. This evidence was not shared with Goldstone to build a legal case against Milošević for his complicity with criminal violence in Bosnia. *See* Pierre Hazan, Justice in a Time of War: The True Story Behind the International Criminal Tribunal for the Former Yugoslavia 192 (2004); Bass, *supra* note 17, at 236–37.
38. Kenneth Roth, *Sidelined on Human Rights*, 77 Foreign Aff. 5 (1998).
39. *See* Akhavan, *supra* note 11, at 738–39; comments by Richard Goldstone in Amnesty International, Open Letter to the Chief Prosecutor of the International Criminal Court: Comments on the Concept of the Interests of Justice 7–8 (17 June 2005).
40. Human Rights Watch Policy Paper: The Meaning of "The Interests of Justice" in Article 53 of the Rome Statute (June 2005), *available at* http://www.hrw.org/campaigns/icc/docs/ij070505.pdf.

The problem with this argument is that it generalizes from individual cases without accounting for the political (i.e., bargaining) contexts in which the indictments were issued. Alexander George observed that "the objective of coercive diplomacy and the means employed on its behalf are likely to be sensitive to the type of relationship the coercing power plans to have with the opponent after the crisis is over."[41] This means that the impact of criminal justice on peace processes depends on whether the cooperation of those who might be targets of prosecution is necessary to negotiate and maintain a political settlement. In 1995, United States envoy Richard Holbrooke concluded that it was futile to negotiate with Karadžić and Mladić since they were spoilers who had reneged on virtually every commitment they had made to international mediators. He therefore sought to bypass them and concentrate his pressure on Milošević to both speak for them and to rein them in. Indicting Karadžić and Mladić assisted this strategy. Indicting Milošević would have undermined it because his cooperation was seen as necessary to negotiate and implement Dayton.[42] The actual indictment of Milošević during the Kosovo War took place in a different bargaining context, in which Milošević was seen as the principal source of instability in the region rather than the key to the peace process. As a result, Milošević's continuing cooperation was not necessary for NATO's war termination strategy. All that was required was the withdrawal of the Yugoslav Third Army from Kosovo.[43]

Another critique, put forward by some international lawyers, rejected peace negotiations with Milošević because they accommodated a war criminal.[44] Indeed, as Schelling notes, successful coercive diplomacy requires accommodation as well as confrontation: "threats require corresponding assurances; the objective of a threat is to give somebody a choice."[45] At Dayton, those assurances included an autonomous Republika Srpska comprising 49 percent of the country, no mandatory surrender of indicted war criminals on pain of sanctions, and a promise to move toward normalized economic relations.[46] Paul Williams and Michael Scharf condemn this as a strategy of "coercive appeasement" which sacrificed justice by ratifying the gains made through ethnic cleansing and legitimizing a man who should have been prosecuted.[47] Instead, they advocate a policy of legal rectitude that rejects negotiations with war criminals. In this, they criticize not only

41. *See* George, Forceful Persuasion, *supra* note 5, at 71.
42. *See* Derek H. Chollet, The Road to the Dayton Accords: A Study of American Statecraft 59, 198–200 (2005); Bass, *supra* note 17, at 232–39.
43. Burg, *supra* note 35, at 94–96.
44. Williams & Scharf, *supra* note 15, at 151–69.
45. Schelling, *supra* note 5, at 74.
46. Williams & Scharf, *supra* note 15, at 161–66.
47. *Id.* at 26, 160–61.

Holbrooke, but also Goldstone for not indicting Milošević in 1995 under the theory of command responsibility, even if there was not yet sufficient direct evidence of his complicity in the crimes he set in motion. By not pursuing a more aggressive prosecutorial strategy, the ICTY failed in "its proper role in influencing the peace process by precluding negotiations with those responsible for international crimes."[48] It also undermined the court's deterrent role, convincing Milošević that he could return to the practice of ethnic cleansing in Kosovo three years later without any legal consequence.[49]

If one refuses to engage criminal leaders in an ongoing war, the premise underlying that choice is the belief that the continuation of the war is likely to lead to a better outcome than a negotiated compromise. Williams and Scharf acknowledge this in asserting that justice can provide moral backing for a more robust use of force on behalf of the victims, though they do not explicitly lay out the specific strategy that should have been pursued. The closest they come to doing so is in their critique of the decision to pressure the Croatian and Bosnian forces to accept a cease-fire in October 1995, noting that "if the offensive continued, the Croatians and Bosnians may well have been able to defeat the Serbian forces and thereby reunify Bosnia."[50]

A case can be made that the continuation of the war might have led to a more just and stable peace than the compromises at Dayton.[51] There is also reason to be skeptical of that case, given Croatia's expulsion of Serb civilians following its reconquest of the Krajina and the fact that its leader, Franjo Tudjman, was as guilty as Milošević in seeking the ethnic partition of Bosnia, which included the brutal deportation of the Muslim population of Mostar in May 1993. Indeed, Williams and Scharf acknowledge this and assert that Tudjman should have been indicted simultaneously with Milošević in 1995.[52] This raises the question of whether it was possible to reconcile legal rectitude with the legitimate use of force.

Whatever the merits of the argument for allowing the war to continue, what was more important was that both the United States and the Europe were committed to a negotiated solution. Both feared that continued fighting could have triggered direct Serbian intervention and a wider war.[53] Were Goldstone to have indicted Milošević, in order to exclude him from peace talks, the negotiations would likely have taken place anyway and there

48. Paul R. Williams & Patricia Taft, *The Role of Justice in the Former Yugoslavia: Antidote or Placebo for Coercive Appeasement,* 35 Case Western Reserve L. Rev. 219, 232 (2003).
49. Williams & Scharf, *supra* note 15, at 126–27, 159.
50. *Id.* at 156; *See also* Williams & Taft, *supra* note 48, at 222.
51. David Rohde suggests that allowing the war to continue might have weakened Milošević's grip on power in David Rohde, Endgame: The Betrayal and Fall of Srebrenica, Europe's Worst Massacre Since World War II 340 (1997).
52. Williams & Scharf, *supra* note 15, at 120–21.
53. Chollet, *supra* note 42, at 97–98.

would have been a serious risk that the ICTY would not have been part of the Dayton accords.[54] Moreover, it is unclear how indicting Milošević in 1995 would have dissuaded him in Kosovo since he would have remained a criminal subject to an arrest warrant regardless of what he did. The actual approach to justice employed at Dayton—maintaining the ICTY and not granting any amnesties—was better positioned to influence Milošević's behavior since, in Pierre Hazan's words, it held a "sword of Damocles" over him that might fall in response to future behavior.[55] Hazan is critical of politicians using the court as a "means of pressure, in the same way they would use threats of sanctions or air strikes."[56] While instrumentalizing justice in this way is contrary to the kind of legal rectitude advocated by proponents of international criminal justice, it is more consistent with the logic of deterrence. The fact that it did not deter Milošević in Kosovo indicates that the threat of prosecution—and more importantly, the threat of using force—was not seen as sufficiently credible to Milošević to influence his aims.[57]

III. THE DARFUR REFERRAL TO THE INTERNATIONAL CRIMINAL COURT

A. The Road to the ICC

The Darfur case was referred to the ICC on 31 March 2005, roughly two years after the outbreak of the war. This war was the latest in a series of violent conflicts that have their origins in the competition between African farmers and Arab herders for control over arable land that has been receding as the result of drought and desertification. The conflict has also been exacerbated by Khartoum's neglect of the region in terms of its development priorities, and its "divide and rule" policies that have favored Darfur's Arab inhabitants, from whom they have recruited militias who have targeted the region's non-Arab population.[58]

The catalyst for the most recent violence was the Naivasha peace process, which provided the blueprint for ending the Sudanese civil war between the

54. One ICTY official interviewed by Bass, acknowledged this constraint: "You have two options . . . A, you can indict Milošević and be shut down. B, or you can do low-level [indictments] and do a few trials, like Mladić and Karadžić." *Cited in* Bass, *supra* note 17, at 229.
55. Hazan, *supra* note 37, at 192.
56. *Id.*
57. On the failure of deterrence and coercive diplomacy in the period leading up to the Kosovo war, see Burg, *supra* note 35, at 70–84.
58. For an overview, see Gérard Prunier, Darfur: The Ambiguous Genocide 61–88 (2007).

