



## RETHINKING DETERRENCE: THE INTERNATIONAL CRIMINAL COURT IN SUDAN

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### **Abstract:**

On 1 April 2005, the United Nations Security Council referred the situation in the Darfur region of Sudan to the International Criminal Court. Only two months later, the Office of the Prosecution accepted the referral and decided to initiate the investigation. It is not only the first case referred to the ICC by the United Nations; it is also the first time that the ICC becomes involved in a country where the sitting government, unlike that of Kabila in the DRC or Museveni in Uganda, categorically rejects its jurisdiction and refuses to cooperate. How will this newly created institution fare in such a complicated political environment? Will the case of Sudan vindicate or disprove the oft-repeated claim that international criminal law can deter the commission of atrocities? Has the conduct of Omar al-Bashir been inhibited by the threat of international scrutiny, investigations, and prosecutions? This paper will argue that the emphasis on deterrence, so prevalent in the literature that links international law and conflict resolution, has little analytical value and does not help further the cause of international justice. On the other hand, skeptics overlook the difference between short-term deterrence and long-term prevention, ignore credibility and consistency as necessary functions of deterrence, and take no notice of the variety of strategies that actors choose to cope with the threat of prosecution, as well as the constraints that narrow down their choices and exit options.

**Keywords:** Darfur, International Criminal Court, Deterrence, Sudan.

### **Resumen:**

*El 1 de Abril del 2005, el Consejo de Seguridad de las Naciones Unidas remitió la situación de Darfur (Sudán) al Tribunal Penal Internacional. Dos meses más tarde, el Fiscal aceptó la remisión y decidió iniciar una investigación. No se trata sólo del primer caso enviado a la Corte por las Naciones Unidas; se trata además de la primera instancia en la que el TPI se ve involucrado en un país cuyo gobierno se opone tajantemente a cooperar con el tribunal y rechaza su jurisdicción. ¿Cómo se desenvolverá esta recién creada institución en un entorno político tan complicado? ¿Probará este caso que el derecho penal internacional puede disuadir la comisión de atrocidades? ¿Puede el escrutinio de la comunidad internacional y la amenaza de acusaciones judiciales inhibir la conducta de del Presidente de Sudán, Omar al-Bashir? Este artículo sugiere que excesivo énfasis en la disuasión como elemento central, tan prevalente en la literatura que vincula el Derecho Internacional con la resolución de conflictos, tiene poco valor analítico y no ayuda a la causa de la justicia internacional. Críticos y escépticos, cada vez mas numerosos en el mundo anglosajón, pasan por alto la diferencia entre disuasión a corto plazo y prevención a largo plazo, ignoran la importancia de la credibilidad y la consistencia como funciones necesarias de la disuasión, y no tienen en cuenta la variedad de estrategias que los actores internacionales eligen para plantarle cara a la amenaza de acusaciones judiciales, así como las restricciones que limitan sus acciones y sus opciones de salida.*

**Palabras clave:** Darfur, Tribunal Penal Internacional, disuasión, Sudán.

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## Introduction

In a recent and controversial article, Helena Cobban sentenced “it is time to abandon the false hope of international justice.”<sup>2</sup> Among several other reasons, she explained that there was hardly any evidence that war crimes prosecutions deter future atrocities. She cited the International Criminal Tribunal for Former Yugoslavia (ICTY) and Kosovo as evidence, but could have as well used the example of the ICC and Sudan. More than a year and a half after the United Nations Security Council referred the situation in the Darfur region of Sudan to the International Criminal Court, there is little evidence of a significant drop in violence or a behavioral change in either the *Janjaweed* or the Sudanese leadership. This has only reinforced the growing skepticism surrounding war crimes courts, as deterrence sits near the top of the list of unqualified blessings that advocates attach to international justice. However, I argue that critics overlook the difference between short-term deterrence and long-term prevention, ignore credibility and consistency as necessary functions of deterrence, and take no notice of the variety of strategies that actors choose to cope with the threat of prosecution, as well as the constraints that narrow down their choices and exit options.

International criminal justice is still in its infancy, and the arrest of Charles Taylor may well indicate a breakthrough in what Naomi Roht-Arriaza has dubbed “the Pinochet effect.”<sup>3</sup> But one should not expect warlords and tyrants to turn magically into agents of peace. The deterrent effect of modern war crimes courts remains under-theorized for lack of empirical evidence.<sup>4</sup> Studies of deterrence have traditionally accompanied research on other threats, such as nuclear weapons and military interventions, and on criminal justice at the domestic level. Even a cursory look at these other areas can illuminate this debate. To name one example only, the fact that the threat of US military intervention sometimes fails to deter—at least on surface- leaders of so-called rogue states, does not prompt scholars to deny the deterrent value of the American military, or discard it as a tool of coercive diplomacy. Proponents of international justice do not expect—or should not expect- all or most warriors to lay down arms upon hearing indictments. Instead, they emphasize—or should emphasize- that only if national or international institutions establish a credible and consistent pattern of accountability replacing impunity, it will be possible over time to impose a high cost on the use of atrocities to further political goals.

Sudan poses the hardest test for the new International Criminal Court.<sup>5</sup> Unlike the leaders of the Democratic Republic of Congo and Uganda, Joseph Kabila and Yoweri Museveni, the government of Sudan, led by Omar Hassan al-Bashir, refuses to cooperate with the court, and is publicly very hostile towards any foreign intervention. Since almost all accounts, including the report of the UN Commission of Inquiry, accuse the Sudanese government and military,

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<sup>2</sup> See Cobban, Helena: “Think Again: International Courts”, *Foreign Policy* (March/April 2006).

<sup>3</sup> See Roht-Arriaza, Naomi (2004): *The Pinochet Effect: Transnational Justice in the Age of Human Rights*, University of Pennsylvania Press.

<sup>4</sup> See Wippman, David: “Atrocities, Deterrence, and the Limits of International Justice” in *Fordham International Law Journal*, Vol. 23 (1999); Smidt, Michael L.: “The International Criminal Court: An Effective Means of Deterrence?”, *Military Law Review*, Vol. 167 (2001); Farer, Tom J.: “Restraining the Barbarians: Can International Criminal Law Help?”, *Human Rights Quarterly*, Vol. 22 (2000); Akhavan, Payam: “Beyond Impunity: Can International Criminal Justice Prevent Future Atrocities?”, *American Journal of International Law*, Vol. 95, No. 1 (2001).

<sup>5</sup> The ICC’s Registry currently lists four situations under consideration: Sudan, Uganda, Central African Republic, and the Democratic Republic of Congo. The Prosecutor has open cases against five LRA top commanders and against the Congolese rebel leader Thomas Lubanga. See ICC’s situations and cases at <http://www.icc-cpi.int/cases.html>.



genuinely cooperating with the court would be tantamount to regime collapse.<sup>6</sup> But al-Bashir and his inner circle in Khartoum are not indifferent to the court, and have employed a variety of tactics to escape its jurisdiction. After Colombia ratified the ICC treaty, Carlos Castaño, one of the nation's top paramilitary commanders, laid down his weapons upon realizing that he might become vulnerable to ICC prosecution. The Sudanese ruling clique knows that it does not have that option.

