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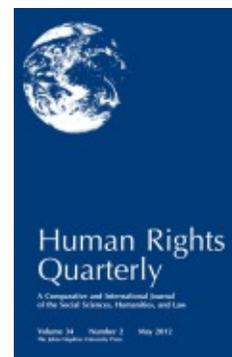
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## **Caution and Confrontation in the International Criminal Court's Pursuit of Accountability in Uganda and Sudan**

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# Caution and Confrontation in the International Criminal Court's Pursuit of Accountability in Uganda and Sudan

Victor Peskin\*

## ABSTRACT

This article addresses the unfolding pursuit of state cooperation by the chief prosecutor of the International Criminal Court (ICC). It explains that the prosecutor's recent shift from a cautionary to a confrontational pursuit is due to 1) the failure to persuade states to hand over suspects and 2) the lack of international backing for arrests amid the quest for a negotiated peace to ongoing conflicts. The article focuses on the prosecutor's forceful campaign to apprehend rebel leaders from Uganda and government suspects implicated in atrocities in Darfur, including President Bashir of Sudan.

## I. INTRODUCTION

On 29 January 2004, Luis Moreno-Ocampo, the chief prosecutor of the International Criminal Court (ICC), held a news conference in London to announce a major step forward for the nascent war crimes tribunal. With Ugandan President Yoweri Museveni by his side, the prosecutor announced his plans to investigate the Lord's Resistance Army (LRA), the notorious

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Ugandan rebel group implicated in atrocities, including the widespread abduction of children and their forced conscription as soldiers. Following its creation in July 2002, the ICC focused on the institutional challenges of building a court from scratch and, at the time of this press conference, had not yet begun a war crimes investigation.<sup>1</sup> A year and a half later in London, the ICC chief prosecutor was eager to show that he could move quickly in the pursuit of criminal accountability.<sup>2</sup>

Yet even as Moreno-Ocampo sought to project an image of prosecutorial efficacy, his press conference signaled a cautionary posture and deferential approach to state power. Rather than cast a wide net leading to investigations of rebel and state crimes, the prosecutor indicated a sole focus on the rebels.<sup>3</sup> In addition, rather than exercise his own prerogative to open an investigation of the LRA, Moreno-Ocampo sought an invitation from the Ugandan government. In December 2003, the government made a formal request that the ICC begin investigating LRA atrocities in Uganda.<sup>4</sup> A month later in London, Museveni was at the prosecutor's side offering his state's endorsement of the ICC's probe of the rebels that had been at war with the government since the late 1980s. The joint public appearance of the prosecutor and the president presented a lasting image of the ICC's dependence on state power and its need to cultivate state support. In turn, this created serious doubts about the prosecutor's independence and how vigorously, or even whether, he would pursue accusations of army involvement in war crimes.

Moreno-Ocampo's apparent deference to the Ugandan government seemed part of a larger submission to state sovereignty aimed at receiving state cooperation in investigations and prosecutions. In a bid to bolster such cooperation, the chief prosecutor pursued a policy of encouraging states to

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1. Rome Statute of the International Criminal Court, *adopted* 17 July 1998, U.N. Doc. A/CONF.183/9 (1998) (*entered into force* 1 July 2002). The formal inauguration of the Court was held in March 2003. Chief Prosecutor Moreno-Ocampo began his nine-year term in June 2003.
  2. After concluding a preliminary investigation, Moreno-Ocampo announced in July 2004 that there were reasonable grounds to open a formal investigation in northern Uganda. Press Release, Int'l Criminal Court, Prosecutor of the International Criminal Court Opens an Investigation into Northern Uganda (29 July 2004). ICC Press Releases are available at <http://www.icc-cpi.int/Menus/ICC/Press+and+Media/Press+Releases/>.
  3. The title of the ICC press release announcing the Ugandan referral signaled the prosecutor's focus on LRA crimes. The title indicated that Museveni's referral specifically concerned LRA conduct. Nothing in this initial press release questioned the narrow terms of the referral. Press Release, Int'l Criminal Court, President of Uganda Refers Situation Concerning the Lord's Resistance Army (LRA) to the ICC (29 Jan. 2004). On the prosecutor's focus on LRA crimes, also see BENJAMIN SCHIFF, *BUILDING THE INTERNATIONAL CRIMINAL COURT 198-99* (2008).
  4. Press Release, Int'l Criminal Court, President of Uganda refers situation concerning the Lord's Resistance Army (LRA) to the ICC (29 Jan. 2004).

invite the ICC in to open investigations.<sup>5</sup> Like Uganda, Moreno-Ocampo sought and received a state referral from the Democratic Republic of the Congo (DRC) to investigate atrocities in the northeast Ituri region.<sup>6</sup> On its own accord, the Central African Republic requested an ICC investigation.<sup>7</sup> For Sudan, however, the chief prosecutor received a Security Council referral to investigate the atrocities in the western region of Darfur.<sup>8</sup> As he did with the other countries, Moreno-Ocampo continued his deference, taking care not to run afoul of the Sudanese government from which he hoped to receive cooperation. The prospects for such support were slim insofar as the Security Council seemed primarily to be calling for investigations of atrocities linked to the government and the state-supported Janjaweed militia. Moreno-Ocampo began the high-profile Darfur investigation in low-profile, with the intent of tempering Sudan's considerable suspicion of the Court by publicly crediting the government for its cooperation, even though its actual assistance was minimal.

For many international human rights activists, Moreno-Ocampo's deferential approach represented an aversion to confronting states to cooperate with the Court.<sup>9</sup> For these activists, the chief prosecutor seemed to be cut from the same cloth as the international diplomats who had dealt so softly and ineffectually with Khartoum since the war in Darfur began in early 2003. Such assessments were particularly evident when Moreno-Ocampo was contrasted with Carla Del Ponte, the chief prosecutor of the International Criminal Tribunal for the Former Yugoslavia (ICTY), who often seemed to relish confrontation with defiant states. On the other hand, a number of

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5. The Office of the Prosecutor, Report on the Activities Performed During the First Three Years (June 2003–June 2006), 12 Sept. 2006, at 2.
  6. The ICC received a state referral from the Democratic Republic of Congo in March 2004. Press Release, Int'l Criminal Court, Prosecutor Receives Referral of the Situation in the Democratic Republic of Congo (19 April 2004). The prosecutor decided to open a formal investigation in Congo in June 2004. Press Release, Int'l Criminal Court, The Office of the Prosecutor of the International Criminal Court Opens its First Investigation (23 June 2004).
  7. The ICC received a state referral from the Central African Republic (CAR) in January 2005. Press Release, Prosecutor Receives Referral Concerning Central African Republic (7 Jan. 2005). The prosecutor decided to open a formal investigation in CAR in May 2007. Press Release, Int'l Criminal Court, Prosecutor Opens Investigation in the Central African Republic, (22 May 2007). For an explanation of the events that led to the referral and the role of CAR civil society organizations in the referral, see Marlies Glasius, *Global Justice Meets Local Civil Society: The International Criminal Court's Investigation in the Central African Republic*, 33 *ALTERNATIVES* 413 (2008).
  8. *Referring the Situation in Darfur Since 1 July 2002 to the Prosecutor of the International Criminal Court*, adopted 31 Mar. 2005, S.C. Res. 1593, U.N. SCOR, 60th Sess., 5158th mtg., U.N. Doc. S/Res/1593 (2005). The prosecutor formally opened an investigation into the situation in Darfur in June 2005.
  9. Interviews with international human rights activists, The Hague (June, Nov. 2007); Brussels (May 2008).

Western diplomats credited the prosecutor for his nuanced pursuit of cooperation and respectful approach to states.<sup>10</sup> What activists saw as weakness, diplomats viewed as sensitivity to their concern that a too vigorous pursuit of arrests could undermine efforts to reach negotiated resolutions to ongoing armed conflicts.

But just as Moreno-Ocampo was becoming increasingly defined by his diplomatic caution, he began to shift course. Halfway through 2007, the prosecutor's statements and actions took a more adversarial turn and tone. This shift was most apparent in his approach to Uganda and Sudan, the Court's most high-profile and most challenging situations. In Uganda, Moreno-Ocampo became increasingly resolute in the face of growing domestic and international pressure to drop his bid for the arrest of five LRA leaders. Moreno-Ocampo had previously indicated that the LRA suspects need not be prosecuted by the ICC as long as a domestic alternative was proposed that would be consistent with the Court's founding document, the Rome Statute. Though as the Ugandan government's peace talks with the rebels progressed, Moreno-Ocampo made it clear that he would not drop his pursuit of the LRA suspects. Having previously portrayed himself as both a prosecutor and a peacemaker, Moreno-Ocampo now said he was unwilling to subordinate the pursuit of prosecutions to the quest for a negotiated peace. Such a firm position, he argued to his critics, offered the best prospect of realizing justice and peace.

In Sudan, the prosecutor became openly confrontational with the government and unambiguously critical of its noncompliance with the Court. Likewise, he began to criticize the "international community" for failing to press Khartoum to cooperate. The prosecutor's willingness to challenge state authority was highlighted by his audacious, though ultimately unsuccessful, attempt to have one of the Sudanese suspects arrested by having his Saudi Arabia-bound plane diverted.<sup>11</sup> This move recalled the strategic boldness of the ICTY chief prosecutors in their pursuit of Balkan fugitives and underscored Moreno-Ocampo's intention to act outside the confines of diplomatic protocol. The prosecutor's confrontational approach reached an apex in his July 2008 bid to charge a sitting head of state, Sudanese President Omar Hassan al-Bashir, with genocide, crimes against humanity, and war crimes and seek an ICC warrant for his arrest.<sup>12</sup>

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10. Interviews with Western diplomats, The Hague (June, Nov. 2007); Brussels (May 2008).
  11. Wasil Ali, *ICC Planned to Divert Plane of Darfur War Crimes Suspect*, SUDAN TRIBUNE, 6 June 2008, available at <http://www.sudantribune.com/spip.php?article27422>.
  12. Press Release, Int'l Criminal Court, ICC Prosecutor Presents Case Against Sudanese President, Hassan Ahmad AL BASHIR, for Genocide, Crimes Against Humanity and War Crimes in Darfur (14 July 2008).

What explains Moreno-Ocampo's initially cautious approach to the quest for state cooperation and his subsequent shift to a more adversarial stance? While the actions of the ICC chief prosecutor have received growing attention in recent years, there has been relatively little scholarly analysis of how he interacts with states to obtain cooperation<sup>13</sup> and even less focus on the *change* in his approach to states. Moreno-Ocampo's shift to an adversarial pursuit of state cooperation has been largely overlooked, perhaps in part because it has occurred so recently. For instance, Kenneth Rodman's August 2008 *Human Rights Quarterly* article, which offers a probing critique of the ICC's deterrent potential in Darfur, draws attention to the prosecutor's cautious approach toward Sudan, but does not acknowledge his newly assertive role.<sup>14</sup> The literature's neglect of the role of the ICC prosecutor in the pursuit of state cooperation parallels a neglect of the role played by other chief prosecutors in their quest for cooperation.<sup>15</sup> The aim of this article is to document this important transformation in the ICC prosecutor's approach to accountability and to explain its significance for the Court's efforts to become a viable and lasting global institution.

## II. THE ROLE OF THE CHIEF PROSECUTOR IN THE PURSUIT OF STATE COOPERATION

The ICC and the other contemporary international tribunals face a challenge that did not confront their predecessors at Nuremberg and Tokyo: in the absence of enforcement powers, how can they deliver on the promise of criminal accountability? Without an army of its own, each of today's tribunals is at the mercy of states—particularly states complicit in atrocities—for the assistance necessary to investigate crimes and bring suspects into custody and to trial.