Islamist Arab government in Khartoum and John Garang's Sudan People's Liberation Army (SPLA), which represents the predominantly Christian and animist population in the south. In February 2003, just one week after the first round of peace negotiations, two rebel groups, the Sudanese Liberation Army (SLA) and the Justice and Equality Movement (JEM), attacked government installations in order to protest Darfur's exclusion from the power and resource-sharing arrangements that were part of the north-south agreement. The government largely ignored these attacks until a joint SLA-JEM force overran the El Fasher air base on 25 April 2003.[59]

The El Fasher attack alarmed Kharotum, which saw in it the risk of secession and political disintegration at a time when it was committing itself to regional autonomy, and possible independence, in the south. The government was therefore determined to defeat the rebels militarily, both directly through the Sudanese army and air force, and by proxy, through recruiting Arab tribal militias who became known as the *janjaweed*.[60] Its counterinsurgency strategy was not to engage the SLA and JEM directly. Rather, it was to attack the region's African population from whom the rebels derived their support, or as Gérard Prunier put it, using Mao's famous metaphor, to "drain the pond in which the guerrillas swim."[61] This involved strafing villages with helicopter gunships and bombing with improvised Antonov supply planes. The *janjaweed* would follow up by attacking the villages, engaging in murder, rape, torture, looting, the burning of homes, the destruction of livestock, and the poisoning of wells. The underlying strategy, as put forth in a directive from *janjaweed* leader Musa Hilal to government intelligence services, was to "change the demography of Darfur and empty it of African tribes."[62] As Adam Lebor observed, this was "the Milošević model, adjusted for Africa."[63]

In 2003, Darfur was not a human rights priority of the international community. There were warnings of an impending catastrophe from some NGOs, such as Amnesty International, and from Jan Egeland, the UN undersecretary for humanitarian affairs.[64] Nonetheless, the principal concern of the UN Secretariat, and most of the international community, vis-à-vis Sudan was the Naivasha peace process—there was a reluctance to address Darfur in a way that might complicate Naivasha's completion. As a result,

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59. Julie Flint & Alex de Waal, Darfur: A Short History of a Long War 99–100 (2005).
60. Prunier, *supra* note 58, at 97.
61. *Id.* at 103.
62. Flint & de Waal, *supra* note 59, at 39.
63. Adam LeBor, "Complicity with Evil": The United Nations in the Age of Modern Genocide 141 (2006).
64. Cheryl O. Igiri & Princeton N. Lyman, Giving Meaning to "Never Again": Seeking an Effective Response to the Crisis in Darfur and Beyond 5–6 (2004), *available at* http://www.cfr.org/publication/7402/giving_meaning_to_never_again.html.

the United Nations initial response was similar to that in Bosnia; namely, to treat Darfur as a humanitarian problem by addressing the symptoms of the violence rather than its causes, and as a diplomatic problem, by assisting a negotiating process comparable to the one that was ending the war between Khartoum and the SPLA.[65]

Darfur began to emerge as a human rights priority in the spring of 2004. On 21 March, Mukesh Kapila, the UN Coordinator in Sudan, gave an interview with the BBC—without his superiors' authorization—accusing the government and the *janjaweed* of "an organized attempt to do away with a group of people" and analogizing the situation to the early phases of the Rwandan genocide.[66] Kapila's interview generated considerable publicity and was followed by Jan Egeland's testimony before the Security Council on government and *janjaweed* responsibility for ethnic cleansing, a speech by Kofi Annan to the UN Human Rights Commission in which he suggested the possibility of humanitarian intervention, and a report by the Office of the High Commissioner of Human Rights confirming massive and criminal violations of human rights.[67] The publicity also galvanized several NGOs to raise the profile of the Darfur case. Within the United States, it catalyzed the creation of the Save Darfur Coalition an alliance of liberal human rights groups and religious conservatives, whose cooperation in opposing Khartoum's human rights abuses in the south was extended to Darfur.[68] This, in turn, got the attention of the Bush administration. While it did not want to rock the boat on Naivasha, for which it played a key mediating role, or on the growing counter-terrorism cooperation with Sudan, its public diplomacy on Darfur became increasingly outspoken.[69]

The Security Council's first reference to Darfur was a short paragraph in Resolution 1547 (11 June 2004), whose purpose was to endorse and pledge support for the north-south peace process.[70] Within that context, it did call on the "parties to use their influence to bring an immediate halt to the fighting in the Darfur region." It also welcomed the cease-fire that was negotiated in N'djamena in April, and endorsed its monitoring by the African Union Mission in Sudan (AMIS). [71] This was the first official statement of the United Nations then-existing policy of applying to Darfur the same kind of impartial Chapter VI model used in Naivasha.

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65. Prunier, *supra* note 58, at 107.
66. Traub, *supra* note 30, at 219.
67. *Id.* at 220–21.
68. LeBor, *supra* note 63, at 195.
69. Prunier, *supra* note 58, at 139.
70. S.C. Res. 1547, U.N. SCOR, 4988th mtg., ¶ 7, U.N. Doc. S/RES/1547 (2004).
71. Nsongurua J. Udombana, *When Neutrality is a Sin: The Darfur Crisis and the Crisis of Humanitarian Intervention in Sudan*, 27 Hum. Rts. Q. 1149, 1181–82 (2005).

Security Council Resolution 1556 (30 July 2004)—the first specifically on Darfur—superficially changed this approach by calling on Khartoum to disarm the *janjaweed* within thirty days and bring its leaders to justice.[72] Alex Bellamy characterized it as a "Janus-faced resolution," because it invoked Chapter VII, indicating a threat to international peace that required enforcement, but neither criticized the government nor spelled out what specific sanctions would be imposed should the government fail to comply.[73] And while it imposed an arms embargo on "all non-governmental entities and individuals" in the Darfur region, that did not extend to the government, which was arming and supporting the *janjaweed*.[74] As with the Bosnian arms embargo, this was an ostensibly neutral action that worked to the advantage of the stronger party.