For some, the ICC will not deter, but exacerbate violence. Sudanese officials and intellectuals have voiced that threat eloquently, warning that Iraq or Somalia would be “picnics” compared to Sudan if the West intervenes and the situation degenerates into chaos.<sup>7</sup> The court and the UN Security Council backing it face the ‘peace vs. justice’ dilemma that comes with every call for accountability in conflicted societies, from Argentina in the mid-80s to Uganda in 2005. With a Comprehensive Peace Agreement holding a fragile peace between North and South after decades of bloodshed, the stakes may be higher this time.<sup>8</sup>

A year ago, television footage showed trucks unloading boxes of documents at the headquarters of the International Criminal Court in The Hague. The documents had been compiled by United Nations’ investigators, and contained photographs and videos of weapons and war damage, along with hundreds of statements from military officers, prisoners, and witnesses to the atrocities.<sup>9</sup> In New York, Secretary General Kofi Annan had provided Luis Moreno Ocampo, the ICC Chief Prosecutor, with a list of 51 suspects recommended for investigation and trial. As with an earlier and shorter list, put together by a group of US Senators, the names of the suspects were kept secret. However, it is known that the list includes ten high-ranking members of the central government, seventeen local officials, fourteen members of the *Janjaweed*, three officers of non-Sudanese armies, and seven rebel commanders.<sup>10</sup> The ICC, in its determination to prosecute only those bearing greatest responsibility, resembles more the Special Court for Sierra Leone than the International Criminal Tribunal for Former Yugoslavia.<sup>11</sup> Thus, it is expected that Moreno Ocampo and his investigators will compile a much shorter list. From the power corridors of Khartoum to conference panels in New York, the question asked is, who will be on that list?

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<sup>6</sup> See United Nations Office of the High Commissioner for Human Rights: “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.” United Nations, Geneva, 25 January 2005, available at [www.ohchr.org/english/docs/darfurreport.doc](http://www.ohchr.org/english/docs/darfurreport.doc).

<sup>7</sup> Ahmed Ibrahim al Tahir, member of the Sudanese National Assembly, declared in September 2004, “if Iraq opened for the West one gate of hell, we will open seven such gates.” President Bashir said “Darfur will be a graveyard for any foreign troop venturing to enter.” Quoted in Farley, Maggie, “Envoy to Sudan Reports Threats”, *Los Angeles Times* (1 March 2006).

<sup>8</sup> The Comprehensive Peace Agreement signed in Naivasha shares power between the existing Sudan government and the Sudanese People’s Liberation Movement (SPLM) for a period of six years, followed by a referendum on self-determination for the South. John Garang, former leader of the rebels –who soon thereafter died in a mysterious accident–, was to be vice president. Revenues from the oilfields in the South are to be divided fifty-fifty between Khartoum and Southern Sudan. The current national army is to withdraw almost wholly from the South. Pending implementation, the CPA is a remarkably good deal for the South. For more details, see the full-text of the Comprehensive Peace Agreement at the United Nations Mission in Sudan, <http://www.unmis.org/English/cpa.htm>.

<sup>9</sup> See Simons, Marlise, “Sudan Poses First Big Trial for World Criminal Court”, *The New York Times*, 29 April 2005.

<sup>10</sup> See De Waal, Alex and Flint, Julie (2006): *Darfur: A Short History of a Long War*, London, Zed Books, p. 132.

<sup>11</sup> The ICTY has indicted 161 individuals. The Special Court for Sierra Leone, only 11, all of them from leadership positions, despite the fact that both regions experienced violence insimilar scale. For more information, see [www.sc-sl.org](http://www.sc-sl.org) and [www.un.org/icty](http://www.un.org/icty).



This question is reminiscent of earlier dilemmas surrounding the ICTY and its initial reluctance, due to outstanding pressure from Western governments, to indict Milosevic and other Serbian leaders. It was feared that indicting high-ranking Serbs would inevitably torpedo the peace negotiations and provoke further instability. It is assumed that if the ICC Prosecutor assumes similar political constraints, and decides to be cautious, the indictments will be limited to leaders of the *Janjaweed* and a low-level government official, perhaps a scapegoat from Military Intelligence that President Bashir can surrender to the court to save his regime. If the ICC chooses to act with more rigor than prudence, the list of accused will include the most important players of the ruling elite of Sudan. In sum, a hypothetically successful ICC prosecution of those most responsible for Darfur entails regime change.

## 1. Darfur's Crimes, Victims, and Perpetrators

Most chronological summaries of the crisis in Darfur begin in February 2003, when rebels from "African" tribes –mainly the Fur, Masalit, Zaghawa-, complaining about Darfur's underdevelopment and lack of political representation, took up arms against the government. In response, the government launched a military campaign and unleashed the Arab militias popularly known as *Janjaweed* against the tribes suspected of supporting the rebels. The result is well-known: roughly 300,000 dead, two millions internally displaced and barely surviving in camps, 90 percent of the "African" villages of Darfur burnt, and the innumerable screened-off scars of a brutal and systematic campaign of sexual violence against the women of Darfur. In 2004, Mukesh Kapila, UN Humanitarian Coordinator for Sudan at the time, warned that the only difference between Sudan and Rwanda were the numbers involved.<sup>12</sup> Shortly thereafter, Jan Egeland, UN Under-Secretary General for Humanitarian Affairs, declared it "the world's worst humanitarian crisis."<sup>13</sup> For the first time in history, both the legislative and the executive branch of the US government agreed in using the word "genocide." However, shying away from more decisive action, the international community's response has been limited to the deployment of a small force of African Union peacekeepers unable to intervene,<sup>14</sup> and the Security Council referral of the Darfur situation to the ICC. Khartoum's reaction, meanwhile, has been a strategy of denial and deception. It claims that its military campaign of 2004 was a swift and restrained counter-insurgency operation against rebel groups, and that the atrocities against civilians are either propaganda of Western Islamophobes or, when acknowledged, the action of uncontrollable bandits or the product of old rivalries over resources between Arab nomads and African farmers.

It is unnecessary for the purposes of this paper to engage in the never-ending debate over whether the Darfur crisis is genocide or not.<sup>15</sup> The unsolvable dispute over this label has obscured more than it has clarified. Besides, systematic crimes against humanity and war

<sup>12</sup> Romeo Dallaire, the Canadian Lieutenant-General that was Force Commander of the UN's peacekeeping mission in Rwanda in 1993 and 1994, eloquently labeled it "Rwanda in slow motion." Quoted in Tinsley, Becky: "Why the World is Ignoring Darfur", *The New Internationalist*, No. 383 (October 2005).

<sup>13</sup> See Prunier, Gerard (2005): *Darfur: The Ambiguous Genocide*, New York, Cornell University Press, p. 90.

<sup>14</sup> Hailed as an African solution to an African problem, the African Union has deployed seven thousand soldiers in the largest region of the largest country in Africa, five times the size of France. In comparison, the candidacy of the city of Paris for hosting the Olympic Games in 2012, counted with 41 thousand policemen and soldiers. It lacks a mandate to intervene and is severely deprived key resources, including, most critically, helicopters. Without aerial reconnaissance in the wide-open desert, the AU peacekeepers are very vulnerable. The EU and the US is seeking now to increase the number of troops committed up to 20,000, provide them with adequate resources, and transfer them to UN command. See Wax, Emily: "Peace Force in Darfur Faces Major Challenges", *The Washington Post*, 21 November 2005.