Despite their enduring dependence on states, today's international tribunals do have the capacity to take effective action in their quest for state cooperation. This is particularly true of the tribunal's chief prosecutor, who

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13. Notable exceptions include: Phil Clark, *Law, Politics and Pragmatism: The ICC and Case Selection in the Democratic Republic of Congo and Uganda*, in *COURTING CONFLICT? JUSTICE, PEACE AND THE ICC IN AFRICA* 37 (Nicholas Waddell & Phil Clark eds., 2008); Alex de Waal, *Law, Darfur, the Court, and Khartoum: The Politics of State Non-Cooperation*, in *COURTING CONFLICT?*, *supra*, at 29; Steven D. Roper & Lilian A. Barria, *State Co-operation and International Criminal Court Bargaining Influence in the Arrest and Surrender of Suspects*, 21 *LEIDEN J. INT'L L.* 457 (2008); William A. Schabas, *Prosecutorial Discretion v. Judicial Activism at the International Criminal Court*, 6 *J. INT'L CRIM. JUST.* 731, 749–53 (2008); BENJAMIN N. SCHIFF, *BUILDING THE INTERNATIONAL CRIMINAL COURT* 194–247 (2008).
  14. Kenneth A. Rodman, *Darfur and the Limits of Legal Deterrence*, 30 *HUM. RTS. Q.* 529, 554–55 (2008).
  15. VICTOR PESKIN, *INTERNATIONAL JUSTICE IN RWANDA AND THE BALKANS: VIRTUAL TRIALS AND THE STRUGGLE FOR STATE COOPERATION* 16–18 (2008).

is the most visible and vital actor both inside and outside the tribunal's courtrooms. Beyond initiating investigations and prosecutions, the chief prosecutor is the official who is most responsible for leading the Court's effort to prod targeted states to cooperate. The very lack of enforcement powers has prompted the chief prosecutor to take measures beyond the arena of the courtroom to increase the prospects of cooperation. Going beyond the courtroom, of course, runs the risk of politicizing international justice.

To best understand the political dimensions of the ICC and how its chief prosecutor engages in politics to further his bid for cooperation, it is helpful to use the UN ad hoc International Criminal Tribunals for the Former Yugoslavia (ICTY) and Rwanda (ICTR) as points of comparison. This will illuminate the different legal and political contexts in which each type of tribunal operates as well as the distinct challenges confronting the ICC. In certain respects, these two ad hoc tribunals and the ICC encounter a similar struggle for cooperation and have similar tools at their disposal. In this regard, the actions taken by the chief prosecutors of the ICTY and ICTR provide important precedents for their counterpart at the ICC. The chief prosecutors of the ICTY and ICTR have developed a repertoire of adversarial and conciliatory measures to prod states complicit in atrocity to cooperate, with the further aim of winning over powerful international actors and convincing them to do the same.

The ad hoc tribunals' struggle for cooperation from the targeted states of the former Yugoslavia and Rwanda can be likened to a virtual trial. This virtual trial—or what is also referred to as a “trial of cooperation”<sup>16</sup>—is fought over whether the states will comply with their legal obligation to cooperate with the tribunals. The idea of a “trial of cooperation” offers a conceptual framework that helps illuminate the features of the power struggles beyond the courtroom. These power struggles occur between the ad hoc tribunals, targeted states, and influential international actors. Whereas the actual courtroom trials pit the prosecution against the individual defendant over war crimes charges, the “trial of cooperation” is a virtual trial that pits the tribunal against the state and state leaders over charges of their obstruction of the tribunal's legal process. Whereas international jurists sit in judgment of indicted war criminals in the actual courtroom trial, powerful international actors—such as the UN Security Council, the United States, and the European Union—sit in unofficial but influential judgment of states in the virtual trial.<sup>17</sup>

A “trial of cooperation” launches a virtual “prosecution” of a targeted state that seeks to expose and shame the state's noncompliance in the court of international public opinion. Even as shaming can strengthen the chief

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16. *Id.* at 9.

17. *Id.* at 10.

prosecutor's leverage, it is rarely enough to prod a defiant state to reverse course. At times, shaming may actually make a targeted state more resistant because it can fuel nationalists' claim that the tribunal is moving away from its purported focus on individual guilt to a more expansive focus on shaming and blaming the state and nation.<sup>18</sup> Shaming also runs the risk of casting the prosecutor as someone to fear instead of trust, which can escalate confrontation and scuttle the prospects of cooperation. Thus, a prosecutor's quest for cooperation will often lead him to adopt a conciliatory approach to a recalcitrant state, offering concessions in order to raise the prospects that the state will provide some cooperation rather than none at all.<sup>19</sup> As long as conciliation is bearing some results and leaves open the prospects of further compliance, a prosecutor is likely to refrain from going on the offensive against a state.

Initially preferring a conciliatory approach to the Sudanese government, Chief Prosecutor Moreno-Ocampo followed the logic of delaying confrontation for as long as possible. His incentive to do so may have been deepened by concerns unique to the ICC. Moreno-Ocampo doubtlessly understood the structural and political constraints he faced as the first chief prosecutor of the ICC. The ICC has been touted as a global court because of its vast territorial jurisdiction that surpasses that of any of the ad hoc tribunals. Yet, it is not truly a global court insofar as its prosecutorial jurisdiction and political backing are far from universal. The ICC is not a part of the UN, but is an institution born from a multi-lateral treaty—signed in Rome in July 1998—that states consent to join. State parties to the Rome Statute are obliged to cooperate with the ICC, but non-state parties are under no such requirement. However, when the Security Council refers a situation to the ICC regarding a non-state party, such as Sudan, that state is under a legal obligation to cooperate with the Court. By contrast, all UN member states are mandated to cooperate with the Security Council-created ICTY and ICTR.<sup>20</sup>

The ICC and the international human rights movement have registered increasing success in attracting nations to ratify the Rome Statute and become state parties, bringing the total to 108 states by mid-April 2009.<sup>21</sup> Yet, the increasing number of state parties has not solved the problem that arises from some of the world's most influential states—such as the United States, China, and Russia—not joining the Court. Thus in most circumstances, the

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18. *Id.* at 10, 238.

19. *Id.* at 12.

20. Statute of the International Tribunal for the Former Yugoslavia, *adopted* 25 May 1993, S.C. Res. 827, U.N. SCOR, 3217th mtg., U.N. Doc. S/25704 annex (1993); Statute of the International Tribunal for Rwanda, *adopted* 8 Nov. 1994, S.C. Res. 955, U.N. SCOR, 3453d mtg., U.N. Doc. S/RES/955 annex (1994).

21. For a list of states that have ratified the Rome Statute, see ICC—The States Parties to the Rome Statute, *available at* <http://www2.icc-cpi.int/Menus/ASP/states+parties/The+States+Parties+to+the+Rome+Statute.htm>.

ICC cannot count on crucial international backing to press defiant states to cooperate with ICC investigations. Operating from a less robust political foundation than the ICTY and ICTR, the ICC chief prosecutor, at least initially, has reason to proceed carefully to draw non-state parties to the Court. Indeed, what was ostensibly given to the ICTY and ICTR, by virtue of their Security Council mandate that binds all UN members to support these tribunals, must be earned by the ICC through its campaign for universal ratification of the Rome Statute.

A low-profile approach to persuading targeted states to cooperate may be a strategic way not only to cultivate support from these states, but also to cultivate support from influential non-state parties, such as the United States, that are wary of a crusading prosecutor who seems eager to challenge state authority. With regard to the United States, the ICC's immediate goal has not been to persuade it to ratify the Rome Statute, a distant prospect during the Bush administration and perhaps during the Obama administration as well. Rather, the aim is to demonstrate that its suspicion of an unaccountable prosecutor is unfounded and that selective support may actually be in Washington's best interest, as the Bush administration conceded with Darfur. Despite its efforts in early 2005 to derail a Security Council referral of the Darfur situation to the ICC in favor of a proposed UN-African Union court, Washington did not block the Darfur referral in March of that year. In a further softening of its once hostile stance toward the ICC, Bush administration officials later stated that, if requested, the administration would consider lending assistance to the prosecutor's Darfur investigations.<sup>22</sup>

Also key to understanding Moreno-Ocampo's early diplomatic caution is his need to deepen the political support the ICC receives from state parties. State parties have aided the ICC in vital ways: providing funding, promoting universal ratification of the Rome Statute, and combating the anti-ICC attacks leveled by the United States in the early years of the Bush administration. However, Moreno-Ocampo has found himself needing far greater support from these states when it comes to his bid for the arrests and transfer of suspects.<sup>23</sup> For example, the European Union, which advertises itself as a champion of the ICC, has not, until recently, pressed the Khartoum government to hand over suspects. The EU's reticence stems from its interest in persuading the government to allow an expanded peacekeeping force into Darfur and bring a resolution to the conflict.<sup>24</sup> "Everyone is committed to the Court, but then comes reality," an EU official said in explaining how the

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22. Nora Boustany, *Official Floats Possibility of Assistance to Hague Court*, WASH. POST, 12 June 2007, at A20.

23. Interviews with ICC officials, The Hague (June 2007).

24. Interviews with ICC officials and Western diplomats, The Hague (June, Nov. 2007); Brussels (Dec. 2006; May 2008).

international community's dependence on Sudan has led to tepid advocacy on behalf of the ICC.<sup>25</sup> The lack of European resolve combined with the absence of strong support from other state parties and, the international community generally, has seriously undermined the Court's efforts to bring Sudanese war crimes suspects to trial. In an effort to build the political foundations of the Court amid this climate of limited international support, the chief prosecutor initially treaded carefully.

As this article's examination of the Uganda and Sudan case studies seeks to demonstrate, Moreno-Ocampo's approach was also shaped by the complex dynamics of carrying out war crimes investigations during armed conflict. All of the ICC's four investigations—Uganda, Darfur, the DRC, and the Central African Republic—have occurred during wartime. In this context the prosecutor initially proceeded cautiously in an apparent attempt to lend credence to the Court's foundational claim that international war crimes prosecutions advance lasting peace. The prosecutor's concern was particularly evident in Uganda, where mediators tried to bring a negotiated end to the war in the north between government forces and the LRA. Beset by criticism that his investigations and the Court's arrest warrants against LRA suspects posed a threat to peace negotiations, Moreno-Ocampo stepped carefully (at least when compared to how other chief prosecutors, such as Richard Goldstone at the ICTY approached peace talks). From the standpoint of influential civil society and religious leaders in northern Uganda, however, the prosecutor's very decision to pursue LRA war crimes and to do so at the behest of President Museveni was perceived as reckless interference in a delicate quest to bring an end to a long and devastating war. As a representative of a fledgling institution in the process of establishing its legitimacy and its claim of deterring atrocities, the ICC chief prosecutor sought to avoid blame for potentially undermining efforts to resolve the conflict in northern Uganda. Toward this end, he appeared reluctant to push vigorously for the immediate arrest of the LRA suspects whom the government needed as partners in peace.

### III. THE CHANGING ROLE OF CHIEF PROSECUTOR MORENO-OCAMPO

Given the array of factors that drove Moreno-Ocampo's cautionary approach, what then motivated him to change course so markedly in 2007? The structural and political constraints that weakened the ICC and seemingly informed the prosecutor's caution did not suddenly change in the five years since the

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25. Interview with EU official, Brussels (May 2008).

Court was created. The ICC remained a fragile institution lacking political backing from some of the world's most powerful states. This being the case, Moreno-Ocampo would seem to have a continuing interest in eschewing a confrontational approach that might alienate would-be supporters among non-state parties and state parties as well. Nor had the potential threat the ICC posed to peace efforts in Africa dissipated. In this regard, there was still ample reason for Moreno-Ocampo not to push too strongly for arrests.