The reason for the weak enforcement provisions was the configuration of state interests in the Security Council. The United States took the most forceful stand, both rhetorically and in its advocacy of an explicit threat of sanctions. Sudan was very skillful in countering this by characterizing the United States' position as a form of neocolonial interference, and by analogizing it to some of the rationales the Bush administration had put forward to justify the war in Iraq. This argument had strong resonance with many governments from the South, particularly the Arab League, who were skeptical of humanitarian arguments that could be used as encroachments on national sovereignty.[75] China and Russia also opposed sanctions, in part on sovereignty grounds, but also due to economic self-interest, since China is the largest investor in Sudan's oil production and Russia is a major supplier of arms.[76] Other countries, such as Great Britain, were concerned that a confrontational policy might complicate the Naivasha process, a concern shared by many within the UN Secretariat.[77] Nor did the United States expend much diplomatic capital in building a stronger consensus since Darfur was not a priority issue.[78]

Calls for tougher action against the Sudanese government intensified after the Secretary General's report found substantial noncompliance with Security Council directives.[79] The United States also adopted a stronger rhetorical position when Secretary of State Colin Powell testified to the US Senate Foreign Relations Committee that "genocide has occurred and

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72. S.C. Res. 1556, U.N. SCOR, 5015th mtg., ¶ 6, U.N. Doc. S/RES/1556 (2004).
73. Alex Bellamy, *Responsibility to Protect or Trojan Horse? The Crisis in Darfur and Humanitarian Intervention after Iraq*, 19 Ethics & Int'l Aff. 31, 43 (2005).
74. S.C. Res. 1556, *supra* note 72, ¶ 7.
75. Bellamy, *supra* note 73, at 41.
76. Igiri & Lyman, *supra* note 64, at 16.
77. Bellamy, *supra* note 73, at 45.
78. Alex J. Bellamy & Paul D. Williams, *The UN Security Council and the Question of Humanitarian Intervention in Darfur*, 5 J. Mil. Ethics 153–54 (2006).
79. Igiri & Lyman, *supra* note 64, at 17.

may still be occurring in Darfur."[80] Powell did add that "no new action is dictated by this designation," meaning that the United States was not going to try to stop the violence on its own. Instead, it would push for stronger multilateral actions, citing Article 8 of the Genocide Convention, which requires state parties to call on the "competent organs of the United Nations" to take action to prevent and suppress genocide.[81] At the Security Council, the United States circulated a draft resolution that declared Sudan to be in material breach of Resolution 1556, expanded the African Union (AU) force, imposed targeted sanctions, and initiated an investigation as a first step toward establishing accountability.[82]

Security Council Resolution 1564 (18 September 2004) fell considerably short of the more forceful approach advocated by the United States and several activist groups, largely because of the same coalitions of national interest that blocked tough action in July. It did reiterate its call on the Sudanese government to disarm and prosecute the *janjaweed*, and for the augmentation of the AU peacekeeping force.[83] There was, however, no explicit criticism of the Sudanese government, no imposition of sanctions for noncompliance, nor their explicit linkage to future compliance beyond the possible future consideration of sanctions against Sudan's oil sector or government officials. As Julie Flint and Alex de Waal put it, "Khartoum crossed the Security Council's red line. Nothing happened."[84]

The resolution did take the first steps toward the ICC when it called on the Secretary General to set up an International Commission of Inquiry (ICI), whose mandate was to investigate violations of international humanitarian law and human rights law, to determine whether genocide has taken place, and "to identify the perpetrators of such violations with a view to ensuring that those responsible are held accountable."[85] The Commission's report, which was released on 25 January 2005, found that the government and the militias were responsible for widespread and systematic attacks on the civilian population that constituted war crimes and crimes against humanity, but not genocide, as Powell had alleged, because the government's intent in attacking civilians was to fight a counter-insurgency war, not to exterminate a protected group.[86] Even though it could not substantiate the genocide charge,

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80. *The Current Situation in Sudan and the Prospects for Peace: Hearing Before the S. Comm. on Foreign Relations*, 108th Cong. 9 (2004) (statement of Colin Powell, Secretary of State of the United States).
81. *Id.*
82. Bellamy, *supra* note 73, at 46.
83. S.C. Res. 1565, U.N. SCOR, 5040th mtg., ¶ ¶ 2, 7, 9, U.N. Doc. S/RES/1565 (2004).
84. Flint & De Waal, *supra* note 59, at 128.
85. S.C. Res. 1565, *supra* note 83, ¶ 12.
86. Report of the International Commission of Inquiry on Darfur to the United Nations Secretary General, Pursuant to Security Council Resolution 1564 of 18 September 2004, *supra* note 2, at ¶ ¶ 507–18. The report acknowledged that some government officials and militia leaders may have acted with genocidal intent, but that could only be determined by a competent court. *Id.* ¶ 520.

that did not diminish its assessment of the gravity of crimes in Darfur because "the crimes against humanity and war crimes may be no less serious and heinous than genocide."[87] Responsibility for these crimes was attributed to the most senior officials in the Sudanese military and government, and the commission compiled a confidential list of fifty-one names that should be investigated by a competent prosecutor. The Security Council was urged to refer the case to the ICC, the legal body best equipped to render expeditious and impartial justice.[88]

This last recommendation triggered a two-month controversy over the proper venue for prosecution.[89] To the supporters of the ICC in the UN and the NGO community, the Commission's recommendation was the logical choice. However, since Sudan is a non-party to the Rome Statute, the Darfur case could only be referred to the ICC through a Security Council resolution, which meant overcoming potential vetoes from China, Russia, and also, from the foremost advocate of tougher measures, the United States. This was because the Bush administration, which saw the ICC as a threat to its freedom of action to use military force and to US sovereignty, had been waging a campaign both to delegitimize the court and to immunize Americans everywhere from its reach. As a result, it initially opposed the referral because, as the US Ambassador for War Crimes, Pierre Richard Prosper stated, "We don't want to be party to legitimizing the I.C.C."[90] In its stead, the United States proposed an African court, either using the existing Rwandan tribunal in Arusha, Tanzania, or creating a new ad hoc tribunal through the AU.[91] The US position was sharply criticized by NGO supporters of the ICC and by the UN Special Rapporteur for Genocide, Juan Mendez, who wrote that since the ICC was already in place, it was "the quickest and most effective way to initiate judicial proceedings."[92] The position was also rejected by the European Union, including the United Kingdom, for whom the ICC referral was non-negotiable.[93] Given the United States isolation on this issue, and the dissonance between its public diplomacy on Darfur and its anti-ICC stance, its position was politically unsustainable. As a result, it sought a compromise that would allow it to maintain its opposition to the ICC while acquiescing to the referral.[94]

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87. *Id.* ¶ 522.
88 *Id.* ¶ ¶ 571–72.
89. Bellamy & Williams, *supra* note 78, at 155.
90. Warren Hoge, *US Lobbies UN on Darfur and International Court*, N.Y. Times, 29 Jan. 2005, at A8.
91. Colum Lynch, *U.S. Urges War Crimes Tribunal for Wartime Atrocities*, WASH. POST, 28 Jan. 2005, at A23.
92. Juan Mendez, *Action is Needed to Resolve Darfur Crisis*, Financial Times, 7 Mar. 2005, at 15.
93. Bellamy & Williams, *supra* note 78, at 155.
94. Adele Waugaman, *The United States in Darfur: Trapped by "Genocide,"* Int'l Just. Tribune, N. 36, 21 Nov. 2005.