<sup>15</sup> Journalists and activists such as John Prendergast of the International Crisis Group, Eric Reeves, or Nicholas Kristof, insist that it is genocide. The United Nations Commission of Inquiry concluded otherwise.



crimes are not less serious offenses. It is also beyond the reach of my argument to ascertain the truth or limits of the identity cleavages –Arabs vs. Africans, nomads vs. settlers, cattle-herder vs. farmers- that supposedly characterize and inflame the conflict. But if one is to assume that those bearing greatest responsibility are part of the inner circle of the Government of Sudan, and are likely to be the target of the ICC, it is necessary to elaborate on who are the perpetrators and what determines their liability. Since the Sudanese government actively obstructs the ICC's investigation, the prosecution will not be able to gather forensic evidence, shrapnel from bombs, or samples of poisoned water from wells.<sup>16</sup> Instead, it will have to rely on thousands of interviews and documents provided by Sudanese dissidents and activists, evidence gathered at the Chad refugee camps, and intelligence intercepts to establish the chain of command and determine who controlled the militias and who had the authority to prevent the atrocities.

Darfur is the largest and most landlocked region of Sudan.<sup>17</sup> It is often said that the recent crisis is merely the last expression of centuries-long clashes between pastoralists and farmers over limited natural resources: water, agricultural land, pastures. However, as Professor Fouad Ibrahim puts it, “this is not the true cause of the current brutal war. In fact, the natural resources of Darfur are not meager at all.”<sup>18</sup> Darfur's poverty has been a consequence of underdevelopment and malign neglect, rather than scarcity. In his pioneering work on the 1984-1985 famine in the region, Alex De Waal compellingly argued that to starve is a transitive action, “something people do to each other.”<sup>19</sup> Darfur has lived in a state of endemic insecurity since then. Hitherto, Sudan had been dubbed by Washington as “the future breadbasket of the Arab world” and a bulwark against communist Ethiopia. After the drought, farmers increasingly tried to hang on to all potential agricultural land, blocking the nomads from previously used routes and pastures, and Darfur became a time-bomb waiting to fuse. Ethnic appellatives entered the discourse to exchange accusations: the “Arabs” accused the “Africans” of enclosing unused tracts of land, and the “Africans” accused the “Arabs” of getting weapons from Libya and collaborating with Gaddafi's dreams of pan-Sahelian unity and Arab supremacy.<sup>20</sup> For years, these tensions were successfully handled and restrained through Darfur's ancient tribal mediation system. Homicide was a communal responsibility and was settled through the payment of blood money to the kin of the individual killed in a feud. Cheap and abundant AK-47s changed this.<sup>21</sup>

Omar Hassan al-Bashir and his National Islamic Front had assumed power via a military coup in 1989. Ten years later, a “soft coup” changed the face of the regime: Hassan al-Turabi, the Guide of the Sudanese Islamist Revolution and until then one of the most powerful figures of the ruling elite, was forced to resign from his position as president of the Parliament.<sup>22</sup> Bashir had gotten temporarily rid of a dangerous rival.<sup>23</sup> For years, he had been bent on centralizing

<sup>16</sup> See Rubin, Elizabeth: “If Not Peace, Then Justice”, *The New York Times*, 2 April 2006.

<sup>17</sup> Darfur was an independent sultanate for centuries, till becoming a province of the Anglo-Egyptian Condominium in the first half of the 20<sup>th</sup> century. It has been one of Sudan's states since the independence of this country in 1956.

<sup>18</sup> Ibrahim, Fouad N. (1980): *Desertification in North Darfur*, Hamburg, Institut für Geographie und Wirtschaftsgeographie der Universität.

<sup>19</sup> De Waal, Alex (2002): *Famine that Kills: Darfur, Sudan*, Oxford, Oxford University Press. Quoted in Kristof, Nicholas, “Genocide in Slow Motion”, *The New York Review of Books*, Vol. 53, No. 2 (9 February 2006).

<sup>20</sup> See Prunier (2005), *op. cit.*, pp. 57-58.

<sup>21</sup> “A jingle of the time ran: ‘The Kalash brings cash; without the Kalash, you're trash.’” See De Waal *et al.* (2006), *op. cit.*, p. 49.

<sup>22</sup> See Prunier (2005), *op. cit.*, p. 81.

<sup>23</sup> Turabi was not only a challenge to Bashir, but, along with the current vice President Ali Osman Taha, had been the main responsible for Sudan's decade of isolation in the 90s. Obsessed with spearheading an Islamic revolution in the Arab world, Turabi threw Khartoum's weight in support of Saddam Hussein after the invasion



political power down to a small military clique. The NIF –now called National Congress Party (NCP)- had slowly dismembered the state bureaucracy and security structures through sidelining the Sudanese Army in favor of tribal militias and paramilitary forces named Popular Defense Forces (PDFs) and loyal not to the state, but to the regime itself.<sup>24</sup> By 1996, the PDF vastly outnumbered the regular army, whose officer ranks were drastically depleted by repeated purges. It was clear that Bashir wanted to avoid repeating the main mistake of his predecessor: a strong and independent military that could eventually oust him.

After ostracizing Turabi, the ruling elite correctly suspected that most Darfurian party members would side with him, posing a challenge to the regime. In May 2000, a document known as *The Black Book: Imbalance of Power and Wealth in Sudan*, was written and distributed by an unheard-of group. It laid out how the state apparatus had been dominated, ever since independence, by a small group from the three tribes who live along the Nile north of Khartoum, and how all the other regions had been grossly marginalized and neglected. Members of three riparian tribes that represented only 5.4 percent of Sudan's population held the vast majority of government positions, from cabinet ministers to their drivers and all the bureaucracy in-between.<sup>25</sup> The government deduced that Turabi was behind the book, and that an insurgency was emerging in Darfur. As an anticipatory measure, Khartoum began replacing local administrators in Darfur with handpicked loyalists, and immersed the PDF – until then an apolitical entity- in the politics of Darfur. It was then that, increasingly armed, the Popular Defense Forces started to intervene in support of indigenous Arabs against the Fur, Masalit, and Zaghawa. For years, supremacist ambitions and a constant flow of weapons had infiltrated the region's Arab tribes, a spillover of Gaddafi's attempts at establishing an Arab belt into central Africa. Especially active was a group known as Arab Gathering, which already in the late-1980s had issued directives that, with hindsight, read as battle plans for the *Janjaweed*.<sup>26</sup> It was also in these years that the word *janjaweed* was first heard in Darfur, and that Musa Hilal, current leader of the militia and first on all the lists of Sudan's suspected war criminals, began to build his violent career.