Yet by mid-2007, and even earlier, there were ample signs that Moreno-Ocampo's cautionary approach to state cooperation was yielding few tangible results. Publicly, Court officials expressed satisfaction with the opening of investigations in four countries and the issuance of a number of arrest warrants, but serious doubts remained about the ability of this new court to fulfill its primary mission of holding trials. The key problem that remained was the ICC's lack of enforcement powers and the absence of international support to press for the handover of suspects. As the fifth anniversary of the ICC approached in July 2007, the Court had only one suspect in custody, Thomas Lubanga, from the DRC. (Over the next year, the ICC obtained custody of three more Congolese suspects, one of whom, Jean-Pierre Bemba, was to stand trial for his alleged involvement in atrocities in the Central African Republic.)<sup>26</sup>

For a chief prosecutor, the wisdom of a conciliatory approach ultimately has to be measured against outcomes in the area of arrests and trials. In Uganda and Sudan, the Court's two most high-profile situations, the chief prosecutor had no suspects in custody. In Uganda, the prospects for arrests looked slim given the atmosphere of attempted reconciliation at the negotiating table between the Uganda government and the LRA. In Sudan, the ICC faced an openly defiant government. As the following case studies of Uganda and Sudan demonstrate, an explanation for Moreno-Ocampo's shift to an adversarial stance can be found in the diminishing prospects of cooperation. As one veteran international human rights activist observed, the prosecutor came to "the realization that the softy approach wasn't really going anywhere."<sup>27</sup>

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26. Germain Katanga and Mathieu Ngudjolo Chui were transferred from Congo to the ICC in October 2007 and February 2008, respectively. They stand accused of crimes committed in northeastern Congo. See Warrant of Arrest for Germain Katanga, Pre-Trial Chamber 1, 2 July 2007, available at <http://www.icc-cpi.int/iccdocs/doc/doc349648.PDF>; Warrant of Arrest for Mathieu Ngudjolo Chui, Pre-Trial Chamber 1, 6 July 2007, available at <http://www.icc-cpi.int/iccdocs/doc/doc453054.PDF>. In July 2008, Jean-Pierre Bemba was transferred to the ICC from Belgium, where he had been arrested in May. Bemba faces charges of carrying out atrocities in the Central African Republic. See Warrant of Arrest for Jean-Pierre Bemba Gombo, Pre-Trial Chamber III, 23 May 2008, available at <http://www.icc-cpi.int/iccdocs/doc/doc504390.PDF>.

27. Interview with international human rights activist, Brussels (May 2008).

Although conciliation can be an important way to leverage some cooperation, its continued use without significant results can exacerbate a perception of a chief prosecutor's capitulation to state power. A prosecutor who primarily resorts to a diplomatic approach may signal to a state that it can continue to flaunt the Court without fear of public criticism or international sanction. Of course, an adversarial approach does not necessarily lead to cooperation either because a state's interest in withholding cooperation may be deeply entrenched. Moreover, confrontation with a targeted state may further complicate diplomatic efforts—presumably planned or already underway—to obtain the state's cooperation in negotiating a resolution to armed conflict. But confrontation may offer the best chance of building the international pressure necessary to move a recalcitrant state to eventually reverse course and arrest suspects. Confrontation signals the prosecutor's determination to counter state defiance, which can pay dividends of its own by raising the institution's profile and galvanizing international human rights organizations to rally behind his campaign.

The prosecutor's decision to take a more forceful stand with regards to state cooperation may have also been influenced by the stinging criticism he received from international human rights activists and luminaries in the international justice field, such as Antonio Cassese, the founding ICTY chief justice and the head of the UN inquiry that investigated the violence in Darfur in late 2004 and early 2005.<sup>28</sup> That the ICC was the product of a broad-based international NGO movement meant that there were many stakeholders who closely scrutinized its every step. These ICC backers could be unsparing critics. A notable example is Cassese's public lament that Moreno-Ocampo's approach to Darfur "cannot help but mystify all those who have laid great stock in the ICC's ability to make rapid and significant headway."<sup>29</sup> For Moreno-Ocampo, taking a more assertive stand on the cooperation issue grew in importance as the mid-point of his single nine-year term in office approached and the need to ensure his legacy as an effective prosecutor became a more pressing concern.<sup>30</sup> As he stated, arrests are essential "for the ultimate efficiency and credibility of the Court."<sup>31</sup>

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28. See Report of the International Commission of Inquiry on Darfur to the United Nations Secretary-General, 25 January 2005, available at [http://www.un.org/News/dh/sudan/com\\_inq\\_darfur.pdf](http://www.un.org/News/dh/sudan/com_inq_darfur.pdf).

29. Antonio Cassese, *Is the ICC Still Having Teething Problems?*, 4 J. INT'L CRIM. JUST. 438 (2006).

30. Moreno-Ocampo began his term as chief prosecutor in mid-June 2003. Press Release, Int'l Criminal Court, *The Solemn Undertaking of the Prosecutor* (13 June 2003).

31. Luis Moreno-Ocampo, Address at the International Conference on Building a Future on Peace and Justice, Nuremberg (25 June 2007), available at [http://www.peace-justice-conference.info/download/speech\\_moreno.pdf](http://www.peace-justice-conference.info/download/speech_moreno.pdf).

#### IV. THE ICC IN SUDAN: FROM CONCILIATION TO CONFRONTATION

In his quest for accountability in Sudan, Chief Prosecutor Moreno-Ocampo possesses leverage that he does not have in Uganda, the DRC, or the Central African Republic, the three other countries in which the ICC prosecutor has opened formal investigations. Because the Security Council referred the Darfur situation to the ICC in a March 2005 resolution, the Court has the legal and ostensible political backing of the world body.<sup>32</sup> Such Council support gives the ICC greater potential for enforcement than when the Court receives a referral from a state or when the prosecutor initiates an investigation. In Darfur only, therefore, the ICC possesses nearly the same level of legal authority to demand state cooperation from Sudan as the ICTY and ICTR have over the governments of the former Yugoslavia and Rwanda.

A Security Council referral is particularly important in a state such as Sudan that has not ratified the Rome Statute and would not otherwise bear a legal obligation to cooperate without a Council referral. In the Darfur situation, the ICC's hand is also strengthened by the requirement that the chief prosecutor report to the Security Council bi-annually on the progress of his investigations.<sup>33</sup> This provides a high-profile forum to expose and potentially condemn non-compliance with an eye toward pressing the Council to take punitive action against Sudan.

Notwithstanding these advantages, the ICC has faced the most formidable challenge to its authority in Sudan. The Khartoum government is a staunchly defiant regime that has been implicated in widespread atrocities in Darfur<sup>34</sup> and has shown little interest in cooperating with the Court. This defiance has grown in intensity with Moreno-Ocampo's moves to charge two Sudanese suspects in early 2007 and then to target Sudanese President Bashir for prosecution in July 2008.<sup>35</sup> The government's confrontational posture was on display when the prosecutor requested arrest warrants from the ICC pre-trial chamber<sup>36</sup> for Ahmad Harun, a Sudanese government minister, and Ali Kushayb, a leader of the government-backed Janjaweed militia, in

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32. *Referring the Situation in Darfur*, *supra* note 8.

33. *Id.*

34. For an overview of the Darfur conflict, see JULIE FLINT & ALEX DE WAAL, *DARFUR: A SHORT HISTORY OF A LONG WAR* (2005); GERARD PRUNIER, *DARFUR: 21ST CENTURY GENOCIDE* (2008).

35. Press Release, Int'l Criminal Court, I.C.C. Prosecutor Presents Case Against Sudanese President, Hassan Ahmad Al-Bashir, for Genocide, Crimes Against Humanity and War Crimes in Darfur (14 July 2008).

36. The Trial Division is comprised of the Pre-Trial Chamber, the Trial Chamber, and the Appeals Chamber. There are currently three pre-trial chambers, each of which has three judges. Pre-Trial Chamber I is assigned to the Darfur and Congo situations, Pre-Trial Chamber II is assigned to the Uganda situation, and Pre-Trial Chamber III is assigned to the Central African Republic situation.

connection with atrocities in Darfur. In an attempt to belittle international pressure to hand over the two suspects, Interior Minister Al-Zubayr Bashir Taha promised to “cut the throat of any international official . . . who tries to jail a Sudanese official in order to present him to the international justice.”<sup>37</sup> Describing the Court’s difficulty in obtaining cooperation, one high-placed ICC official unsurprisingly said in a June 2007 interview that the situation is “almost impossible. We cannot do anything within Sudan.”<sup>38</sup>

In theory, the Security Council’s referral of the Darfur situation would embolden Moreno-Ocampo to deal strongly with the Bashir government. Yet from mid-2005 until mid-2007, the prosecutor took a decidedly cautious stance toward Khartoum, exhibiting little of the adversarial rhetoric of the ICTY chief prosecutors in response to non-compliance in the former Yugoslavia. The government’s fear of the ICC was brewing well before the arrest warrants were issued for Harun and Kushayb. The government’s fear was first stoked by the UN International Commission of Inquiry on Darfur report delivered in January 2005, which found war crimes and crimes against humanity being committed in Darfur.<sup>39</sup> The Security Council’s September 2004 decision to authorize the inquiry was, according to the Sudan analysts Julie Flint and Alex de Waal, “a shot aimed right at the heart of the security cabal in Khartoum.”<sup>40</sup> The Commission, led by Antonio Cassese, prepared a secret list of fifty-one potential suspects and recommended that the ICC investigate the Darfur atrocities. The Bashir government feared that if the ICC obtained Security Council authorization to investigate, it might well target many of those on the Commission’s list of suspects, reaching to the highest levels of government. Moreno-Ocampo’s apparent aim was to defuse the Bashir government’s mounting suspicion of the ICC.

When Moreno-Ocampo announced his decision to open a formal investigation in June 2005, he reached out to the Khartoum government to establish a foundation for future cooperation. A key part of this effort was to correct the government’s perception that the ICC would target all or even many of the suspects on the Commission’s list or that the Court would carelessly trump Sudan’s sovereignty. Moreno-Ocampo walked a fine line. Even as he began to pursue incriminating evidence against suspects tied to the Sudanese government, he also sought to establish a close working relationship

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37. Sudanese Minister Threatens Action Against International Court Proponents, text of report by London-based newspaper, AL-HAYAT, supplied by BBC WORLDWIDE MONITORING, 1 Mar. 2007.

38. Interview with ICC official, The Hague (June 2007).

39. *Report of the International Commission of Inquiry on Darfur to the United Nations Secretary-General* (25 Jan. 2005), available at [http://www.un.org/News/dh/sudan/com\\_inq\\_darfur.pdf](http://www.un.org/News/dh/sudan/com_inq_darfur.pdf).

40. FLINT & DE WAAL, *supra* note 34, at 129.

with government officials. The prosecutor's reliance on the government was three-fold. First, he turned to Sudan for assistance in determining whether, under the principle of complementarity, its domestic courts were genuinely able or willing to undertake war crimes cases being pursued by the ICC. The ICC was created as a court of last resort and could only intervene when domestic courts could not be counted on to deliver credible justice. Second, the prosecutor needed Sudan to hand over evidence that could aid the prosecutor's investigations in Darfur. Third, he would eventually rely on the government to hand over indicted suspects for trial in The Hague.