The Darfur case was sent to the ICC through Security Council Resolution 1593 on 31 March 2005, with eleven affirmative votes and four abstentions, including China and the United States.[95] The US abstention was obtained in exchange for an exemption from ICC jurisdiction for all non-party states involved in UN or AU authorized operations in the Sudan. This concession to the Bush administration was sharply criticized by the court's supporters in the NGO community, who nonetheless welcomed the referral as an important step toward ending impunity in Darfur.[96] The Secretary General then put the process in motion by handing the prosecutor the list of fifty-one names that had been compiled by the Commission of Inquiry. On 1 June 2005, the Prosecutor accepted the case and initiated a formal investigation.[97]

B. The Impact of the ICC on Impunity in Darfur

One of the central arguments deployed by proponents of the ICC referral was that prosecution would deter criminal violence, and hence, provide protection to civilians.[98] As evidence of this, some human rights advocates who visited Sudan observed that several government officials and militia leaders expressed concern about becoming international fugitives who might get "sent to The Hague."[99] That was one of the reasons why many NGOs expressed a sense of urgency in using a court that was already operational rather than waiting, as the United States had proposed, to create a new, African tribunal. As Human Rights Watch Executive Director, Kenneth Roth stated, "The I.C.C. could start saving lives now."[100] Roth also analogized the potential contribution of the ICC in Darfur to that of the ICTY in Bosnia: "If the ICC takes up Darfur, the government would have to begin high-level prosecutions or, as in Bosnia when an international tribunal launched its own prosecution, abusive leaders would be marginalized as they tried to evade arrest. Either result would help curb the violence."[101]

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95. Robert Cryer, *Sudan, Resolution 1593, and International Criminal Justice*, 19 Leiden J. Int'l L. 195, 222 (2006).
96. Elise Keppler & Yolanda J. Revilla, *Council Makes Historic Referral on Darfur to ICC*, 29 ICC Monitor 1 (2005).
97. *First Report of the Prosecutor of the International Criminal Court, Mr. Luis Moreno Ocampo, to the Security Council Pursuant to UNSCR 1593 (2005)*, at 5 (29 June 2005).
98. Mendez, *supra* note 92. *See also* Press Release, Human Rights Watch, UN: Pass Resolution to Refer Darfur to ICC, 25 Mar. 2005, *available at* hrw.org/english/docs/2005/03/25/sudan10371.htm.
99. *See* Samantha Power, *Court of First Resort*, N.Y. Times, 10 Feb. 2005, at A1; Kenneth Roth, *Bring the Darfur Killers to the World Court*, Financial Times, 18 Nov. 2004, at 15.
100. *Quoted in* Nicholas Kristof, *Why Should We Shield the Killers*? N.Y. Times, 2 Feb. 2005, at A21.
101. Roth, *Bring the Darfur Killers*, *supra* note 99.

The reason why the ICC referral has had no impact on "saving lives" in Darfur lies in the problem with the Bosnian analogy. The ICTY's indictments of Mladić and Karadžić did indeed contribute to the curbing ethnic violence by isolating the most virulent ethnic extremists, but only after the war had ended, and that required NATO's use of air power and a range of other coercive measures against Pale and Belgrade. By contrast, when NATO and the UN issued empty threats they were unwilling to enforce, and were reluctant to move beyond neutral peacekeeping and impartial mediation, those under investigation or indictment were hardly marginalized. It was only when the purported commitment to punish criminal behavior was complemented by a determination to stop and prevent it that impunity on the ground ended, and the ICTY was able to play a constructive role in removing criminal spoilers from the political scene.

The problem with the Darfur referral is that it was issued in an international political context comparable to Bosnia prior to August 1995. First, the referral was not accompanied by any meaningful change in the penalties threatened, or imposed, on Khartoum for noncompliance with previous resolutions. The Security Council did pass a sanctions resolution (1591) two days before the ICC referral, but its provisions were incommensurate with a commitment to subject the government to criminal scrutiny.[102] Those sanctions did not include oil, which represents 90 percent of the government's export earnings, because of the threat of a Chinese veto.[103] In addition, the arms embargo was not extended from the Darfur region to the government. In fact, Russia was completing a sale of Antonov supply planes as the Security Council was deliberating.[104] Smart sanctions, such as travel bans or asset freezes, were neither imposed on the Sudanese leadership nor explicitly linked to compliance with previous Security Council resolutions. Instead, the Security Council established a committee to recommend targeted sanctions against those persons found to be most responsible for cease-fire violations and atrocities against civilians.[105] On 25 April 2006, more than one year later, the Security Council accepted the committee's recommendation, applying sanctions even-handedly on a Sudanese military official, *janjaweed* leader Musa Hilal, and two rebel commanders.[106]

A second parallel with the ICTY during the Bosnian war is the unwillingness of the UN or regional actors to move beyond neutral peacekeeping and mediation. The Security Council did authorize a peacekeeping force, the United Nations Mission in Sudan (UNMIS) three days before the ICC

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102. S.C. Res. 1591, SCOR, 5153rd mtg., U.N. Doc. S/RES/1591 (2005).
103. David Zweig & Bi Jianhi, *China's Global Hunt for Energy*, 84 Foreign Aff. 25, 32 (Sept.–Oct. 2005).
104. Igiri & Lyman, *supra* note 64, at 24.
105. S.C. Res. 1591, *supra* note 102, ¶ 3.
106. International Crisis Group, Getting the UN into Darfur 6–7 (12 Oct. 2006).

referral (Resolution 1590). Its mission was to supervise the Comprehensive Peace Agreement (CPA) between Khartoum and the SPLA that was finalized in January 2005. None of those forces were dedicated to Darfur. This meant the only peacekeeping presence in Darfur was an understaffed and underfunded AU mission that had been deployed to monitor a non-existent cease-fire.[107] In other words, civilian protection was entrusted to a force with fewer resources, and a more limited mandate, than UNPROFOR in Bosnia. As in Bosnia, this reinforced the culture of impunity in Darfur by telling Khartoum, and the *janjaweed,* that they would not have to contend with a serious military presence.

The Security Council attempted to remedy this through Resolution 1706 (31 August 2006), authorizing a more robust UN force of 20,600 to augment the AU force with a stronger mandate for civilian protection. The resolution "invited" Sudanese consent, which was declined.[108] An apparent compromise was reached in Addis Ababa in November to create a hybrid AU-UN force, which would be more acceptable to Sudanese sensitivities, but President Bashir subsequently backed out of the agreement. Since then, Sudan has agreed to the deployment of 3000 UN personnel as part of a heavy support package working with the AU, and later, to the deployment of a 26,000 United Nations-African Union Mission in Darfur (UNAMID) with a mandate to protect civilians.[109] Nonetheless, only a fraction of the force has been deployed and Khartoum has set limits on its autonomy and composition, blocking the participation of specialized non-African personnel whose contribution is considered vital to the mission.[110] Despite the fact that both the ICC referral and UNAMID were authorized under Chapter VII, the Security Council has never moved beyond what was in practice a pacific settlement approach in which the terms of any peacekeeping mission would depend upon Sudanese consent and there would be no penalties for withholding it or for imposing conditions that amounted to obstruction.

Nor did the invocation of Chapter VII move either the UN or the AU away from neutral mediation as the principal instrument of conflict resolution any more than the creation of the ICTY altered international mediation efforts prior to Operation Deliberate Force. It is telling that on the day of the ICC referral, Secretary General Kofi Annan asserted that the war in

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107. Paul D. Williams, *Military Responses to Mass Killing: The African Union Mission in Sudan*, 13 Int'l Peacekeeping 174 (2006).
108. Lydia Polgreen, *U.N. Council Votes to Send Troops to Darfur; Sudan Objects*, N.Y. Times, 1 Sept. 2006, at A3.
109 Center on International Cooperation, ANNUAL REVIEW OF GLOBAL PEACE OPERATIONS 77–78 (2008), *available at* http://www.nyu.edu/pages/cic/internationalsecurity/docs/Final2008briefingreport.pdf.
110. Lydia Polgreen, *Peacekeeping in Darfur Hits More Obstacles*, N.Y. TIMES, 24 Mar. 2008, at A1; Warren Hoge, *U.N. Officials Tell of Impasse in Darfur Peacekeeping Task*, N.Y. TIMES, 9 Feb. 2008, at A5.