The rebels that mounted a full-blown insurgency in 2002-2003 against the government had already formed self-defense groups during the previous decade. In 1995, heavy armed Arab raiders had stolen 40,000 head of cattle and killed 23 civilians. In 1996, raiders burned

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of Kuwait, and opened the doors of Sudan to thousands of militants in the Islamic world, including Osama bin Laden. Turabi and Taha aimed at regime changes from Cairo to Kampala, with the result that by mid-90s Sudan was in war with Egypt, Eritrea, Ethiopia, and Uganda. Especially notorious was the assassination attempt of Egyptian President Hosni Mubarak, allegedly plotted by Ali Osman Taha and security chief Nafie Ali Nafie. By the end of the decade, it was clear that Turabi and Taha's revolution had failed on both the social and the geopolitical level, and had managed to antagonize Washington. After the 1998 al Qaeda bombings of US embassies in Nairobi and Dar es Salaam, the US fired cruise missiles against a pharmaceutical plant in Khartoum, making dubious allegations that it was engaged in producing chemical weapons and was linked to bin Laden. Most significantly, the US Congress began to support the Sudanese opposition forces led by John Garang. Bashir demoted Turabi and promoted Ali Osman from foreign minister to vice President. See De Waal *et al.* (2006), *op. cit.*, pp. 27-30.

<sup>24</sup> The Popular Defense Forces emerged in the 80s, and were composed of volunteers associated with the Muslim Brotherhood. According to regime's propaganda, the PDF's aim was to wage *jihād* to halt Christian expansion in Central Africa.

<sup>25</sup> See De Waal *et al.* (2006), *op. cit.*, pp. 17-18.

<sup>26</sup> Gaddafi had sealed an alliance with Khartoum. In exchange of weapons, the Sudanese government would turn a blind eye to Gaddafi's use of Darfur as a rear base for his wars in Chad. Thousands of well-trained and well-armed militants, members of the Islamic Legion –which recruited Bedouins from Mauritania to Sudan- or part of the Arab Gathering, arrived in Darfur. Since the 80s, leaflets and cassette recordings from the Arab Gathering had begun to be distributed anonymously, proclaiming that the *zurga* (derogatory appellative to refer to members of the "African" tribes of Darfur) had ruled Darfur long enough and it was time for Arabs to have their turn. See *ibid.*, pp. 50-53.



seven villages in a single day. Abakir, who would become one of the leaders of the Sudanese Liberation Army (SLA/SLM), began to rally Masalit youths, under the premise that these were not signs of local trouble with Arab pastoralists, but part of a government plan to change the ethnic geography of the region. They had many reasons to believe this: many of them had served in the police or the army for years, and had read the secret directives of the Arab Gathering.<sup>27</sup> As early as 1988, Musa Hilal had been taped thanking Gaddafi's Chadian protégées for 'providing his tribe in Sudan with the necessary weapons and ammunition to exterminate the African tribes in Darfur.'<sup>28</sup>

Several Fur, Masalit, and Zaghawa forged a tenuous alliance based more on common grievances than on a common agenda. It is usually said that the rebellion began with an attack in February 2003. However, during 2002 the rebels had already attacked police stations and army posts with impressive results and alarming military proficiency. The SLA entered into an alliance with another group, called the Justice and Equality Movement (JEM) and closely linked to the Islamist movement, the authorship of the *Black Book*, and perhaps to Mr Turabi himself.<sup>29</sup> Fur MPs in the National Assembly had documented 181 attacks on 83 African villages in Darfur. At least two of them had been settled with Arabs and given Arab names.<sup>30</sup> The Sudanese Army, untrained in desert warfare, was losing almost every encounter – 34 out of 38 in the middle months of 2003 to the rebels.<sup>31</sup> The head of security in Khartoum, Major General Salah Abdalla 'Gosh', warned that this insurgency posed a greater threat to the regime than the war in the South. The government feared it would lose the whole of Darfur, and probably Kordofan too, and decided to rely on its favorite tactic: using paramilitary militias as proxies.<sup>32</sup>

Among other reasons, this method of counter-insurgency was cheap and provided the Sudanese government with plausible deniability in case the atrocities attracted attention. The Sudanese army was already undermanned, under-equipped, and many of its conscripts were Darfuri themselves, members of the tribes that were being "cleansed." Instead of paying fixed salaries for soldiers and mobilizing and sustaining a conventional armed force, Khartoum's ruling clique preferred to assign the main task to the paramilitary Popular Defense Forces and the Arab *Janjaweed*, and allow them to loot, pillage, and keep the profits as payment for their services. This tactic was also extremely effective. A few months after announcing "we will use all available means, the Army, the police, the *mujahideen*, the horsemen, to get rid of the rebellion," Bashir declared victory. The human cost of this brutal campaign began to make

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<sup>27</sup> *Ibid.*, pp. 67-69.

<sup>28</sup> *Ibid.*, p. 56.

<sup>29</sup> Turabi's connection with the Justice and Equality Movement is often suspected by Khartoum officials and flatly denied by JEM's chairman, Dr Khalil Ibrahim: "We were marginalized in Turabi's time too. Turabi is nothing." *Ibid.*, p. 88.

<sup>30</sup> *Ibid.*, p. 78.

<sup>31</sup> *Ibid.*, p. 101.

<sup>32</sup> Examples of government-sponsored-violence through proxies are abundant throughout Sudanese modern history. In the 80s, the *muraheleen* (nomads) Arab militias from the Rizeigat tribes residing in South Darfur were employed as raiders against their Dinka neighbors. In 1998, government-sponsored militias attacked SPLA/M positions in the Upper Nile Province to secure oil drilling sites for foreign firms such as Calgary-based Talisman Energy. A similar pattern explains the arming of Chadian Arab nomads against Fur and Masalit populations in the late 1980s and mid to late 1990s. But the most blatant example can be found in response to the rebellion of Nuba tribes in Kordofan in the late 1980s and early 1990s. Declaring *Jihad* against the Nuba in 1992, the NIF trained and armed local Arab militias to fight the insurgency and relocate the entire Nuba population away from their ancestral lands and into camps. See Anderson, G. Norman (1999): *Sudan in Crisis: The Failure of Democracy*, Gainesville, Florida, UP of Florida, pp. 228-230; see also De Waal, Alex: "Massacre in the mountains while the world looked the other way," *Parliamentary Brief* (August 2004), p. 15.



headlines in the Western media after NGOs such as Amnesty International, the International Crisis Group, and Human Rights Watch, documented, somewhat belatedly, the atrocities.<sup>33</sup>

In the event of a trial, it will be very difficult for President Bashir or vice President Taha to deny their responsibility, as they have consistently done in multiple public statements. In most attacks, the *Janjaweed* did not storm the villages until they had been previously burnt down by the government's air force. The raids were typically carried out by Russian-built four-engine Antonov An-12s, which are transports, not bombers, and thus have no aiming mechanisms. They dropped oil drums stuffed with a mixture of explosives and metallic debris. These primitive, free-falling cluster bombs were evidently unsuited for military targets, and had the only purpose of causing high destruction among civilians. Helicopters and MiG fighter-bombers normally completed a second round, followed by the *Janjaweed*, sometimes in company of regular Army units. In a clearly programmed pattern, the militiamen would loot personal belongings, rape the girls and women, execute some boys and men, steal the cattle, kill the donkeys, burn the houses, and shoot those who could not run away.<sup>34</sup> There is nothing of improvisation in this type of violence.