To comply with the complementarity principle, Moreno-Ocampo sought to determine if his cases would be admissible for ICC prosecution. To do so he assessed whether suspects under ICC scrutiny were also being pursued by Sudanese courts for the same alleged conduct, and if so, whether the domestic prosecutions would be credible. Toward that end, members of the Office of the Prosecutor undertook a rigorous evaluation of the Darfur Special Criminal Court, newly established by the Khartoum government to purportedly prosecute suspects implicated in the Darfur atrocities.<sup>41</sup> Not surprisingly, the government's effort to render accountability for crimes in which it was implicated was greeted skeptically by international human rights activists and a number of outside observers.<sup>42</sup> Still, Moreno-Ocampo's office took its admissibility inquiry seriously, undertaking five missions to Sudan aimed at assessing the viability of the domestic legal system.<sup>43</sup> To downplay the sting of his forthcoming decision, Moreno-Ocampo emphasized that he was making a "case specific" assessment and not rendering "a judgment on the Sudanese justice system as a whole."<sup>44</sup> In early 2007, Moreno-Ocampo determined that his case against the two Sudanese suspects, Ahmad Harun and Ali Kushayb, was admissible for ICC prosecution. He determined that the Sudanese courts had not brought a case against Harun and that a pending case against Kushayb, who was in domestic custody, related to different crimes. The ICC pre-trial chamber concurred and issued arrest warrants for Harun and Kushayb.<sup>45</sup>

The diligence of Moreno-Ocampo's admissibility evaluation was arguably mandated by the Rome Statute itself. Such a thorough evaluation could also signal to ICC skeptics, such as the United States, that the chief prosecutor

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41. Interviews with ICC officials, The Hague (June, Nov. 2007).

42. Elizabeth Rubin, *If Not Peace, Then Justice*, N.Y. TIMES MAG., 2 Apr. 2006, at 42.

43. Interviews with ICC officials, The Hague (June, Nov. 2007).

44. Luis Moreno-Ocampo, Address at the Fifth Session of the Assembly of States Parties, The Hague (23 Nov. 2006).

45. Warrant of Arrest for Ahmad Harun, Pre Trial Chamber 1, 27 April 2007, available at <http://www.icc-cpi.int/iccdocs/doc/doc279813.PDF>; Warrant of Arrest for Ali Kushayb, Pre Trial Chamber 1, 27 April 2007, available at <http://www.icc-cpi.int/iccdocs/doc/doc279858.PDF>.

would actually abide by the constraints to his authority stipulated in the Statute and be prudently sensitive to the prerogatives of state sovereignty. Moreno-Ocampo's conciliatory approach was also evident in his not requesting Khartoum to grant ICC investigators permission to enter Darfur.<sup>46</sup> In the face of security threats in Darfur, the Office of the Prosecutor conducted its investigations outside Sudan. Investigators gained access to valuable witness testimony by interviewing survivors of atrocities in Darfur who had fled to refugee camps in neighboring Chad and further afield. The government may well have rejected the prosecutor's request for access to Darfur and its crime scenes. Still, as Antonio Cassese has argued, Moreno-Ocampo could have then used this refusal to petition the Security Council to press Sudan to cooperate and then resort to punitive actions if it failed to do so.<sup>47</sup> The prosecutor, however, refrained from making a request that the government would likely reject, leading inevitably to a cycle of confrontation between state and court.

The prosecutor's conciliation also carried over to his early reports to the Security Council, where he refrained from criticizing the Khartoum government, even though it had provided little cooperation. Beyond that, Moreno-Ocampo gave prominence to the assistance Khartoum had provided, crediting it with a measure of cooperation.<sup>48</sup> An international human rights activist who closely follows the cooperation issue characterized the prosecutor's rhetorical move as an unwarranted concession insofar as he was "just pretending there was cooperation on the part of Sudan."<sup>49</sup> By his fourth speech to the Council, which was in December 2006, Moreno-Ocampo became somewhat critical, noting that Khartoum had not agreed to "requests for documents and interviews which remain an important feature of the fact-finding process."<sup>50</sup> Yet, he did not directly appeal to the government to improve its cooperation or clearly ask the Council to intervene on his behalf.

When it came to his efforts to gain custody of Harun and Kushayb, Moreno-Ocampo continued on the path of diplomatic conciliation. In early 2007, the prosecutor requested that the ICC pre-trial chamber issue a summons for the two suspects to appear before the Court, rather than a warrant that would have constituted a stronger mandate for their arrest. Whereas an arrest warrant is unmistakably confrontational, a summons is in effect a legal invitation to appear before a court with an expectation that a would-be suspect would willingly comply. By asking the pre-trial chamber

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46. Cassese, *supra* note 29, at 439.

47. *Id.*

48. See, e.g., Luis Moreno-Ocampo, Chief Prosecutor, Int'l Criminal Court, Address to the United Nations Security Council (14 Dec. 2006).

49. Interview with international human rights activist, Brussels (May 2008).

50. Luis Moreno-Ocampo, Chief Prosecutor, Int'l Criminal Court, Address to the United Nations Security Council (14 Dec. 2006).

to issue a summons, Moreno-Ocampo sought to increase the chances of the suspects' appearance in The Hague by demonstrating his desire to avoid legal confrontation.<sup>51</sup> Moreover, he hoped a summons would lower the domestic political costs for President Bashir by making their departure look like a voluntary act as opposed to a capitulation.<sup>52</sup> But Moreno-Ocampo's request for a summons did little to soften Sudan's hostile reaction to his bid to prosecute Harun and Kushayb.<sup>53</sup> Citing the government's obstinacy, the pre-trial chamber in late April 2007 rejected Moreno-Ocampo's request for a summons and issued arrest warrants instead.<sup>54</sup>

Prosecution officials and some Western diplomats defended Moreno-Ocampo's move as a strategic attempt to persuade Bashir to hand over the suspects.<sup>55</sup> But the request nevertheless frustrated many human rights activists eager for a bold pursuit of the Sudanese suspects. To these activists the move was emblematic of Moreno-Ocampo's propensity to play the politics of conciliation with a defiant state. "It damaged the prosecutor in the eyes of a lot of human rights organizations because it was like you are not acting like a prosecutor, you are acting like a diplomat," said a prominent international NGO official who has watched Ocampo since he began his tenure as chief prosecutor. Further, the official stated: "And poor Ocampo . . . for the first two years, was constantly being confronted with comparisons with Carla Del Ponte. One would not expect that Carla would gently issue summons."<sup>56</sup>

Sudan's immediate defiance and the pre-trial chamber's rejection of Moreno-Ocampo's summons strategy marked the beginning of a more assertive phase in the prosecutor's relationship with the government. In his fifth address to the Security Council, in June 2007, Moreno-Ocampo stressed the government's legal obligation to the ICC, telling the Council that "the law requires the appearance of Ahmad Harun and Ali Kushayb in Court."<sup>57</sup> The prosecutor also called on the international community to live up to its responsibilities by pressing Sudan to cooperate. Still, the prosecutor remained measured and did not try to shame the government for failing to abide by its Security Council-mandated obligation to cooperate. At his most critical, he told of Khartoum's non-response to an April 2007 letter he sent asking

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51. Interviews with European diplomats, The Hague (June & Nov. 2007).

52. Interview with ICC official, The Hague (June 2007).

53. *Sudanese Justice Minister Rejects ICC Indictments on Darfur*, SUDAN TRIBUNE, 9 Mar. 2007.

54. Prosecutor v. Harun, Case No. ICC -02/05-01/07, Warrant of Arrest for Ahmad Harun (27 Apr. 2007).

55. Interviews with ICC prosecution officials and Western diplomats, The Hague (June, Nov. 2007).

56. Interview with international NGO official, Brussels (May 2008).

57. Luis Moreno-Ocampo, Chief Prosecutor, Int'l Criminal Court, Address to the United Nations Security Council (5 June 2007).

whether the government would cooperate in the arrest and handover of Harun and Kushayb.<sup>58</sup>

By the end of 2007, Sudan's continued defiance led Moreno-Ocampo to become openly adversarial. In his December speech to the Security Council, he strongly criticized the Sudanese government, both for its obstruction of international justice and for its role in on-going atrocities in Darfur. He addressed the depth of this defiance by relaying the following remark from Bashir Taha, Sudan's interior minister: "The Prosecutor has no jurisdiction here. He is an intruder."<sup>59</sup> The prosecutor also argued that failure to prosecute Harun—whom the government gave responsibility to oversee refugee camps in Darfur—presented a grave threat to the survival of displaced refugees and to regional stability. Thus, added to the moral imperative to arrest Harun for his alleged role in atrocities in 2003 and 2004 was the new charge to do so for the protection of vulnerable refugees in Darfur. Of the Security Council, Moreno-Ocampo asked four pressing questions: "When will be a better time to arrest Harun? How many more women, girls, have to be raped? How many persons have to be killed? Must we really wait, again, for the destruction of entire communities?"<sup>60</sup> And to the Security Council he gave the following answer: "The only realist solution today is to request the removal and arrest of Harun as a first step to any solution."<sup>61</sup> Moreno-Ocampo's speech is noteworthy, not only for his attempt to shame Sudan for its failure to cooperate, but also for advancing a clear argument for the Court's role in contributing to the protection of human rights.

Even as Moreno-Ocampo intensified his criticisms of state recalcitrance, some analysts fault him for waiting until May 2008 to formally notify the pre-trial chamber of Sudan's non-compliance, which has slowed the process of the ICC lodging an official complaint with the Security Council.<sup>62</sup> Still, even without receiving a formal complaint, the Security Council has the authority to take measures against Sudan. However, following the prosecutor's speeches to the Security Council in June and December 2007, the Council took no punitive measures against the regime and even refrained from issuing a mild statement reminding Sudan of its obligations.

The prosecutor's strong confrontation of the regime also broke through his usual neutrality toward the international community, including his close allies in the European Union. He seemed to understand that his leverage would be even further diminished if the international community was not

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58. *Id.*

59. Luis Moreno-Ocampo, Chief Prosecutor, Int'l Criminal Court, Address to the United Nations Security Council (5 Dec. 2007).

60. *Id.*

61. *Id.*

62. See Goran Sluiter, *Obtaining Cooperation Sudan—Where is the Law?*, 6 J. INT'L CRIM. JUST. 871 (2008).

made to feel accountable for Sudan's non-compliance. This new stance was on display, beginning with a June 2007 speech in Nuremberg, in which he chastised state parties to the Rome Statute for not supporting the ICC's bid for arrests and for portraying the Court as an obstacle to peace. In a September speech in Toronto, the prosecutor called on the Security Council and regional organizations to press Sudan to hand over Harun and Kushayb. "They cannot remain silent," he asserted.<sup>63</sup>

Moreno-Ocampo's criticism of international inaction went still further in the face of continued violence in Darfur. In his address to the Security Council in June 2008, he laid the blame directly on the international community, invoking its previous failures in Rwanda and Srebrenica. "It takes a lot to commit massive crimes," he said. "It takes commanders and many executioners. But mostly, it requires that the rest of the world look away and do nothing."<sup>64</sup> In seeking to shame the Security Council for not doing more to stop the bloodshed, the prosecutor also tried to preempt the predictable accusations that the ICC threatened peace in Darfur—accusations that would grow more intense when he announced his request for an arrest warrant for President Bashir. A measure of how much the prosecutor's approach had changed over the previous year is seen in how some of his previous admirers in the diplomatic community now bristled at his new assertiveness. "He's a bit too harsh sometimes on us," a European Union official said in a May 2008 interview, referring to the prosecutor's complaints about lackluster backing from state parties.<sup>65</sup> Still, the official acknowledged that pressure exerted by Moreno-Ocampo was not necessarily misplaced, saying, "Of course, we could do more. And of course when you have pressure you do more."<sup>66</sup>

Lobbying from Moreno-Ocampo and from international human rights organizations finally prodded the EU to become vocal with Khartoum. After Moreno-Ocampo addressed the EU foreign ministers in mid-June 2008, the ministers issued a statement deploring the government's failure to cooperate, calling for the handover of Harun and Kushayb, and putting the government on notice that EU sanctions could be forthcoming in the face of continued defiance.<sup>67</sup> Also in mid-June—ten days after Moreno-Ocampo's Security Council address—the Security Council issued its first formal call for Sudan to cooperate.<sup>68</sup> By standing with the ICC, at least rhetorically, there was

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63. Press Release, Int'l Criminal Court, I.C.C. Prosecutor Luis Moreno-Ocampo Urges Arrest of Indicted Criminals, Following Release of New Darfur Documentary (6 Sept. 2007).