Darfur could only be addressed through a "return to negotiations in Abuja to bring it to a speedy end."[111] These negotiations have produced a number of cease-fires and government commitments to disarm the militias, none of which have been honored. Their most significant result was the Darfur Peace Agreement, negotiated on 5 May 2006, between the government and one faction of the two main rebel groups.[112] The agreement did have a number of positive features regarding power-sharing, revenues, and disarmament, but its principal weakness was its reliance on the Sudanese government, rather than an international force, for the disarmament of the *janjaweed*—a commitment it failed to implement six previous times—and for maintaining a secure environment for refugees to return to their homes. No pressure was placed on Sudan to accept an international force to supervise the accord nor was any penalty imposed when the government escalated its attacks on the rebels in August.[113]

This is not to argue against efforts to mediate a political settlement, which is probably the most realistic way to end violence against civilians. It is to argue that there is an inherent tension in simultaneously pursuing a judicial strategy that subjects the government to criminal scrutiny and an impartial, non-coercive mediating strategy that tries to elicit its cooperation—particularly when major UN and NGO studies have attributed responsibility to the very senior political and military officials with whom one would have to negotiate a peace agreement.[114] If one is committed to criminal justice, these are not legitimate interlocutors, but if one is serious about diplomacy, this will require at least the temporary subordination of criminal justice to the exigencies of conflict resolution. It will also require a movement away from a neutral to a coercive strategy of conflict resolution. In a case like Darfur or Bosnia in which the government believes that the war serves its interests better than a negotiated compromise, impartial mediation does little more than provide cover for a military solution. As in Bosnia, the key to changing this lies not in deploying legal instruments—those in power are unlikely to be deterred since they are already complicit in crimes for which they should be prosecuted—but rather coercive military and economic instruments to increase the costs and risks to Khartoum so that its self-interest coincides with ending criminal violence.

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111. *Security Council Refers Darfur Crimes to the ICC,* IRIN News, 1 Apr. 2005, *available at* http://www.irinnews.org/report.aspx?reportid=53691.
112. *See* International Crisis Group, Darfur: Revitalizing the Peace Process, Africa Report No. 125, 30 Apr. 2007, at 3–4; Prunier, *supra* note 58, at 179–80.
113. *After Darfur's Deal,* Africa Confidential, 4 Aug. 2006, at 5.
114. *See* Report of the International Commission of Inquiry on Darfur to the United Nations Secretary General, Pursuant to Security Council Resolution 1564 of 18 September 2004, *supra* note 2, ¶ ¶ 533–63; Human Rights Watch, Darfur Documents Confirm Government Policy of Militia Support, Briefing Paper, 19 July 2004; Human Rights Watch, Entrenching Impunity: Government Responsibility for International Crimes in Darfur 48–63 (Dec. 2005).

Coercive strategies will be difficult and contentious because they will have to be employed outside the UN multilateral framework unless alignments in the Security Council change. Some proponents of tougher actions have recommended economic measures that would be uncontroversial in terms of international law. The International Crisis Group has called for concentrating economic pressure on the regime through asset freezes and travel bans on senior officials implicated by UN reports, the identification of front companies for financing the militias in order to freeze their accounts, and for the augmentation of EU sanctions, currently limited to the defense sector, to cover all assistance to Sudan's oil industry.[115] In addition, citizens groups have initiated grassroots campaigns calling on universities, institutional investors, and state and local governments to divest their portfolios of stocks from companies that do business in Sudan.[116]

Sanctions on Sudan, however, are unlikely to have a coercive impact comparable to those imposed on Serbia during the Bosnian war or Indonesia over East Timor. Unlike Belgrade and Jakarta, whose economies were in crisis, Sudan's economy has been growing at almost 10 percent per year as the result of expanding oil production at a time of record prices.[117] While tightened sanctions, and public pressures, could impose some costs and inconveniences on the regime, the Economic Intelligence Unit concludes that "this is not likely to jeopardize Sudan's economic development [because] Asian partners, such as China, Malaysia and India are unwilling to risk the huge sums they have invested in the energy sector."[118] Similarly, while civil society pressures may lead some of the few remaining Western companies doing business in Sudan to withdraw, this is unlikely to extend to their Asian counterparts given the commitment of their governments to overseas energy development and the absence of comparable pressures at home.[119]

Another option would be to threaten, or use, force outside of the Security Council, as was done during the Kosovo War in 1999. This would be legally controversial since a strict reading of the UN Charter would prohibit intervention in a state's internal affairs unless explicitly authorized by the Security Council as part of its Chapter VII obligation to respond to a threat to the peace. Proponents of intervention point to the emergence of a new norm in international politics, the Responsibility to Protect, which was developed by the International Commission on Intervention and State Security (ICISS), an independent body of experts established by the Canadian government in response to a challenge from the Secretary General after the legal controversy

115. International Crisis Group, Getting the UN into Darfur, *supra* note 106, at 7–9.
116. *Id.* at 9–10.
117. Economist Intelligence Unit (EIU), Sudan, Country Report 8 (Feb. 2008).
118. EIU, Sudan, Country Report 4 (Feb. 2007).
119. EIU, Sudan, Country Report 22 (Dec. 2006).

following the Kosovo war and in light of the international community's failure to act against genocide in Rwanda. The Responsibility to Protect holds that sovereignty is not an absolute license to do anything within one's borders. It also entails a responsibility to protect one's citizens and if a state defaults on that duty, that responsibility falls to the international community. In extreme cases of genocide or crimes against humanity, this could also include forcible humanitarian intervention. While the report argues humanitarian intervention should ideally be authorized by the Security Council—and calls on the permanent members to refrain from using the veto during humanitarian emergencies—it does lay out exceptional circumstances where force might be used legitimately without explicit Security Council approval.[120]

From this perspective, Khartoum's complicity in mass atrocity in Darfur, and its obstruction of humanitarian and peacekeeping efforts, constitutes the kind of radical default on its responsibilities that would merit intervention even without UN authorization. In theory, this could involve nonconsensual humanitarian intervention to forcibly stop the killing.[121] Most proposals, however, advocate the threat or use of force as part of a strategy of coercive diplomacy to "change the calculus in Khartoum and persuade them to let the U.N. in."[122] The most aggressive proposal, advocated by two former Clinton administration officials and a member of the Congressional Black Caucus, argues for giving Sudan an ultimatum for unconditional deployment; failure to comply would be followed by enforcement of a no-fly zone, air strikes on military assets, and a naval blockade of Port Sudan, which would have the effect of enforcing an oil boycott that could not be achieved through the Security Council.[123] The International Crisis Group is more reluctant to endorse military action outside the UN framework, but nonetheless advocates NATO enforcement of the no-fly zone in Darfur already demanded in Resolution 1591 should the Security Council fail to act.[124] A Council on Foreign Relations study recommends air strikes against military bases as the most effective way to concentrate pressure on Khartoum, noting the logistic[al] problems with the no-fly zone and the harm a blockade could inflict on the government in southern Sudan.[125] In each proposal, the goal is not to

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120. *See* Bellamy, *supra* note 73, at 34–36.
121. *See* David C. Gompert, Courtney Richardson, Richard L. Kugler, & Clifford H. Bernath, Center for Technology and National Security Policy. Learning from Darfur: Building a Net-Capable African Force to Stop Mass Killing (July 2005), *available at* www.ndu.edu/CTNSP/Def_Tech/DTP%2015%20Darfur.pdf.
122. Former Undersecretary of State for African Affairs, Susan E. Rice, Interviewed on the Jim Lehrer News Hour, 17 Nov. 2006.
123. Susan E. Rice, Anthony Lake & Donald M. Payne, *We Saved Europeans. Why Not Africans?*, Wash. Post, 2 Oct. 2006, at A19.
124. International Crisis Group, Getting the UN into Darfur, *supra* note 106, at 11.
125. Lee Feinstein, *Darfur and Beyond: What is Needed to Prevent Mass Atrocities*, *in* Beyond Humanitarianism: What You Need to Know About Africa and Why It Matters 100, 109–10 (Princeton N. Lyman & Patricia Dorff eds., 2007).

stop the killing directly. As in Bosnia and Kosovo, it is to raise the costs and risks of the status quo to a point where the regime concludes that its security requires it to create a permissive environment for a multilateral peacekeeping force.