As Bashir promised, the government used a section of the Sudanese military, organized paramilitaries commanded by Sudanese military officers and senior tribal leaders, and finally the *Janjaweed*, which operate under their own tribal structure and act many times on their own discretion. But it should be clear that all of these groups, including the *Janjaweed*, receive money, weapons, and orders from Khartoum.<sup>35</sup> Musa Hilal, who was in jail on murder charges prior to the outbreak of the insurgency, was released by government authorities and given the assignment to organize *Janjaweed* brigades in northern Darfur. An intercepted directive from the administration ordered the local security officials to "allow the activities of the *mujahedeen* and the volunteers under the command of Sheikh Musa Hilal." The directive specifically asked government's officials to overlook offenses against civilians. Musa Hilal himself never bothered to hide this connection with Khartoum. In an interview with Human Rights Watch, he boasted, "all of the *Janjaweed* in the field are led by top army commanders. These people get their orders from the Western command center and from Khartoum."<sup>36</sup>

Musa Hilal, who controls around 20,000 recruits and whose camp includes a helicopter pad for daily deliveries of food, weapons, and ammunition, also leads the Arab Gathering. In August 2004, a directive issued from Hilal's headquarters, spelled out his ultimate goal: "Change the demography of Darfur and empty it of African tribes." This directive was addressed to the Intelligence and Security Department, Military Intelligence and National Security, and the ultra-secret 'Constructive Security', confirming the involvement of the highest levels of Khartoum's security apparatus.<sup>37</sup> In fact, Hilal regularly complains about being called *janjaweed* –who he refers to as 'bandits'–, but never denies being a government agent. In documents obtained by Darfur experts Alex De Waal and Julie Flint, he sends his

<sup>33</sup> See Grono, Nick: "Darfur: The International Community's Failure to Protect", *African Affairs*, 105/421 (2006), p. 625.

<sup>34</sup> See Prunier (2005), *op. cit.*, p.100. Rape was so ubiquitous and systematic in Darfur that it appears to be an instrument of policy to destroy the fabric of the targeted communities, and perhaps even to create a new generation with 'Arab' paternity, a pattern too reminiscent of the use of sexual violence as a weapon of war in Bosnia, Rwanda, and elsewhere. See Amnesty International: "Darfur: Rape as a Weapon of War: Sexual Violence and its Consequences," London, July 2004.

<sup>35</sup> The UN established that the Sudanese government spent around 1 million dollars per day on salaries to paramilitary forces and militia. Volunteers received 79 dollars a month if they were on foot, or 117 dollars if they had a horse or a camel. See Kristof (2005), *op. cit.*

<sup>36</sup> See UN ICID, *op. cit.*

<sup>37</sup> According to Alex De Waal, Military Intelligence was the architect, arbiter, and, often, executioner of the Darfur campaign. De Waal *et al.* (2006), *op. cit.*, pp. 38-39, 109.



gratitude and greetings to his supporters, including some of the most important men in national and regional government.<sup>38</sup>

The government was also lying about their use of the air force to indiscriminately target civilians. If the testimonies of thousands of fleeing villagers did not suffice, at least two revealing conversations between Antonov pilots and officers from Military Intelligence were intercepted, exposing the ultimate goal of the air raids. The *Janjaweed* and the planes rarely attacked the guerrillas in their mountain bases. The Darfur campaign –call it genocide, ethnic cleansing, or counter-insurgency of the most criminal kind- was planned from Khartoum and executed with the government’s resources and following the government’s commands.

## 2. The International Community and Khartoum

How did Khartoum react when the international community tuned in? The government of Sudan, vis-à-vis humanitarian aid, first, UN Security Council intervention, second, and, finally, the involvement of the ICC, responded similarly. In every instance, it was clear that Bashir and his inner circle were not indifferent, quite the contrary, to any negative repercussions that the international condemnation could bring, and devoted much energy to avoid them. At the same time, the government of Sudan never responded positively to the international community’s demands, refusing to cooperate or alter its course of actions. The threat of ICC indictments has not deterred Bashir, Taha, or Hilal, but neither have Security Council ultimatums and heavy pressure from the United States. Two main reasons explain this, a priori, sub-optimal outcome: the government of Sudan has good motives to believe that the ‘foreigners’ are only delivering empty threats and bluffs they cannot carry out; furthermore, a policy reversal may not be available for Khartoum anymore, as complying with international demands would mean the end of the regime.

Instead, Khartoum invariably chose denial and deception. From the start of the campaign, the government tried to black out comment on Darfur. Independent newspapers were suspended, correspondents were arrested and even beaten, and Al Jazeera was closed after it became the first station in the world to report the atrocities in Darfur.<sup>39</sup> Foreign Minister Mustafa Osman Ismail shamelessly declared, “all those who have been killed, whether militia, rebels, soldiers, or civilians caught in the fighting, do not reach one thousand.”<sup>40</sup> Although violence never reached the peaks of 2004 –partly because the region had been successfully “cleansed” of African tribes-, the two million refugees and internally displaced Darfurians continued to endure untold suffering, in what has been called “genocide by attrition.” The first shipment of food aid arriving at Port Sudan from the United States was blocked by Khartoum on the pretext that the wheat and sorghum cargo was genetically modified.<sup>41</sup> This was only the first illustration of what would become an almost ritualistic strategy of impediments and hurdles to the distribution of aid by humanitarian agencies. Urgently needed medicines that had been unloaded in Port Sudan, for example, were held up in Khartoum under the official excuse that they had to be lab-tested before use in the camps in case they were expired or deficient.<sup>42</sup> Visas were denied or delayed, local translators were typically harassed and arrested, and all the red lines marked by the Security Council were crossed without exception.

<sup>38</sup> “Major General Omar al Bashir [...], Ali Osman Mohammed Taha, Vice President and the hero of Sudan [...], Brother Major General Adam Hamid Musa, Governor of South Darfur [...], Airforce General Safi al Nur [...], Brother Osman Mohamed Yousif Kibir, Governor of North Darfur...” See De Waal *et al.* (2006), *op. cit.*, p. 39.

<sup>39</sup> *Ibid.*, p. 115.

<sup>40</sup> See Prunier (2005), *op. cit.*, p. 135.

<sup>41</sup> *Ibid.*, p.108.

<sup>42</sup> *Ibid.*, p. 133.