64. Luis Moreno-Ocampo, Chief Prosecutor, Int'l Criminal Court, Address to the United Nations Security Council (5 June 2008).

65. Interview with EU official, Brussels (May 2008).

66. *Id.*

67. Press Release, Council of the European Union, 2879th Council Meeting (16 June 2008).

68. *Statement by the President of the Security Council*, U.N. SCOR, 5912d mtg., UN. Doc. S/PRST/2008/21 (2008).

greater chance that the Security Council would not later invoke a provision of the Rome Statute to sideline Moreno-Ocampo's bid to prosecute Harun and Kushayb or more high-level Sudanese officials who might come under scrutiny. Under Article 16 of the Rome Statute, the Security Council can suspend ICC investigations and prosecutions for renewable one-year periods if they are deemed to pose a threat to international peace and security.<sup>69</sup>

A measure of a prosecutor is found not only in how he tries to obtain custody of suspects, but also in whom he targets for prosecution. In initially focusing on figures outside of President Bashir's inner circle, it seemed to some observers that the prosecutor was exercising prudence in order not to unduly imperil Sudan's incentive to cooperate in bringing peace to Darfur.<sup>70</sup> To actually target higher-level officials, including the president himself, could irrevocably damage the prospects of persuading Khartoum to end the Darfur conflict<sup>71</sup> and might even foment instability elsewhere in Sudan. With this in mind, some commentators, such as Kenneth Rodman, have argued that the prosecutor should defer to the peacemakers. "It is incumbent on the prosecutor to adopt a 'do not harm' approach to any political processes that might put an end to criminal violence," Rodman advised.<sup>72</sup>

Given his general preference for caution, the prosecutor's request to the pre-trial chamber for an arrest warrant for President Bashir in July 2008, which occurred during the continuing Darfur conflict—though not during ongoing peace negotiations—took many observers off guard.<sup>73</sup> However, in his address to the Security Council in June 2008, Moreno-Ocampo hinted that he would soon target the highest level of the Sudanese leadership. With his request for the arrest warrant, Moreno-Ocampo brought the ICC to the center of world attention and rebuffed those who pressed him to subordinate his legal mandate to prosecute those most responsible for massive human rights abuses. ICC supporters hailed the move as a defining moment for the Court and one that might galvanize the world to take decisive action against Khartoum after more than five years of state-sponsored violence.<sup>74</sup> Predictably, the Bashir government argued the opposite, issuing what may yet become a self-fulfilling prophecy that international justice fosters instability. A sympathetic African Union and Arab League amplified the instability claim and called on the Security Council to invoke Article 16 and suspend the Bashir

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69. Rome Statute of the International Criminal Court, *supra* note 1, art. 16.

70. De Waal, *Darfur, the Court, and Khartoum*, *supra* note 13, at 31.

71. Rodman, *supra* note 14, at 556–57.

72. *Id.* at 557.

73. Victor Peskin, *The Omar al-Bashir Indictment: The ICC and the Darfur Crisis*, OPEN DEMOCRACY, 15 July 2008, available at <http://www.opendemocracy.net/article/the-omar-al-bashir-indictment-the-icc-and-the-darfur-crisis>.

74. Human Rights Watch, *ICC: Bashir Warrant A Major Step Forward For Human Rights Victims in Darfur* (4 Mar. 2009), available at <http://www.hrw.org/en/news/2009/03/04/icc-bashir-warrant-major-step-toward-justice-victims-darfur>.

case. But by mid-August, the Council did not seem likely to invoke Article 16 unless the Khartoum government offered something in return, namely a return to peace in Darfur.

Targeting a head of state is the ultimate adversarial move in a chief prosecutor's arsenal. Moreno-Ocampo's request for a warrant for President Bashir's arrest—and the pre-trial chamber's 4 March 2009 decision to grant this warrant for war crimes and crimes against humanity<sup>75</sup>—poses an enduring threat to the president's hold on power as well as to the regime itself. The pre-trial chamber, however, rejected the prosecutor's request for a genocide charge. Despite his pursuit of the head of state, Moreno-Ocampo has signaled that he is not abandoning conciliation altogether. This is seen in the prosecutor's effort, exemplified in his December 2008 address to the Security Council, to create an incentive for Bashir's handover by assuring the president's inner circle that there will be no other charges against senior government officials.<sup>76</sup> And in an apparent bid to demonstrate his evenhandedness and counter charges of anti-government bias, Moreno-Ocampo is seeking to prosecute Darfur rebels in connection with a 2007 attack on AU peacekeepers.<sup>77</sup> Nevertheless, Moreno-Ocampo's pursuit of Bashir stands out as perhaps the boldest and riskiest act taken by any of the contemporary chief prosecutors. Where he was once criticized by ICC advocates for being too conciliatory, he is now being accused by ICC opponents in Sudan and elsewhere for being too adversarial. Concern with Moreno-Ocampo's approach has also been registered by some Sudan analysts, such as Julie Flint and Alex de Waal, who have criticized his "zealous pursuit"<sup>78</sup> of Bashir and his legal judgment in seeking a genocide charge against the president.

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75. See Warrant of Arrest for Omar Hassan Ahmad Al Bashir, Pre-Trial Chamber 1, 4 Mar. 2009, available at <http://www.icc-cpi.int/iccdocs/doc/doc639078.pdf>.

76. Specifically, the prosecutor, in his Security Council address, said: "All the arrest warrants and all the requests for arrest warrants have been made public. There are no others." Luis Moreno-Ocampo, Address to the Security Council (3 Dec. 2008).

77. The prosecutor's announcement of his intent to prosecute Darfur rebels came on 17 July 2008, just three days after he issued a request for an arrest warrant for President Bashir. See Elissa Gootman, *Prosecutor to Pursue Rebels in Next Case on Darfur Crisis*, N.Y. TIMES, 18 July 2009, at A8. On 20 November 2008, the prosecutor submitted a request to the pre-trial chamber for sealed arrest warrants for three rebel leaders implicated in the 2007 killing of 12 African Union peacekeepers. See Nora Boustany, *ICC Warrants Sought for 3 Sudanese Rebel Chiefs*, WASH. POST, 21 Nov. 2008, at A17. By 15 April 2009, the pre-trial chamber had not yet announced a decision on the warrants. Prosecution officials expect the decision to be imminent. See Fifteenth Diplomatic Briefing of the International Criminal Court, Statement by Deputy Prosecutor Fatou Bensouda, The Hague (7 Apr. 2009).

78. Julie Flint and Alex de Waal contend that "[s]enior ICC staff who had worried over Moreno-Ocampo's earlier caution were now puzzled by his zealous pursuit of the biggest culprits he could identify—and especially his determination to charge President Bashir with genocide, including for his policies toward the displaced camps in Darfur." See Julie Flint & Alex de Waal, *Case Closed: A Prosecutor Without Borders*, WORLD AFF., Spring 2009, 23, 27.

In his failure to obtain a genocide charge from the pre-trial chamber, these analysts have had further reason to question his judgment.<sup>79</sup> The prosecutor has appealed the pre-trial chamber's rejection.<sup>80</sup>

This is not the first time a tribunal prosecutor has sought to prosecute a head of state, as seen in the ICTY Chief Prosecutor Louise Arbour's indictment of Slobodan Milošević in May 1999. Yet the Milošević indictment had a greater prospect of international support, since it came during the NATO assault to reverse Serbia's military gains in Kosovo and the mass expulsions of Kosovar Albanian refugees that followed the beginning of the NATO air war. In contrast, Moreno-Ocampo's bid to prosecute Bashir has not occurred in the context of military intervention or substantial international pressure against Sudan's president to reverse the situation in Darfur. Even as Darfur activists have sought to cast Bashir as a pariah, the international community has engaged him in a long-running effort to find a negotiated solution to the Darfur crisis, to field an expanded African Union-UN peacekeeping force, to safeguard the fragile Comprehensive Peace Agreement that ended the north-south civil war in Sudan, and to continue to allow the delivery of humanitarian aid to hundreds of thousands of internally displaced Darfuris. This dynamic of dependence has constrained the international community's willingness to confront the Khartoum regime, not only before, but even after Moreno-Ocampo announced his pursuit of Bashir in July 2008. This, in turn, renders extremely difficult the chief prosecutor's task of building substantial international pressure on the Sudanese government.

In the month and a half following the issuance of the Bashir warrant in early March 2009, the ICC's international state backers were hesitant to confront the Sudanese government. The EU reiterated its earlier calls for cooperation but did not explicitly call for Bashir's handover.<sup>81</sup> The EU also did not follow through on its June 2008 threat to take punitive action against Sudan for its continued non-compliance. Meanwhile, Sudan and its allies—particularly the African Union and the Arab League—intensified their opposition to the Bashir warrant, again calling on the Security Council to suspend the case. China and Russia, Sudan's most powerful backers, echoed the sentiments of African and Arab states. A suspension seemed unlikely in the short-term, given opposition from the United States, Britain, and France and the fact that such a move can be blocked by the dissenting vote of just one permanent Security Council member. Thus, the Council remained deeply

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79. *Id.*

80. See Prosecution's Application for Leave to Appeal the "Decision on the Prosecution's Application for a Warrant of Arrest against Omar Hassan Ahmad Al Bashir," (10 Mar. 2009), available at <http://www.icc-cpi.int/iccdocs/doc/doc644001.pdf>.

81. Declaration by the Presidency on behalf of the European Union following the ICC decision concerning the arrest warrant for President Al-Bashir, Council of The European Union, Brussels (6 Mar. 2009).

divided over whether and the extent to which to support Moreno-Ocampo's bid to prosecute Bashir.

The ICC's prospect for international backing was further complicated by Bashir's swift retaliation. Immediately after the ICC announced the Bashir warrant, the Sudanese president expelled from Darfur thirteen international and three domestic aid groups that had provided critical humanitarian support to more than four million people there.<sup>82</sup> The alleged transgression of these humanitarian organizations was aiding and spying on behalf of the ICC. The expulsions—and the threat this posed to Darfuris in displaced persons camps<sup>83</sup>—appeared to be a calculated attempt to deepen the dynamic of international dependence on Bashir, thereby increasing the prospects of an Article 16 suspension or at least further diminishing international pressure for his handover. Since the ICC began its investigations of the Darfur situation, the Sudanese government has sought to heighten the potential conflict between peace and justice and, therein, to undermine the Court's foundational claim of deterring atrocities. With Bashir's decision to expel humanitarian aid groups that provide a life-line to vulnerable Darfuris, the president has sought to instill yet more doubts about the fledgling ICC by manufacturing a conflict not only between peace and justice, but also between *survival* and *justice*.