The argument that the "responsibility to protect" allows the unauthorized use of force, both generally and in Darfur, has generated considerable opposition. Many UN members, particularly from the South, view this as a license for powerful states to appropriate humanitarian language for self-serving interventions, particularly after the Iraq war. This partly explains Sudan's success in generating a blocking coalition against tougher action and the decision at the UN 2005 World Summit to accept the principle of the Responsibility to Protect, but to limit authorization to the Security Council.[126]

This is also the view of most international lawyers, including many supporters of the ICC and the Darfur referral—who adopt a "restrictionist"[127] view that the only exception to the UN Charter's prohibition on the use of force outside of the Security Council is self-defense against an armed attack—something that applies to humanitarian intervention no less than it does to preventive war. William Schabas takes this position in an article defending the ICI's inability to substantiate Powell's genocide charge, in which he alleges that the United States has used the term because of "an important school of thought within the US government that considers a finding of genocide to authorize 'humanitarian intervention,' even in the absence of Security Council authorization."[128] A plain reading of the Genocide Convention indicates no such right. Article 8 only reinforces what the Charter already allows by obliging the contracting parties to "call upon the competent organs of the United Nations to take such actions under the Charter of the United Nations as they consider appropriate for the prevention and suppression of genocide." Schabas goes on to characterize the Bush administration's use of the genocide charge as "humanitarian sabre-rattling" to "tarnish Sudan, which must be on [the] short-list for the vacant Iraqi seat as a member of the 'axis of evil.'"[129]

Yet, when Powell characterized the conflict in Darfur as genocide, he explicitly cited Article 8 in asserting that the United States would appeal to the UN rather than act unilaterally. The reason lies less in respect for the law than in the politics of US-Sudanese relations. Prunier documented

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126. Alex J. Bellamy, *Whither the Responsibility to Protect? Humanitarian Intervention and the 2005 World Summit,* 20 Ethics & Int'l Aff. 143, 144 (2006).
127. For an overview of the "restrictionist approach," see Nicholas J. Wheeler, Saving Strangers: Humanitarian Intervention in International Society 41 (2000).
128. William A. Schabas, *Darfur and the 'Odious Scourge': The Commission of Inquiry's Findings on Genocide,* 18 Leiden J. Int'l L. 871, 883 (2005).
129. *Id.* at 882, 883.

tactical changes in Sudan's political orientation, in the late 1990s, which were intended to end its political isolation and build political bridges to the United States.[130] For Khartoum, 9-11 was an opportunity to expand this strategy to include counter-terrorism cooperation, particularly since Sudan was the former base of Al Qaeda. The Bush administration welcomed this cooperation and sought to strengthen it by expending considerable diplomatic capital on the Naivasha process, designed to end a war that had become a lightning rod for many of its conservative Christian allies.[131]

The emergence of the Darfur crisis, just as the Naivasha process was concluding, came at an inopportune time for the administration. It also generated conflicting domestic pressures from, on the one hand, what Prunier calls the pro-Garang lobby, whose mobilization on the north-south civil war had shifted to Darfur, and the "realists," who wanted to insulate Naivasha and intelligence cooperation from human rights considerations.[132] The administration parried these pressures with a strategy of strong rhetorical condemnation and advocacy, unaccompanied by the expenditure of significant diplomatic capital. The seeming contradictions in Powell's testimony before the Senate Foreign Relations Committee are perfectly consistent with these priorities, as were reports that the United States interceded with the UN Sanctions Committee to dissuade it from naming Sudan's National Security Minister, Salah Abdallah Gosh. He has been one of the main architects of Khartoum's Darfur policy, but also a major intelligence asset who has been flown by private jet to CIA headquarters in Langley, Virginia.[133]

Moreover, most serious proposals for humanitarian intervention in Darfur do not use the Bush Doctrine in Iraq as their template. They are not pushing for an invasion to implement a regime-change agenda that has not been ratified multilaterally, but rather for the use of military coercion to enforce compliance with disarmament and civilian protection provisions that the Security Council has demanded but whose enforcement it has not explicitly authorized. This notion of implied authorization had been used to deploy Operation Provide Comfort to protect the Kurds in northern Iraq, and, more controversially, as the legal rationale for the authorization of the Kosovo war through NATO rather than the Security Council.[134] Moreover, these interventions—like the proposals for Darfur—are consistent with the norms of the "responsibility to protect" in a way that the Iraq war is not. In

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130. Prunier, *supra* note 58, at 88.
131. *Id.* at 89–91.
132 *Id.* at 138–40; *see also* LeBor, *supra* note 63, at 185, on the initial US reluctance to raise the Darfur issue in the United Nations.
133. *See* Maggie Farley, *UN Sanctions Four in Darfur Case*, L. A. Times, 26 Apr. 2006, at A17; Elizabeth Rubin, *If Not Peace, Then Justice,* N. Y. Times Mag., 2 Apr. 2006, at 42.
134. For contrasting views on this, see Christine Gray, International Law and the Use of Force 26–35, 191–95 (2000); but see Wheeler, *supra* note 127, at 154–69, 265–67.

the former cases, interventions were designed to rescue threatened populations that were under attack. In Iraq, where humanitarian rationales were presented post-hoc, no such threat existed in 2003, even though Iraq's Anfal campaign against the Kurds in 1988, and its attacks on the Kurdish and Shi'ite populations in 1991, provided more legitimate opportunities for "the politics of rescue."[135] As Gareth Evans observed, "The rationale for coercive humanitarian intervention is not punishment for past sins, however grotesque, but to avert, here and now, the threat to large numbers of people, which are actually occurring or imminently about to occur."[136]

These political and moral distinctions may not matter from a legal point of view if the frame of reference is a restrictionist reading of the UN Charter. The virtue of such an approach is that it erects a higher barrier against the abuse of power by states that use humanitarian language to justify self-serving interventions. But what impact would such an approach have on Sudan's impunity for abuses against civilians under current circumstances? Schabas concludes his article by asserting that the ICC could make a difference: "[W]hether it is for genocide or crimes against humanity, the perpetrators now stand a reasonable chance of being brought to justice, and they know it."[137] Yet, is that really the case? All that perpetrators have witnessed for the last four years is the United Nations unwillingness to act. The United Nations inaction continues, despite Sudan's reneging on repeated statements committing itself to end such violations. It is Khartoum's confidence that it will not be penalized for its actions that is the real source of impunity in Darfur. Until that changes, the Darfur referral to the ICC is no less "criminal justice in a political vacuum" than was the ICTY for its first two-and-one-half years.