Khartoum did prepare thoroughly for the visit of UN officials. The government regularized *Janjaweed*, emptied mass graves, and prevented the UN delegation from traveling to the worst affected areas. They arrested and tried some alleged *Janjaweed* in Nyala, but it was soon found that all were petty criminals, some of whom had been in jail for years, and none had been in the militia.<sup>43</sup> Despite government commitments to disarm and arrest the *Janjaweed* in compliance with a Security Council resolution, the militiamen continued to roam free and unimpeded. Months after the agreement to disarm, the *Janjaweed* were operating sixteen camps in just one of Darfur's three states. Five of these camps were shared with regular government forces, and three had pads for helicopters. Sham disarmament ceremonies were organized for visitors.<sup>44</sup> Similarly, the government agreed to halt its military flights, but the air raids did not cease. On the very day that Khartoum signed the agreement in December 2004, seven government aircraft were simultaneously bombarding the Labado area east of Nyala.<sup>45</sup>

To be sure, the government of Sudan miscalculated, and was surprised by the reaction of the international community. They thought that the Darfur campaign would be a quick fix, and that no one would pay attention because there are neither Christians nor oil in the region, as opposed to in southern Sudan.<sup>46</sup> The Sudanese leaders were undoubtedly unnerved when the Security Council put Darfur in its agenda, where it has stayed for review and discussion every month. But they were only upset to a certain extent, and were more than confident in their ability to out-manuever the United Nations. First, they found out soon that the Security Council had taken sanctions and military intervention off the table. Instead, the Council imposed unenforceable sanctions on several individuals and called on the government to disarm the *Janjaweed*, but attached no consequences for lack of adherence. Both Russia and China had sold the NCP advanced MiG fighters, attack helicopters, and tanks during 2003. China National Petroleum Company owns 40 percent of the Sudanese state owned oil production.<sup>47</sup> The United States did not want to jeopardize the North-South peace agreement that had cost so many years and effort.<sup>48</sup> Furthermore, Sudan has been cooperating with U.S. intelligence agencies and the Pentagon post-9/11, providing valuable information on international terrorists. Sudan's director of National Security, Salah Abdallah Ghosh is, according to various lists, one of the top security men orchestrating Darfur's crimes. Yet in 2005 he was flown to Washington by the CIA for a debriefing, and the American government has been pressuring the United Nations not to make Ghosh a target of sanctions.<sup>49</sup> The Arab and Islamic world, which had worked so hard in response to ethnic cleansing in Bosnia, remained silent on Darfur, choosing Arab solidarity and status quo stability over promoting protection of co-religionists.<sup>50</sup> Meanwhile, the Europeans, despite much anti-Khartoum noise,

<sup>43</sup> *Ibid.*, p. 115, 121. In January 2005, the UN's Independent Commission of Inquiry reported that the government had been able to cite only once case of punishment since the rebellion began –that of a man who, apparently acting on his own initiative, had burned a single village and killed 24 people. See De Waal *et al.* (2006), *op. cit.*, p. 111.

<sup>44</sup> *Ibid.*, pp. 104, 111. On 27 August 2004, the UN Special Representative witnessed 300 *Janjaweed* in Geneina hand over their weapons. Locals said they were handed back the following day.

<sup>45</sup> *Ibid.*, p. 106.

<sup>46</sup> They had the precedent of the fast and efficacious repression of the Daud Bolad uprising in 1991. *Ibid.*, p. 117.

<sup>47</sup> See Taylor, Ian: "China's oil diplomacy in Africa", *International Affairs*, Vol. 82, No. 5 (2006), pp. 949-950.

<sup>48</sup> It should be reminded that the North-South war has lasted for two decades and resulted in a greater number of deaths than those in Angola, Bosnia, Chechnya, Kosovo, Liberia, Sierra Leone, Somalia, and Rwanda combined.

<sup>49</sup> See Rubin, *op. cit.*

<sup>50</sup> See Slim, Hugo: "Dithering over Darfur? A preliminary review of the international response", *International Affairs*, Vol. 80, No. 5 (2004). In the first year of the rebellion, more than sixty-two mosques were burned in West Darfur alone, where the desecration of Qurans was a usual practice during raids. Also, the Justice and Equality Movement has better Muslim credentials than the government forces. See De Waal (2002), *op. cit.*, p. xviii.



preferred a humanitarian, and thus non-committal, approach to the crisis. The EU and its member states poured more money than the United States, but admitted that its troops were already engaged elsewhere.<sup>51</sup> More than overstretched military forces in Iraq, Afghanistan, or West Africa, what transpired on both sides of the Atlantic was a profound international reluctance to see a strong military intervention in the wake of the invasion of Iraq. For several reasons, it is apparent in most fora that the Iraq war has caused a serious blow to the appeal of military interventions on humanitarian grounds, so favored and frequently used during the 90s.

To date, the most decisive actions taken by the UNSC have been establishing the Independent Commission of Inquiry, sharing its results with the ICC, and activating Chapter VII of the Charter to refer the Sudan situation to The Hague. Khartoum offered the same response as with earlier UN actions: refused from the outset to cooperate with the court, surrender one single suspect, or even grant entry to ICC investigators, while at the same time implementing cosmetic and deceptive measures to escape jurisdiction.<sup>52</sup> As the ICC only has jurisdiction when a given country is either “unwilling or unable” to exercise it, Khartoum set up the Darfur Special Criminal Court. This attempt is not very different from the sham disarmament ceremonies. Needless to say, the president and his cabinet, the members of the National Assembly, and the top-ranking members of the armed forces and police are immune from prosecution. So far, the Special Court has heard few cases, and handed less convicting sentences –one of the harshest ones went to a man convicted of stealing 80 sheep. It has not tried a single individual connected to the atrocities; rather, it has punished with 10 to 20 years of jail-time several Darfurian Air Force pilots that refused to fly bombing missions over their homeland. Despite the efforts of organizations like the Amal Center of Nyala, that has compiled thousands of rape cases, crimes of sexual violence are entirely absent of the court’s hearings.<sup>53</sup>

Of course, neither does the Darfur Special Criminal Court fool Moreno Ocampo, nor Khartoum expects him to be. But it can quite effectively intensify domestic opposition against ICC involvement, and paint it as another sign of a Western conspiracy against the Muslim world. It is not only the fragile Comprehensive Peace Agreement that is at play. The UN’s top envoy to Sudan, Jan Pronk, has reported on growing threats from Al Qaeda against any kind of interference in Sudan by non-Africans.<sup>54</sup> As in northern Uganda and elsewhere, the questions raised are again: should peace be allowed to trump justice? How can the United Nations be a neutral monitor and implementer of a peace agreement while charging one of the parties with crimes against humanity in another conflict? Amnesties and reconciliation were the favored approach in southern Sudan and in Mali, and seems to be preferred by many tribal leaders in Darfur today. In northern Uganda, for example, Betty Bigombe has been very vocal in her complaints about the timing of ICC indictments against the leaders of the Lord’s Resistance Army. She claims that it jeopardizes the peace negotiations that she leads. What she fails to mention is that peace negotiations between the LRA and Kampala and generous amnesty offers, have been on and off the table for more than twenty years, without yielding any progress. Similarly, Darfur’s old sheikhs know that inter-tribal agreements cannot, on

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<sup>51</sup> See Prunier (2005), *op. cit.*, pp. 140-141.