Moreno-Ocampo has strongly defended his targeting of Bashir, citing the expulsion of the aid groups as further confirmation that the president "is exterminating his people."<sup>84</sup> As the unfolding humanitarian crisis leads to civilian deaths in Darfur, the prosecutor's allegation of Bashir's genocidal intent may become tragically prescient.<sup>85</sup> The worsening of the crisis could in time lead to growing international support for the prosecutor's campaign for Bashir's immediate arrest. Yet in the month and a half following the issuance of the warrant, the prosecutor's voice seemed to be drowned out by the high-profile attacks leveled against the ICC by Bashir<sup>86</sup> and his African and Arab allies. A case in point is the media coverage given to the Arab League's decision to oppose the ICC warrant for President Bashir in a late March summit meeting in Qatar, which Bashir attended.<sup>87</sup> In late March and

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82. Lynsey Addario & Lydia Polgreen, *In Aid Groups Expulsion, Fears of More Misery Engulfing Darfur*, N.Y. TIMES, 23 Mar. 2009, at A6; *UN Agencies Warn of Devastating Implications for Darfur*, SUDAN TRIBUNE, 8 Mar. 2009.

83. *UN Agencies Warn of Devastating Implications for Darfur*, *supra* note 82.

84. Louis Charbonneau, *Sudan Says to Never Reverse Decision to Expel NGOs*, REUTERS, 20 Mar. 2009.

85. Kevin Jon Heller, *Genocidal Intent and the Irony of Expelling the Humanitarian Groups*, *Opinio Juris Blog Archive*, 23 Mar. 2009, available at <http://opiniojuris.org/2009/03/23/genocidal-intent-and-the-irony-of-expelling-the-humanitarian-groups/>.

86. See, e.g., Neil MacFarquhar & Marlise Simons, *Sudan's Leader Scolds the West and Assails Aid Groups*, N.Y. TIMES, 6 Mar. 2009, at A10.

87. See, e.g., Michael Slackman & Robert F. Worth, *Setting Aside Divisions, Arab Leaders Rally Behind Sudan's President at Meeting*, N.Y. TIMES, 31 Mar. 2009, at A5.

early April, the Sudanese president also sought to flout the ICC by traveling to Eritrea, Egypt, Libya, and Saudi Arabia. As with Qatar, these countries are non-state parties and, therefore, do not have a legal obligation to arrest Bashir and hand him over to the ICC. Even as the president's visits abroad and anti-ICC rallies at home foster an image of an untouchable leader, his hold on power could weaken if the Darfur conflict deteriorates, Sudan's oil-driven economy worsens, and the Security Council enacts sanctions against the regime.<sup>88</sup> Bashir, of course, will be most vulnerable to being arrested and handed over to The Hague if and when he falls from power in Khartoum.

The "trials of cooperation" framework introduced earlier underscores the attempt of tribunal chief prosecutors to shame targeted states to draw key international actors to their side; but shame is not a one-way street. Targeted states such as Sudan often try to "counter-shame" tribunals by exposing their real or perceived shortcomings.<sup>89</sup> The intent is to knock the tribunals off their moral pedestal, thereby undercutting their moral authority and capacity to garner crucial international support. The ICC, as with its ad hoc predecessors, stands uneasily on this pedestal. The ICC and the Moreno-Ocampo himself are vulnerable to criticism because of the prosecutor's mishandling of the Thomas Lubanga case which led to a long delay in the opening of the Court's first case until January 2009.<sup>90</sup> However, in its counter-shaming offensive against the ICC, Khartoum has sought to tarnish the Court as a neo-colonial weapon wielded by the West to punish not only Sudan, but also Africa as a whole. This charge stems from the ICC currently focusing its prosecutorial scrutiny solely in Africa. This charge of anti-African (and anti-Arab) bias seeks to place the Court on the defensive by disputing its foundational principle of being a legal institution that delivers justice universally. Of course, this charge ignores the fact that it was the Security Council, with China and Russia's acquiescence, that referred the Darfur situation to the ICC (and that the Uganda, DRC, and Central African Republic situations were the outcomes of self-referrals). Nevertheless, such charges of anti-African bias may grow into a major perception problem for the ICC that can benefit Bashir by shifting global attention away from his non-compliance.<sup>91</sup> At the very least, Khartoum has tried to create a wedge between the ICC and the thirty state parties from Africa. This, in turn, may undercut the prosecutor's campaign for cooperation by diminishing his ability to frame the terms of the contentious debate over the Bashir arrest warrant.

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88. Andrew Heavens, *Sudan's Bashir Vulnerable Despite Defiant Front*, REUTERS, 1 Apr. 2009.

89. PESKIN, INTERNATIONAL JUSTICE IN RWANDA AND THE BALKANS, *supra* note 15, at 11.

90. For an analysis of the problems surrounding the Lubanga case, see Heikelina Verrijn Stuart, *The ICC in Trouble*, 6 J. INT'L CRIM JUST. 409–417 (2008).

91. Interviews with ICC official and international NGO representatives, The Hague (Dec. 2008).

In his effort to see the Sudanese president in The Hague, Chief Prosecutor Moreno-Ocampo faces an enormous challenge.

## V. THE ICC IN UGANDA: COOPERATION, JUSTICE, AND BARGAINS FOR PEACE

Luis Moreno-Ocampo's 2004 press conference with Yoweri Museveni seemed to foreshadow a close relationship between the chief prosecutor and the Ugandan president. Each actor had a strong interest in partnership. For Moreno-Ocampo, the invitation he sought from the Ugandan government to probe the Lord's Resistance Army's atrocities in northern Uganda represented the Court's first opportunity to demonstrate its relevance and an apparent assurance of state cooperation. For Museveni, the Court's involvement represented a chance to outsource a difficult war crimes investigation, and a chance to focus international opprobrium on the atrocities of its long-standing enemy.

Government forces and the LRA, led by the mercurial Joseph Kony, had been engaged in a civil war since the late 1980s that cost tens of thousands of lives and led to the displacement of close to two million people.<sup>92</sup> The LRA is blamed for the majority of atrocities, but the government is also implicated in killings and the brutal treatment of the Acholi people who had been forced by the tens of thousands into displaced persons camps.<sup>93</sup> Despite its greater strength, the Ugandan army was unable to vanquish the LRA or capture its top leadership, a fact that was underscored by its unsuccessful 2002 offensive against the rebels that led to an escalation of the conflict and the widespread displacement of civilians.<sup>94</sup>

The prosecutor's strategy of encouraging a referral from the Ugandan government<sup>95</sup> led to clear results. Government cooperation proved to be crucial in facilitating and expediting Moreno-Ocampo's investigations of the LRA. In May 2005, Moreno-Ocampo presented evidence of rebel atrocities to the ICC pre-trial chamber and requested sealed arrest warrants for Kony and four top LRA commanders. Two months later in July, the pre-trial chamber issued the arrest warrants for the LRA members, charging them with war crimes and crimes against humanity, but the chamber also kept them under

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92. *Drums of War Across the Borders*, *ECONOMIST*, 14 Aug. 2008, at 49.

93. For a history of the war in Northern Uganda and an analysis of the pattern of human rights abuses, see TIM ALLEN, *TRIAL JUSTICE: THE INTERNATIONAL CRIMINAL COURT AND THE LORD'S RESISTANCE ARMY* (2006); HUMAN RIGHTS WATCH, *LRA CONFLICT IN NORTHERN UGANDA AND SOUTHERN SUDAN* (2002).

94. *Id.*

95. HUMAN RIGHTS WATCH, *COURTING HISTORY: THE LANDMARK INTERNATIONAL CRIMINAL COURT'S FIRST YEARS* (July 2008). See also Clark, *supra* note 13, at 43.

seal.<sup>96</sup> In October 2005, the pre-trial chamber unsealed the warrants, the first warrants ever issued by the ICC. The warrants, observed the International Crisis Group, “heartened human rights advocates looking for evidence of the ICC’s relevance to accountability worldwide.”<sup>97</sup>

Moreno-Ocampo’s pragmatism soon came under criticism from Museveni’s political opponents, including Acholi community leaders in the north who doubted the prosecutor’s claim of willingness to investigate army abuses and criticized the ICC as an impediment to a negotiated peace with the LRA.<sup>98</sup> The perception of prosecutorial bias and Museveni’s use of the ICC for the government’s ends would undermine the Court’s legitimacy in northern Uganda for years to come.<sup>99</sup> Subsequently, Moreno-Ocampo tried to counter this perception of bias by reaching out to Acholi leaders. He let it be known that he was not bound by the narrow terms of Museveni’s referral and was pursuing information concerning alleged Ugandan army crimes<sup>100</sup> However, the likelihood of the ICC bringing charges against Ugandan army officers appeared slim. ICC officials have indicated that the government abuses that took place after the Court’s temporal jurisdiction began on 1 July 2002 do not appear to be of sufficient gravity to warrant prosecution.<sup>101</sup> What may in fact be a legitimate reason not to charge army officers has not persuaded skeptics who view the prosecutor’s sole focus on rebel wrongdoing as a quid pro quo for the government’s referral and cooperation.

If the Ugandan government had difficulty arresting Kony, then the ICC’s challenge was far greater. The enduring problem was the ICC’s lack of enforcement powers and the ability of the LRA suspects to elude capture by moving between northern Uganda, southern Sudan, and northeastern DRC. The new problem for the Court arose from the Ugandan government’s decision to engage the LRA in peace talks rather than redouble its efforts to locate and arrest the rebel leaders. The government’s frustration with the LRA’s staying power and the lack of international community backing in arresting Kony prompted Museveni’s bid to talk peace with the LRA in mid-2006. “Bereft of a stick long enough to reach Kony, Museveni saw little choice but to opt for a carrot,” the International Crisis Group opined.<sup>102</sup> For its own part, the

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96. SCHIFF, *supra* note 13, at 204.

97. Int’l Crisis Group, *Shock Therapy for Northern Uganda’s Peace Process*, AFRICA BRIEFING No. 23, 11 Apr. 2005, at 5.

98. Clark, *supra* note 13, at 42. ALLEN, *supra* note 93, at 83–88.

99. Interview with Western diplomats, The Hague (June 2007); Interview with international NGO official, Brussels (May 2008).

100. HUMAN RIGHTS WATCH, *COURTING HISTORY*, *supra* note 95, at 41–42. The chief prosecutor and the ICC’s Outreach Program have been criticized for not doing enough in northern Uganda to counter the perception of being one-sided. See Clark, *supra* note 13, at 42.

101. Interviews with ICC officials, The Hague (June 2007).

102. Int’l Crisis Group, *Peace in Northern Uganda?*, AFRICA BRIEFING No. 41, 13 Sep. 2006, at 11.

LRA had a new incentive to return to the bargaining table, given its loss of support from the Sudanese government following issuance of the arrest warrants and its weakened military position. In this respect, the ICC arrest warrants have been credited by many diplomats and analysts with helping set the stage for the peace talks.<sup>103</sup> Still, some analysts point to other factors that played a role in influencing the LRA's return to negotiations, such as the signing of the 2005 Comprehensive Peace Agreement in Sudan which no longer made it viable for the Sudanese Armed Forces to aid the LRA and to provide it sanctuary.<sup>104</sup> For Kony, negotiation with the government also offered hope of winning a formal amnesty, something that Museveni had often hinted at, despite not possessing the legal right to usurp the ICC's arrest warrants. Thus, both the LRA and the Museveni government now had an incentive to pursue a negotiated peace and build a partnership of their own.

As a state party to the Rome Statute, the Ugandan government has a legal obligation to fully cooperate with the ICC and arrest the LRA fugitives, but the government's decision to seek peace with its enemies changed the dynamics of the ICC's involvement in Uganda, weakening the government's interest in apprehending the LRA suspects. Whereas Museveni originally hoped the ICC would target the rebels for prosecution, the decision to talk peace rendered the president ambivalent about the Court. It was not clear whether the ICC would facilitate or impede a negotiated peace. On the one hand, the arrest warrants appeared to increase Kony's incentive to reach a settlement that shielded him from international prosecution. The Rome Statute allows for several scenarios in which pending ICC cases can be suspended or withdrawn. Under a scenario provided by Article 19 of the Rome Statute, the pre-trial chamber can withdraw arrest warrants and defer cases back to a domestic judiciary if it is determined to be able and genuinely willing to prosecute.<sup>105</sup> Moreover, the ICC prosecutor can, under Article 53, move to halt a case if doing so is found to be in the "interests of justice."<sup>106</sup> Under Article 16, the Security Council has the authority to suspend investigations

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103. Interviews with international NGO officials and diplomats, The Hague (June, Nov. 2007); Brussels (May 2008).