Some international lawyers and NGOs have argued that another possible change that could make a difference is a more aggressive prosecutorial strategy. In 2006, Antonio Cassese and Louise Arbour submitted briefs to the pre-trial chamber questioning the prosecutor's decision not to demand that the Sudanese government allow investigations inside Darfur because of the court's inability to provide protection to witnesses and victims. A more visible presence on the ground, they argued, would be the most effective way of reducing violence and protecting present and prospective victims.[138] Cassese has also written critically of the prosecutor's "small steps" strategy, focusing initially on mid-level perpetrators. A better strategy would have

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135. Michael Walzer, *The Politics of Rescue,* 62 SOCIAL RESEARCH 53–66 (1995); For a more systematic analysis of the difference between Darfur and Iraq in terms of criteria for humanitarian intervention, see ALEX J. BELLAMY, JUST WARS: FROM CICERO TO IRAQ 219–26 (2006).
136. Gareth Evans, *From Humanitarian Intervention to the Responsibility to Protect,* 24 WISC. INT'L L. J. 703, 717 (2006).
137. Schabas, *supra* note 128, at 885.
138. Their arguments are summarized in Heikelina Verrijn Stuart, *Arbour and Cassese Criticize the ICC in Darfur,* INT'L JUST. TRIB., N. 55, 23 Oct. 2006.

been to move expeditiously to indictments of senior officials, which "might have *dramatized* the ongoing conflict in Darfur, even if those arrest warrants were to remain un-executed."[139] Cassese acknowledges that the Sudanese government would almost certainly refuse the prosecutor's request to hand over high-level indictees or conduct investigations in Darfur. That refusal, however, could be used by the prosecutor to ask the Security Council to "take into account such refusal to cooperate and envisage appropriate measures designed to secure cooperation."[140]

It is certainly possible that this kind of prosecutorial brinksmanship could break the deadlock in the Security Council by shaming its members into supporting a process for which they had voted—particularly if the publicity surrounding the indictments mobilizes civil society pressure on governments. The key is whether that would influence China, which had abstained on the ICC referral and had been the strongest defender of Sudan in the Security Council. John Prendergast and Colin Thomas-Jensen suggest that Beijing's threat to veto resolutions punishing Sudan may be hollow, because the "growing perception that Beijing is turning a blind eye to continuing atrocities in Darfur could mar its international image as it prepares to host the 2008 Olympics."[141] If they are correct, indicting senior officials may increase the reputational costs to China to the point where they either lean on Khartoum, or support enforcement actions in the Security Council.

If a more aggressive prosecutorial approach puts pressure on governments to take more forceful action, the question is: action to do what? Many NGOs and international lawyers believe the primary focus should be on the arrest and extradition of those indicted by the court. However, Khartoum is unlikely to cooperate in a way that threatens those most responsible—namely, the regime's leadership. At most, any judicial cooperation would likely resemble that of Libya in the Lockerbie trial, where those directly involved were extradited with the understanding that they not implicate their superiors.[142] If a higher profile prosecutorial strategy does help galvanize international political will, or creates a more credible fear of prosecution on the part of Sudan's leaders, the first priority should be protection and prevention, not punishment. This means pushing the parties towards a cease-fire and securing Sudan's consent to a robust UN peacekeeping mandate that would protect civilians and disarm the militias. Pressure should then be applied

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139. Antonio Cassese, *Is the ICC Still Having Teething Problems?*, 4 J. Int'l Crim. Just. 434, 439 (2006); *see also* Franck Petit, *The "Small Steps" Strategy of the ICC in Darfur*, Int'l Just. Trib., N. 63, 5 Mar. 2007 (interviewing Cassese about the ICC prosecutions).
140. Cassese, *supra* note 139, at 439.
141. John Prendergast & Colin Thomas-Jenson, *Blowing the Horn*, 86 Foreign Aff. 59, 72–73 (2007).
142. Robert S. Litwak, REGIME CHANGE: U.S. STRATEGY THROUGH THE PRISM OF 9/11 181 (2007).

for a broader political settlement that addresses the underlying sources of the conflict through a more equitable sharing of power and resources, and through ending Khartoum's practice of arming tribal militias. In other words, the threat of prosecution can most effectively protect civilians if it is used as part of a strategy of coercive diplomacy that, in combination with other economic or military threats, alters Khartoum's calculation that the war serves its interests.

As was the case in Bosnia, however, there is a potential conflict between criminal justice and the kind of coercive diplomacy described above. The former would demand prosecution not only of the *janjaweed* leaders and military commanders who oversaw them, but also of President Bashir and his inner circle. Indeed, Moreno-Ocampo has suggested that the long-term goal of his strategy is to move up the chain of command from mid-level perpetrators against whom he has the best evidence to their superiors who bore the greatest responsibility for their crimes.[143]

Yet this would be difficult if the threat of prosecution is another arrow in the quiver of coercive instruments to leverage Khartoum's behavior. As in the case of bargaining with Milošević, the goal of pressure is to induce consent to the deployment of peacekeepers or the negotiation and implementation of a cease-fire, if not a peace agreement. This is likely to require the active cooperation of parties subjected to criminal scrutiny. In testimony before the US Congress, Alex de Waal noted that any effective UN peacekeeping force would monitor, rather than enforce, demilitarization and would require a comprehensive and robust cease-fire, [144] both of which are dependent on the consent not only of the government, but also of rebel leaders who have also been implicated in criminal violence and may be under investigation by the ICC. The same cooperation would almost certainly be necessary for a broader political settlement. De Waal also cautioned against policies that Khartoum could interpret as the first steps toward regime change: "[P]ressure only works if there is an outcome that is ultimately acceptable to the person whom you are putting pressure on."[145] The ICC poses a potential impediment to such an approach because, as one study noted, a principled approach to prosecuting those most responsible for atrocity crimes in Darfur should "include the most important players of the ruling elite of Sudan."[146]

Ending criminal violence in Darfur will therefore require some compromises with international criminal justice similar to those in Bosnia, at least in

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143. Frederic Bichon, *ICC Vows to Bring Darfur War Criminals to Justice*, Agence France Presse, 24 Feb. 2008; *see also* Marlise Simons, *Sudan Poses First Big Trial for World Criminal Court*, N.Y.Times, 29 Apr. 2005, at A12; Marlise Simons, *Two Face Trials at The Hague over Atrocities in Darfur* N.Y. TIMES, 28 Feb. 2007, at A3.
144. *Current Situation in Darfur: Hearing Before the H. Comm. on Foreign Affairs*, 110th Cong. 25–26 (2007) (statement of Alex de Waal, Director, Social Science Research Council).
145. *Id.* at 33; s*ee also* Alex de Waal, *The Wars of Sudan*, Nation, 19 Mar. 2007, at 16.
146. Pablo Castillo, *Rethinking Deterrence: The International Criminal Court in Sudan*, UNISCI Discussion Papers, Jan. 2007, at 167, 170.

the short-to-medium term. This could involve: the prosecutor exercising his discretion and maintaining a low profile during the negotiations and post-conflict stabilization process, restrictions on the UN peacekeeping mandate regarding the arrest of those under indictment, or invocation by the Security Council of Article 16 of the Rome Statute, which allows it to suspend an ICC investigation for renewable twelve month periods if it interferes with its mandate to maintain or restore international peace and security. This does not necessarily mean the abandonment of justice any more than Dayton meant the dismantling of the ICTY or amnesty for Milošević. Criminal proceedings could continue against spoilers or particularly heinous actors whose cooperation is not crucial for the peace process and whose removal from the political scene could contribute to postwar reconciliation. Moreover, maintaining the active prospect of prosecution could also deter powerful actors from becoming spoilers. However, as long as the transitional process is dependent on the continuing cooperation of these actors, criminal cases against them will have to be held in abeyance.

Many international lawyers and NGOs would object to this use of the ICC as leverage in the same way that Pierre Hazan criticized the use of the ICTY as a political instrument by Western governments.[147] However, as we saw in Bosnia, the law cannot be enforced while a war is raging and was only able to play a significant role after there was sufficient political will to end the conflict. Given the dependence of law on politics, it is incumbent on the prosecutor to adopt a "do no harm" approach to any political processes that might put an end to criminal violence and establish the conditions under which international criminal justice can play a role— even if that role is circumscribed by power realities. Though coercive diplomacy may differ from pacific settlement strategies, which were employed for the first three years of the Bosnian war and the duration of the war in Darfur, it is still a bargaining relationship to which international criminal justice must adapt.