<sup>52</sup> One Sudanese foreign-ministry ambassador told the journalist Elizabeth Rubin, “we just have to get one step ahead of the game so we can outmaneuver the ICC when they finally request to send investigators [...]. We make national trials, show no impunity, and ruin the ICC.” See Rubin, *op. cit.*

<sup>53</sup> *Ibid.*

<sup>54</sup> See Farley, *op. cit.*



their own, remove the warmongers and war criminals. Thirty conferences over twenty years have not solved Darfur's problems.<sup>55</sup>

Some members of the Security Council, like Algeria, Nigeria, and the United States, preferred an *ad hoc* African tribunal, similar to those set up for former Yugoslavia and Rwanda, and in line with the much-discussed principle "African solutions for African problems" of the Brahimi report. In contrast, a large network of African-based and African-focused civil society organizations, created in Pretoria in 2004 under the name 'Darfur Consortium', is actively supporting the intervention of the ICC on the premise that it is both an international *and* an African mechanism. According to the UN Independent Commission of Inquiry, an ICC prosecution has several advantages over the existing alternatives: first, the prosecution of the crimes would be conducive to peace and security in Darfur; second, the ICC, sitting far from the perpetrators' spheres of influence, would ensure that justice is done, regardless of the authority or prestige of the perpetrators; third, the ICC and the Security Council could complement each other and exert great pressure on those responsible for the atrocities; fourth, the ICC's international composition and rules of procedure place this institution as the best suited organ for ensuring a veritably fair trial; finally, the creation of an *ad hoc* court would delay the process, and the ICC is presented as the most cost-effective option.<sup>56</sup> The commission does not explain how exactly will the court contribute to peace and security in the region.

Nonetheless, the United Nations Security Council, the international organization most directly in charge of peace and security, also faces the obstacle of Khartoum's obstruction. Despite having been repeatedly directed by the Security Council to disarm de *Janjaweed*, and committed to do so on several occasions –most recently in the Darfur Peace Agreement of May 5<sup>th</sup> 2006- the Sudanese government has yet to make even symbolic gestures in that direction.<sup>57</sup> The expulsion from Sudan of Jan Pronk, UN envoy to Sudan, shortly after being finally admitted, is only the latest episode of a long story of failed diplomacy. Although the Sudanese government is not impervious to the pressure of the international community, it will continue to evade its responsibilities as long as this pressure is not unified and strong enough. So far, Chinese and Russian interests in the region, Washington's security concerns, European timidity, and Arab silence, prescribe open-ended prolongation of Darfur's plight. With the violence spilling over to Chad, the rebel groups fighting among themselves, and most victims now dying the slow-death of the displaced refugee, Darfur is starting to resemble Congo rather than Rwanda.<sup>58</sup>

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<sup>55</sup> De Waal (2006), *op. cit.*, p. 125. Amnesties, on the other hand, seem to be as inefficient as courts and indictments in preventing the resumption of conflict, as shown, to name but a few, in Sierra Leone, Uganda, or Haiti. See "Bringing the Wicked to the Dock: But does an international search for justice hurt or help the pursuit of peace?", *The Economist*, 9 March 2006.

<sup>56</sup> See Du Plessis, Max and Gevers, Christopher: "Darfur goes to the International Criminal Court (Perhaps)", *African Security Review*, Vol. 14, No. 2 (2005).

<sup>57</sup> See Grono, *op. cit.*, p. 625.

<sup>58</sup> Predictably, the casual observer in the West is either losing interest or getting more confused. In May 2006, *The New York Times* ran a controversial op-ed piece that blamed the Darfuri rebel groups for the both the beginning of the crisis and the failure of the peace negotiations, implied that humanitarian organizations like Save Darfur had only made matters worse, and called for the international community to let Sudan's army "handle any recalcitrant rebels." See Kuperman, Alan J.: "Strategic Victimhood in Sudan", *The New York Times*, 31 May 2006.



### 3. The ICC in Sudan: Concluding Remarks on Deterrence

Prosecutions have only been possible where the regime has either been militarily defeated or there has been a substantial change in the target regime's composition or agenda. This alone should not discourage advocates of ICC prosecution. Indictments can hamper the political career of the accused, and weaken their hold on power in the long run. Charles Taylor's arrest is a reminder that, as demands for accountability proliferate, war criminals will have to be careful about their travel destinations, and concerned about their eventual overthrow or retirement.

Skeptics of war crimes' courts argue that, since they convict few people, solve few social problems and grievances, and deter no one, international courts are in reality set up to mask the inaction of rich countries. Initially, the International Criminal Tribunal for former Yugoslavia was born out of an attempt to deflect criticism for European and American passivity during the mass atrocities in Bosnia.<sup>59</sup> It is plausible that the referral of the crisis in Sudan to the ICC was a second-best option to avoid sending NATO troops, a strategy to mask the inaction of rich countries. This argument has more than a kernel of truth, but it helps very little in an assessment of the judicial process itself. Like the ICTY in its context, the ICC will act independently of those that triggered this particular mechanism. Courts quickly gather its own momentum and resist political constraints. This general principle would be contradicted, for example, if Moreno Ocampo decided to indict members of the *Janjaweed* while leaving high-ranking government officials unmentioned.

Nonetheless, most disenchantment with international courts has to do with the failure to deliver as the promising tool of deterrence that advocates augured. To be sure, the debate around the promises and dangers of international criminal justice has been marred by exaggeration on both sides. On one side, detractors and skeptics blame international courts for the perpetuation of violence in specific settings and the potential to provoke the commission of more atrocities rather than less. On the other, advocates enthusiastically attach to the cause an ever-expanding list of unrealistic goals. Thus, war crimes tribunals are not only expected to help in the apprehension, trial, and conviction of criminals, but, in addition, to reinforce the rule of law, enhance accountability, stigmatize malefactors, educate citizenries, heal societies, pacify conflicts, and prevent future ones. In fact, the ability of international criminal law to deter criminals from their wrongdoing is one of the arguments most used by supporters, and most discussed by scholars and practitioners alike. Can prosecutions restrain the barbarians?<sup>60</sup>

The deterrent effect of international courts remains a plausible, but largely untested, assumption. Did the establishment of the ICTY deter Mladic at Srebrenica or Milosevic in Kosovo? Has the involvement of the International Criminal Court slowed down the violence in eastern DRC, northern Uganda, or western Sudan? Nicholas Kristof, arguably the Western journalist that has followed the crisis most closely, emphasizes the shrewd opportunism of Sudan's leaders and asserts that whenever the international community intensified its pressure on Khartoum, the level of killings and rape subsided.<sup>61</sup> Unfortunately, these tactics tell more about the ability of Sudan's leaders to "play the game" than about the deterrent power of international institutions. As NATO secretary general Javier Solana described Milosevic's tactics in 1998, "one village burned every day; but no more, so as not to upset NATO."<sup>62</sup>

<sup>59</sup> See Hazan, Pierre (2004): *Justice in a Time of War: The True Story Behind the International Criminal Tribunal for the Former Yugoslavia*, Texas A&M University Press.

<sup>60</sup> See Farer, *op. cit.*

<sup>61</sup> See Kristof, *op. cit.*

<sup>62</sup> Hazan, *op. cit.*, p. 118.



The case of Yugoslavia and the Serbian leaders is very pertinent to assess the prospects of the ICC and its deterrent potential in Sudan. During the late-90s, it seemed futile to prove that the court had dissuaded anyone from anything.<sup>63</sup> With hindsight, an evaluation of the court may yield more positive results. By the end of 1998, only four judgments had been delivered by the court and it was too soon to expect any deterrent effect. The ICTY's early years were slow and devoted to indicting subordinates and minions, while Karadzic, Mladic, or Milosevic were constantly reminded by Western diplomats that their political careers would not be touched. Contrary to the fears of French and British diplomats, the creation of the Tribunal and its sluggish progress towards its first trials did not seem to have any damaging effect on the peace process. Rather, by contributing to the gradual loss of power of Karadzic and Mladic, it made the Dayton Accords possible.<sup>64</sup> By 2005, most of the ICTY's indictees were in custody, and it is rumored that the Serbian government is finally going to surrender Mladic.