104. Nick Grono & Adam O'Brien, *Justice in Conflict? The ICC and Peace Processes*, in *COURTING CONFLICT?*, *supra* note 13, at 13.

105. Rome Statute of the International Criminal Court, *supra* note 1, art. 19. In a policy paper assessing a Ugandan plan for domestic war crimes trials, Human Rights Watch argued that any domestic alternative to an ICC trial should provide for a "credible, impartial, and independent investigation and prosecution; rigorous adherence in principle and practice to international fair trial standards; and penalties that are appropriate and that reflect the gravity of the crimes." The June 29 Agreement on Accountability and Reconciliation and the Need for Adequate Penalties for the Most Serious Crimes, Human Rights Watch's Second Memorandum on Justice Issues and the Juba Talks, July 2007, at 13, at 13.

106. Rome Statute of the International Criminal Court, *supra* note 1, art. 53(2)(c).

or prosecutions for renewable one-year periods if they are deemed to pose a threat to peace and security.<sup>107</sup> However, the existence of these escape clauses from ICC prosecution does not mean they will be employed. On the other hand, the threat that the ICC posed to the peace process—particularly to Kony's incentive to lay down his arms and sign a peace agreement—lay in the real possibility that the pre-trial chamber, the prosecutor, or the Security Council would not take action to halt the arrest warrants.

The terrible toll of the war in northern Uganda—and the tangible benefits of the August 2006 cessation of hostilities agreement that allowed many displaced Acholi to return to their homes—put increasing pressure on Museveni and Kony to ensure the success of their negotiations. There was also increasing pressure on Chief Prosecutor Moreno-Ocampo not to impede the prospects of a final resolution to the war. Although the prosecutor did not have an official role in the peace talks, he had a virtual one. What he said and did could have a direct and potentially detrimental impact on the negotiations held in Juba, Sudan. Moreno-Ocampo had a consequential decision to make.

On the one hand, the prosecutor could take a conciliatory approach to the Juba talks, assuming a low-profile and not waging a vigorous campaign for the capture of the LRA suspects.<sup>108</sup> A downside, however, is that this could sideline the ICC at a pivotal moment in its early development by diminishing international support for arresting the LRA suspects. In turn, such marginalization could leave the ICC more vulnerable to being undermined by other states, particularly Sudan. Prosecutorial accommodation could also deepen the perception that Moreno-Ocampo would do whatever the government wished, first heeding its call to pursue the LRA and then soft-pedaling this pursuit when peace talks began. Beyond accommodation, Moreno-Ocampo could succumb to growing pressure in Uganda and seek to halt his pursuit of Kony and his top commanders by invoking the “interests of justice” provision in Article 53. This provision grants the prosecutor, pending pre-trial chamber review, considerable discretion to determine whether the pursuit of prosecutions would have such negative consequences on “the interests of victims”<sup>109</sup> as to not truly advance the cause of justice. In theory, Article 53 can be construed to take into account the detrimental effect of a prosecution on peace and stability.<sup>110</sup> Crafted broadly and open to prosecutorial interpretation, this provision can serve as a convenient way for the chief prosecutor to forego politically controversial cases while maintaining that

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107. *Id.* art. 16.

108. While LRA representatives attended the peace talks in Juba, Sudan, Kony and his rebel army were based in northeastern DRC.

109. Rome Statute of the International Criminal Court, *supra* note 1, art. 53(1)(c).

110. HUMAN RIGHTS WATCH, *COURTING HISTORY*, *supra* note 95, at 34.

his decision is based in the law of the Rome Statute, rather than the logic of political expediency. As Luc Cote has written, it is “the prosecutor’s most ‘political’ decision” and, if used without restraint, “could easily jeopardize the integrity of the International Criminal Court as a whole.”<sup>111</sup>

On the other hand, the prosecutor also faced risks if he took an adversarial position on the peace talks. Issuing strident calls for Kony’s arrest, criticizing Museveni for engaging the LRA, or opposing any compromise to suspend or withdraw the warrants could discourage continued rebel participation in the talks. If the negotiations failed, the prosecutor and the ICC would likely be on the receiving end of harsh criticism, particularly from Acholi leaders and others in Uganda who had long blamed the Court for disrupting the quest for peace.<sup>112</sup> This in turn could undermine the Court’s foundational claim that international justice is an indispensable tool of conflict resolution.

Moreno-Ocampo proceeded carefully, trying neither to interfere with the peace talks nor to relinquish the Court’s prerogative to prosecute the LRA suspects one day. The prosecutor sought to balance reminders that the arrest warrants remained in effect with indications that there were ways to have the ICC arrest warrants suspended or withdrawn that was consistent with the Rome Statute. In late 2005, Moreno-Ocampo indicated that his interpretation of the “interests of justice” provision in Article 53 might extend to instances when there was an apparent conflict between peace and prosecutions.<sup>113</sup> Several months earlier, he had said that if his prosecution of the LRA suspects did not serve “the interests of justice” once the violence stopped, then he would be obliged to bring a halt to these cases.<sup>114</sup> Moreno-Ocampo also reportedly expressed his potential backing for the Security Council’s use of Article 16 to suspend the LRA cases.<sup>115</sup> It was this early support for measures in the Rome Statute that would subordinate the ICC’s role, ostensibly for the cause of peace, that led Court observers to see Moreno-Ocampo as part diplomat, part prosecutor. “I think Luis perceived his role as something

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111. Luc Cote, *International Criminal Justice: Tightening up the Rules of the Game*, 88 INT’L REV. RED CROSS 144 (2006).

112. For the results of two population-based surveys conducted in northern Uganda on the ICC and the peace and justice issue, see PHUONG PHAM ET AL., INT’L CTR. FOR TRANSITIONAL JUSTICE & HUMAN RIGHTS CTR. UNIV. OF CAL., BERKELEY, FORGOTTEN VOICES: A POPULATION-BASED SURVEY OF ATTITUDES ABOUT PEACE AND JUSTICE IN NORTHERN UGANDA (July 2005); PHUONG PHAM ET AL., HUMAN RIGHTS CTR. UNIV. OF CAL., BERKELEY, PAYSON CTR. FOR INT’L DEV. TULANE UNIV. & INT’L CTR. FOR TRANSITIONAL JUSTICE, WHEN THE WAR ENDS: A POPULATION-BASED SURVEY ON ATTITUDES ABOUT PEACE, JUSTICE, AND SOCIAL RECONSTRUCTION IN NORTHERN UGANDA (Dec. 2007).

113. Luis Moreno-Ocampo, *Second Report of the Prosecutor of the International Criminal Court, Mr. Luis Moreno-Ocampo, to the Security Council Pursuant to UNSC 1593 (2005)*, (13 Dec. 2005); Luis Moreno-Ocampo, Chief Prosecutor, Int’l Criminal Court, Address to the United Nations Security Council (13 Dec. 2005).

114. ALLEN, *supra* note 93, at 93.

115. Interview with international NGO official, Brussels (May 2008).

a bit more different and amorphous, like a prosecutor-cum-peacemaker," remarked a prominent international NGO official.<sup>116</sup>

Subsequently, Moreno-Ocampo sought to insulate himself from pressure to sideline his own prosecutions. He did so by emphasizing that the matter of the arrest warrants was in the hands of the ICC pre-trial chamber which retained the sole authority to determine whether the Ugandan courts were able and willing to take over the LRA cases. He also pointed out that the question of withdrawing the arrest warrants remained hypothetical because the Ugandan government had not actually made a request to the pre-trial chamber for their withdrawal.<sup>117</sup> Despite concerns in Uganda about the warrants, it is important to emphasize that the government to date has not issued a request to the pre-trial chamber to withdraw the warrants, likely because the warrants have provided important leverage when negotiating with the LRA. Even as he tried to remove himself from the cauldron of domestic politics, Moreno-Ocampo sought to convey sensitivity to domestic concerns. Well before the peace talks began, he elicited the viewpoints of Acholi community leaders and Uganda experts.<sup>118</sup> In March 2005, he invited Acholi leaders to meet with him in The Hague. Following the meeting, he pledged his sensitivity to "efforts to promote dialogue between different actors in order to achieve peace."<sup>119</sup>

In the beginning, Moreno-Ocampo favored deference to the peace talks and conciliation with the Ugandan government. However, as we will show, the prosecutor would later change his approach, issuing strong calls for Kony's arrest even as the peace talks continued. The prosecutor initially refrained from criticizing President Museveni even though the president's engagement of the LRA arguably undermined attempts to apprehend Kony and his top commanders. At the same time, the prosecutor defended his own approach, suggesting that casting judgment on Museveni would constitute a derogation of his own duty to remain above politics. Moreno-Ocampo's approach is evident in his reaction to Museveni's offer of a full amnesty to the LRA indictees prior to the start of peace talks in July 2006: "We are a prosecutor's office. We cannot make any comment on how the President of Uganda executes his mandate. What we know is that Uganda helped to carry out our investigations."<sup>120</sup>

By trying to remain about the fray of the Juba peace talks, Moreno-Ocampo took a very different approach than that taken by ICTY Chief Pros-

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116. *Id.*

117. Statement by the Chief Prosecutor Luis Moreno-Ocampo (12 July 2006).

118. ALLEN, *supra* note 93, at 124.

119. Press Release, Int'l Criminal Court, Statements by I.C.C. Chief Prosecutor and the Visiting Delegation of Acholi Leaders from Northern Uganda (18 Mar. 2005).

120. *Kony Will Eventually Face Trial, Says ICC Prosecutor*, INTEGRATED REGIONAL INFO. NETWORKS, 7 July 2006.

ecutor Richard Goldstone during the Dayton peace talks that brought an end to the Bosnian war in 1995. For both Moreno-Ocampo and Goldstone, the respective peace talks threatened their nascent tribunals. Goldstone sought to safeguard the ICTY's authority by strategically issuing indictments of Serb and Croat suspects during the three-week long Dayton talks and criticizing a potential amnesty for some indicted suspects.<sup>121</sup> Moreno-Ocampo tried to protect the ICC's standing by proceeding cautiously, apparently in the hopes that a collapse of the fragile Ugandan peace negotiations would not be blamed on an overreaching prosecutor. While Moreno-Ocampo reiterated that the ICC warrants had to be acted upon, he neither waged a strong campaign for the arrests nor faulted the Ugandan government for backing away from its earlier attempts to apprehend the LRA suspects.<sup>122</sup>

The slow, drawn-out nature of the Juba peace talks increased the risks of legitimizing the LRA suspects and their egregious practices, the very opposite intent of the arrest warrants, according to Moreno-Ocampo.<sup>123</sup> The incentive to engage the LRA and render an attractive peace agreement led Ugandan officials and diplomats to downplay the rebels' atrocities. As Stig Barlyng, the Danish ambassador to Uganda, said: "If the process requires us to momentarily put aside our strong stance on the inhumane and degrading way the LRA have behaved . . . I am not the one to oppose this."<sup>124</sup> This attitude on the part of international actors—including state parties to the Rome Statute such as Denmark—raised fears in the prosecutor's office that the ICC was losing leverage in Uganda.<sup>125</sup>

The need for Moreno-Ocampo to assert himself likely stemmed from his wish to reframe the narrative regarding the ICC's alleged detrimental role in the Ugandan peace process. Of particular worry was that some state parties believed that the ICC was complicating the peace process and pressed the prosecutor to temper his pursuit of the LRA suspects. The lack of support from state parties vis-à-vis both Uganda and Sudan, led to growing frustration in the prosecutor's office and concern that it was losing vital international support.<sup>126</sup> It was in this context that Moreno-Ocampo began to take a more adversarial approach in both countries.