IV. CONCLUSION

One of the themes of David Kennedy's, *The Dark Sides of Virtue*, is the tendency of many in the human rights community to overpromise what the law can deliver. He attributes this to their assumption that international governance can "do globally what we fantasize or expect national governments to do locally."[148] Their advocacy of the ICC is based on the same premise, that "the political and military contexts in which war crimes were likely to occur were somehow analogous to the social forces surrounding other criminal

147. Hazan, *supra* note 37, at 191.
148. David Kennedy, The Dark Sides of Virtue: Reassessing International Humanitarianism 31 (2004).

behavior."[149] This is evident in the law enforcement language, used by many lawyers and NGOs, emphasizing that "not a single mid- or high-level civilian official, military commander or militia leader has been suspended from duty, investigated or prosecuted" for atrocities in Darfur.[150] The implication is that continued criminal violence can be attributed to "the climate of impunity fostered by the failure to prosecute."[151] Since the problem has been diagnosed as the inadequacy of national law enforcement, the solution lies in apolitically deploying international legal instruments, such as expanding the scope of investigations or executing arrest warrants, to fill the gap.

In order to understand the problems with the domestic criminal law analogy, imagine someone saying in November 1941 that it has been two years since Germany invaded Poland, its armaments industry was exploiting hundreds of thousands of Polish citizens as slave laborers, and its *einsatzgruppen* had machine-gunned to death hundreds of thousands of Jews—and not a single German military commander or high-level Nazi party official had been investigated or prosecuted for these crimes. While such a statement is factually correct, it obscures the fact that Nazi atrocities were deliberate acts of state policy for which the absence of judicial scrutiny was a symptom, not a cause. Similarly, atrocity crimes in Darfur are not the result of military excesses that the state has failed to prosecute. Rather, they are part of a systematic and well-planned government strategy, consistent with the regime's historical practice of arming tribal militias for scorched-earth campaigns against populations seen as sympathetic to insurgencies in the south and in the Nuba Mountains.[152] In fact, a detailed analysis by Human Rights Watch came to the same conclusion, attributing responsibility to "the highest levels of the government" and calling for the ICC Prosecutor to investigate President Bashir and his inner circle.[153] Yet it is difficult to reconcile this analysis with the recommendation that the Sudanese government "investigate and fully prosecute all civilian and military personnel" involved in atrocities and "[f]ully cooperate with and facilitate" the ICC investigation.[154] If the atrocities are indeed acts of state policy for which Sudan's top

149. *Id.* at 129.
150. Human Rights Watch, Entrenching Impunity, *supra* note 114, at 52.
151. Human Rights Watch, Lack of Conviction: The Special Criminal Court on the Events in Darfur 4 (2006). This same attribution of impunity to the failure to prosecute informs Schabas's treatment of the case, though he is less definitive in dismissing Sudan's efforts to establish accountability mechanisms than is Human Rights Watch or the ICC Prosecutor. After citing Sudan's assertion that it was prosecuting crimes in Darfur in response to Moreno-Ocampo's June 2006 report to the Security Council, he suggests: "It may well be that, spurred by the Security Council referral, Sudan is doing an adequate job of addressing impunity. If that is the case, then the Court will have succeeded." William A. Schabas, AN INTRODUCTION TO THE INTERNATIONAL CRIMINAL COURT, 178 (3d ed. 2007).
152. *See* Prunier, *supra* note 58, at 105; Flint & De Waal, *supra* note 59, at 24–25.
153. Human Rights Watch, Entrenching Impunity, *supra* note 114, at 5, 58–63.
154. *Id.* at 3.

leaders are criminally responsible, what incentive do they have to cooperate with the Court, or alter their policies, as the result of its scrutiny? Eric Reeves captures this contradiction between analysis and advocacy with a quote from Darfuri leader in an IDP camp: "The government is part of the problem. You cannot catch yourself."[155]

In situations like Darfur, where the government is the most important part of the problem, the solution lies in politics, not law. Some advocates of international criminal justice acknowledge this. In a sympathetically critical analysis of the Security Council's Darfur referral, Robert Cryer wrote: "Sending the matter to the ICC does mean that the Security Council is doing something, but other ways of limiting the conflict in Darfur are not being pursued as vigorously as they ought to be."[156] Which "other ways" are chosen, however, will set the parameters of international criminal justice. If that involves a negotiated settlement, even one achieved through forcible coercion, as was the case in Bosnia, the court will have to hold back from criminal proceedings, at least temporarily, against those whose cooperation is needed to negotiate and maintain a peace process. Such an approach would, to a degree, condone impunity and make for inconsistency in enforcing the law, but the alternative is either regime change—through internal forces or an external intervention—or an intervention comparable to the one in Kosovo, in which civilian protection does not depend on the continuing cooperation of the Sudanese government. The kinds of justice and accountability mechanisms that are possible in war's aftermath cannot be divorced from the political strategies designed to bring a war to an end because the key to ending impunity in an ongoing war lies in the deployment of political instruments such as diplomacy, sanctions, or force, rather than in deterrent power of the law.

The ICC's weaknesses as an agent of war-time deterrence in Darfur—what Payam Akhavan calls specific deterrence—does not necessarily rule out its promise to promote general deterrence vis-à-vis the world community. Writing about the ICTY, Akhavan noted that focusing on the weaknesses of the former, such as the limited impact of indictments on the behavior of Karadžić and Mladić in Bosnia, overlooks the ICTY's contribution to the latter, its "long-term impact on the transformation of the political culture of both the former Yugoslavia and international society as a whole."[157] Yet

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155. *Quoted in* Eric Reeves, *The ICC "Application" Concerning International Crimes in Darfur*, Sudan Trib., 27 Feb. 2007, *available at* http://www.sudantribune.com/spip.php?article20496. For more on the contradictions in Human Rights Watch's advocacy and analysis, see Eric Reeves, *Khartoum Triumphant: Intl community has failed to prevent, punish genocide*, Sudan Trib., 17 Dec. 2005, *available at* http://www.sudantribune.com/spip.php?article13092.
156. Cryer, *supra* note 95, at 195, 222.
157. Akhavan, *supra* note 11, at 746.

these broader deterrent ambitions are dependent upon the capability and willingness of powerful states to back them up. The ICTY's contribution to stigmatizing extremists, and deterring ethnic violence, in post-Dayton Bosnia only became possible because of the NATO air campaign and the US support for the Croatian and Bosnian ground offensives, as well US and EU policies of linking normalized economic relations to cooperation with the tribunal. Similarly, the ability of international criminal tribunals to have a broader deterrent impact, beyond the country in question, is dependent upon whether states and intergovernmental organizations are committed to a "no business as usual" policy with criminal regimes and movements, and to enforcement actions against perpetrators, or in defense of victims, even at some cost to themselves. What Darfur tells us about this commitment is not a cause for optimism.

The Darfur experience also points to one of the contradictions built into the preamble of the Rome Statute. After the first six phrases, which lay out the Court's mission to root out impunity, the next two phrases attempt to reconcile this with the traditional principles of non-interference, reaffirming "that all States shall refrain from the threat or use of force against the territorial integrity or political independence of any State" and emphasizing "that nothing in this Statute shall be taken as authorizing any State Party to intervene in an armed conflict or in the internal affairs of any State." Yet, in cases like Darfur where the government is directly complicit in criminal activity, strict adherence to non-interference effectively shields the perpetrators from accountability. In such cases, ending impunity may require overriding the sovereignty of criminal governments, even without Security Council authorization. International tribunals can be important complements to humanitarian interventions. They are poor substitutes for them.