Regarding international courts and deterrence, two things can be argued more forcefully. First, while indictments do not stop atrocities, many signs indicate that they instill a certain fear, which signifies a deterrent potential. Serbs did not stop killing in Kosovo, but they took greater care to hide the evidence. In East Timor, the militias carried victims hundreds of miles to mass graves over the border, for fear of war-crimes investigators. The same applies to the leaders of Sudan.<sup>65</sup>

Second, stronger empirical evidence supports the claim, both in the domestic and in the international realm, that criminal law deters private justice and revenge. In Bosnia, Kosovo, Sierra Leone, East Timor, Cambodia, or Rwanda, hybrid and international courts inhibit retaliation by the affected group. Translated to the context of Darfur, it is arguable that successful prosecutions, and even the mere prospect of them, may inhibit present and future generations of Darfurians to avenge the atrocities by inflicting them on the perpetrators' kin.

Another factor deserves further exploration: is policy reversal even an option for Khartoum? By the time the Security Council took up the Darfur file, most of the atrocities had already been committed. Furthermore, while using paramilitary forces has the benefits of improving deniability, it gives the government limited control over its proxies. Locked in path dependence, Sudan's leaders would be discouraged from risking a drastic reversal of policies. Musa Hilal himself warned the government that they would not retreat. Perhaps Khartoum was well aware that it could not disarm the *Janjaweed* even if wanted to.<sup>66</sup> As it happens in many failed states in Africa, leaders turn very often to a strategy of warlordism, as a result of their own weakness and to shut out potential power rivals within the state bureaucracy, security apparatus, and traditional patronage networks. This strategy has its obvious shortcomings, and forces the regime to its chronic use in detriment of the country's well being. However, in the absence of traditional features of sovereignty, such as control over

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<sup>63</sup> It has been argued that while mass rape was prevalent as a tool of ethnic cleansing during the conflict in Bosnia, there were no 'rape camps' during the later Kosovo crisis and sexual violence was markedly less frequent. At this point, the ICTY had had more time to build precedents, issue indictments, and demonstrate that it was not a 'paper-tiger' institution. But is there a causal link? If there were, we would have to expect the Serbian leadership to show restraint across the whole range of atrocities, not only in sexual violence.

<sup>64</sup> See Robertson, Geoffrey (2002): *Crimes Against Humanity: The Struggle for Global Justice*, New York, The New Press, pp. 338-339.

<sup>65</sup> Farer quotes the following excerpts from an American intelligence official: "From the beginning, Mr. Milosevic sought to build a fire wall around himself, to distance himself from indictable criminal acts carried out against Muslims during the war in Bosnia [...]. Mr. Milosevic has been in meetings where brutal operations against civilians were discussed, but he has allowed his underlings to do the talking, apparently fearing that the conversations might be monitored by sophisticated listening devices." See Farer, *op. cit.*

<sup>66</sup> See De Waal *et al.* (2006), *op. cit.*, p. 122.



territory, the existence of a centralized monopoly of violence, and some societal legitimacy – in the Gramscian sense of the word-, the priority of the rulers of a weak state becomes their own survival.

In any case, it is difficult to establish causal or predictive hypotheses regarding the deterrent potential of war crime' courts. The enforcement mechanisms of international criminal law are still in their infancy, and the number of successful prosecutions has been paltry compared to the scale of crimes.

The purpose of penal sanctions in international law is largely coextensive with that in national legal orders. With regards to domestic criminal law, scholars and practitioners debate the intensity of deterrence, the relationship in terms of crime reduction between deterrence and harsher sentences, and the possibility and conditions of rehabilitation.<sup>67</sup> In the international realm, however, the link with deterrence is even weaker. Several reasons explain this: international criminal law has only been employed very recently and very selectively, a flaw that the permanence of the ICC expects to alleviate in the long term. Since international courts do not have automatic mechanisms to apprehend suspected criminals and enforce their decisions, and have to rely on the support of other actors, impunity rather than accountability still dominates the conduct of war. One widely accepted dictum of domestic law enforcement is that a high probability of punishment generally deters more effectively than a very severe sanction rarely applied. This condition has yet to materialize in the international realm.<sup>68</sup> In sum, to be effective, deterrence has to be credible.

Secondly, the threat of punishment –let alone an empty threat- has a limited impact on human behavior in a culture already intoxicated with hatred and violence. To expect that the *ad hoc* courts would have brought instant relief and reconciliation to Rwanda or former Yugoslavia misapprehends the complexities of these situations and the depth of the social wounds left in their wake. Once violence has erupted, threats of punishment can do little to achieve immediate deterrence. However, the outbreak of such violence *can* be inhibited, and its resumption in post-conflict situations prevented, because it often results from an elite's deliberate political choices. Needless to say, the number of people that end up at the dock is minuscule in comparison to the number of persons that took part in the atrocities. Since acting otherwise might be undesirable and unfeasible, international criminal law generally targets the top leadership responsible for the commission of the worst atrocities. Contrary to the simplistic myths of primordial 'tribal' hatred, most conflicts are neither historically inevitable nor the spontaneous expression of collective blood lust. They result from the deliberate incitement of ethnic hatred and violence by which ruthless demagogues and warlords cement their power. Thus, with a measured and careful application of the principle of command responsibility, effective and fair prosecutions at international tribunals can become a powerful tool –albeit not the only one- to enhance prevention. Political leaders would be forced to calibrate their decisions with more caution, and generals would be compelled, for example, to better train their combatants on the specific prohibitions against sexual violence, or discipline breaches of compliance.<sup>69</sup>

An over-emphasis on the concept of short-term deterrence is of dubious analytical value. For the broader purposes of international criminal law and prevention, it should be more relevant to the cause of international justice to see if decades-long consistent jurisprudence succeeds in moving the conduct of war from a culture of impunity to a culture of accountability, in which the preventive benefits of the law would logically mirror those of

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<sup>67</sup> See Farer, *op. cit.*, pp. 91-92.

<sup>68</sup> *Ibid.*, p. 92.

<sup>69</sup> See Akhavan, *op. cit.*, p. 7.



domestic legal systems. Besides, deterrence remains a complicated concept when analyzed in the backdrop of other coercive measures, such as the deployment of troops, the use of force, or the possession of nuclear weapons. For example, why does a thin blue line of peacekeepers in Macedonia have a strong deterrent effect, whereas the threat of the full force of NATO or the U.S. military fails to ward off Hussein or Milosevic?

As Professor David Wippman observed in 1999, the general deterrent effect of international criminal prosecutions “seems likely to be modest and incremental, rather than dramatic and transformative.”<sup>70</sup> The lack of empirical evidence does not demonstrate that the international application of the rule of law fails in its goal of prevention, but that this movement is still young, incomplete, and needs firmer commitment and support from the other actors. In that sense, failure to dissuade the government of Sudan or the *Janjaweed* is the weakest argument employed by those that paint a dark picture for the ICC in Darfur, or remain critical of international justice initiatives in general.

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<sup>70</sup> See Wippman, *op. cit.*



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