The prosecutor's new approach was evident in his Nuremberg speech in June 2007. The speech is noteworthy for its embrace of prosecutions as

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121. PESKIN, INTERNATIONAL JUSTICE IN RWANDA AND THE BALKANS, *supra* note 15, at 41–45.

122. Luis Moreno-Ocampo, Chief Prosecutor, Int'l Criminal Court, Statement by the Chief Prosecutor on the Uganda Arrest Warrants (14 Oct. 2005).

123. Luis Moreno-Ocampo, Chief Prosecutor, Int'l Criminal Court, Address at Nuremberg International Conference "Building a Future of Peace and Justice" (25 June 2007).

124. Katy Glassborow, *LRA Accused of Selling Food Aid*, AFRICA UPDATE No. 140 (INST. FOR WAR & PEACE REPORTING), 25 Oct. 2007.

125. Interviews with ICC officials, The Hague (Nov. 2007).

126. Interviews with ICC officials, The Hague (June 2007).

a key to lasting peace, his rejection of any compromise on accountability, and his sharp criticism of tepid support from state parties. In response to the claim that the ICC threatened peace, Moreno-Ocampo shifted the blame to fugitives, such as Kony, and to the lack of international commitment to arrest them. That failure, he said, “is the real threat to enduring peace.”<sup>127</sup> The prosecutor also argued that lifting the LRA warrants would be a capitulation to blackmail, given Kony’s threat to resume violence if he did not get his way. With this and subsequent stands, the prosecutor signaled a clear shift in his own thinking about invoking the Rome Statute in order to suspend or withdraw pending cases. Where he once suggested potential backing for such escape clauses from prosecution, he now ruled out doing so, saying that “there can be *no* political compromise on legality and accountability.”<sup>128</sup> And where Moreno-Ocampo once countenanced invoking “the interests of justice” when an apparent conflict between peace and justice arose, he now said this provision should only be used as a “last resort”<sup>129</sup> and that he would not consider peace and stability as reasons to halt cases.<sup>130</sup> In the past, the diplomatic prosecutor had been reluctant to criticize state parties that he had been trying to cultivate. At Nuremberg he took aim at these allies—not only in the Uganda situation, but as we have described earlier, in the Sudan situation as well. He argued that the lack of international backing, particularly in pressing for arrests, was hurting the very court they helped create. “Ultimately, the decision to uphold the law will be the decision of States Parties,” he said. “If States Parties do not actively support the Court . . . then they are actively undermining it.”<sup>131</sup>

In the months to come, Moreno-Ocampo expanded his scrutiny of the international community, leveling criticisms of what he considered its direct support of the LRA. The prosecutor asserted that the food aid given to the LRA while its representatives negotiated peace in Juba was being sold by the rebels to rearm, heightening Kony’s prospects of evading arrest if the peace talks collapsed.<sup>132</sup> Moreno-Ocampo put the several European states funding the food aid on notice for potentially violating both the spirit and letter of the Rome Statute and called for vigilant monitoring of how the LRA used

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127. Moreno-Ocampo Nuremberg address, *supra* note 123.

128. *Id.*

129. Office of the Prosecutor, Int’l Criminal Court, Policy Paper on the Interests of Justice 9 (Sept. 2007), available at <http://www2.icc-cpi.int/NR/rdonlyres/772C95C9-F54D-4321-BF09-73422BB23528/143640/ICCOTPIInterestsOfJustice.pdf>.

130. *Id.* at 1, 8–9.

131. Moreno-Ocampo Nuremberg address, *supra* note 123.

132. Glassborow, *supra* note 124. European nations reportedly provided the food aid to the LRA to increase incentive for rebel participation in the Juba talks and to reduce the prevalence of LRA members looting for food. See Int’l Crisis Group, *Northern Uganda Peace Process: The Need to Maintain Momentum*, AFRICA BRIEFING No. 46, 14 Sept. 2007, at 9–10.

the aid.<sup>133</sup> “It must be recalled that any assistance that can help the sought individuals abscond from the Court would be illegal,” the prosecutor told diplomats in an October 2007 briefing in The Hague.<sup>134</sup>

By early 2008, the on and off again Juba peace talks had registered notable accomplishments. On the accountability issue, which proved to be the most difficult at the talks, the government and LRA representatives agreed in February to a plan whereby top LRA suspects would be prosecuted by a special chamber of Uganda’s High Court and lower-level suspects would face traditional justice.<sup>135</sup> The idea behind the domestic war crimes court was to create a way for the Ugandan judiciary to demonstrate its willingness and capacity to take over the LRA prosecutions from the ICC.<sup>136</sup> However, the ICC pre-trial chamber would remain the final arbiter of whether to allow the Ugandan courts to prosecute Kony and other top LRA leaders facing ICC arrest warrants. The Ugandan government saw the prospect of domestic trials as a way to entice Kony—who was said to especially fear an international trial—into concluding a peace agreement. Still, the specter of facing justice, even in Uganda, was not necessarily palatable to Kony who likely feared his fate in front of any court.<sup>137</sup>

With a plan for domestic prosecutions in place, the government had a stronger basis than it previously had to petition the ICC pre-trial chamber to send the LRA cases to the Ugandan judiciary. The government could also call on the Security Council to invoke its authority to suspend the arrest warrants under Article 16. With peace within reach, Western diplomats viewed Article 16 as a way to bolster Kony’s confidence and persuade him to sign off on a final agreement.<sup>138</sup> The government, however, would not petition the pre-trial chamber or the Security Council until Kony came out of the bush and signed the final peace settlement. For its part, the Security Council appeared unlikely to invoke an Article 16 suspension of the ICC warrants as long as Kony remained a fugitive and posed an ongoing regional threat.<sup>139</sup> Kony would not sign the final settlement until the warrants were dropped, a position that LRA leaders had previously made clear.<sup>140</sup> The two sides

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133. The food aid was funded by Denmark, Sweden, Austria, and Switzerland. Luis Moreno-Ocampo, Prosecutor, International Criminal Court, Statement at Eleventh Diplomatic Briefing of the International Criminal Court (10 Oct. 2007).

134. *Id.*

135. See Human Rights Watch’s Fourth Memorandum on Justice Issues and the Juba Talks, Analysis of the Annex to the June 29 Agreement on Accountability and Reconciliation (Feb. 2008).

136. For a critical assessment of the plan for domestic war crimes prosecutions, see Benchmarks for Justice for Serious Crimes in Northern Uganda: Human Rights Watch Memoranda on Justice Standards and the Juba Peace Talks, May 2007–February 2008. See also Kasaija Phillip Apuuli, *The Possible Deferral of the LRA Case*, 6 J. INT’L CRIM. JUST. 805 (2008).

137. Joseph Kony, *Might the Lord’s Resisters Give Up*, *ECONOMIST*, 15 Mar. 2008, at 59.

138. Interview with European diplomats, Brussels (May 2008).

139. *Id.*

140. Apuuli, *supra* note 136, at 805.

had reached an impasse. When Kony failed to sign by an early April 2008 deadline, the long-sought effort for peace in northern Uganda appeared to be on the brink of collapse.

With the Juba talks apparently over, the chief prosecutor intensified his campaign for the arrests of Kony and the surviving LRA suspects.<sup>141</sup> In late April 2008, Moreno-Ocampo criticized the peace negotiations for allowing Kony to strengthen his rebel army and called on state parties to the Rome Statute and the UN peacekeeping force in northeastern Congo to arrest the LRA leader. By this time, it had become apparent that Kony was committing human rights abuses and actively reinforcing his rebel army by abducting Congolese civilians to bolster his forces.<sup>142</sup> In a rare act of self-criticism for a chief prosecutor, Moreno-Ocampo faulted his previous conciliatory approach, namely, the endorsement he reportedly gave to a UN decision not to authorize its DRC peacekeeping mission to pursue Kony during the course the peace talks.<sup>143</sup> “Never again,” Moreno-Ocampo said, would he acquiesce in suspending international efforts to capture suspects facing ICC arrest warrants.<sup>144</sup> Once it became clear that Kony would not lay down his arms, Moreno-Ocampo’s office called for the suspension of all food aid to the rebels and condemned new atrocities committed by the LRA in mid-2008. For the prosecutor, the latest atrocities perpetrated by the LRA—including abductions and sexual slavery in southern Sudan, DRC, and the Central African Republic—highlighted the urgency of arresting the rebel leader.<sup>145</sup> “How many times will Kony . . . use negotiations to regain power and attack again?” the prosecutor asked rhetorically in a July 2008 speech marking the tenth anniversary of the adoption of the Rome Statute.<sup>146</sup> Moreno-Ocampo reiterated his call for Kony’s arrest following an LRA attack on Congolese

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141. Out of the five original LRA suspects, only three were reportedly alive by April 2009. The Ugandan army killed Raska Lukwiya in August 2006. Situation Ouganda Affaire, Informations sur le Décès de Raska Lukwiya, ICC -02/04-01/ 05 (2 Nov. 2006). Vincent Otti, the LRA’s second in command, was reportedly killed at Kony’s behest in October 2007. *Otti “Executed by Uganda Rebels,”* BBC NEWS, 21 Dec. 2007, available at <http://news.bbc.co.uk/2/hi/africa/7156284.stm>. In early 2009, one suspect, Okot Odhiambo, reportedly sought to surrender to the Ugandan government in exchange for amnesty. Tabu Butagira, *NGO’s Fight Over Odhiambo*, DAILY MONITOR (Kampala), 4 Feb. 2009, available at [http://www.monitor.co.ug/artman/publish/regionalspecial/NGOs\\_fight\\_over\\_Okot\\_Odhiambo\\_79273.shtml](http://www.monitor.co.ug/artman/publish/regionalspecial/NGOs_fight_over_Okot_Odhiambo_79273.shtml).
  142. Katy Glassborow & Peter Eichstaedt, *LRA Prepares for War, Not Peace*, AFRICA UPDATE NO. 168 (INST. FOR WAR & PEACE REPORTING), 24 Apr. 2008.
  143. Peter Eichstaedt, *ICC Chief Prosecutor Talks Tough*, AFRICA UPDATE NO. 169 (INST. FOR WAR & PEACE REPORTING), 28 Apr. 2008.
  144. *Id.*
  145. Press Release, Human Rights Watch, UN: Council Should Help End Fresh Abuses by Uganda’s LRA Boys, Girls Among Hundreds Abducted Across Three Countries (19 Jun. 2008), available at <http://www.hrw.org/en/news/2008/06/18/un-council-should-help-end-fresh-abuses-uganda-s-lra>.
  146. Luis Moreno-Ocampo, Chief Prosecutor, Int’l Criminal Court, Statement at Informal Meeting of the Assembly of States Parties to the Rome Statute (17 Jul. 2008) at 7.

villages two months later.<sup>147</sup> The rhetorical question the prosecutor asked in his July 2008 speech underscored the lethal if unintended consequences of the drawn-out Juba peace process that gave the LRA time to bolster its operational capacity and threaten stability in the border region of northeastern DRC, southern Sudan, and the Central African Republic.<sup>148</sup> By the end of 2008, the Ugandan rebel group, according to an International Crisis Group report, had become “a much harder force to disarm . . . than a few years ago.”<sup>149</sup>

After having its offers of peace rejected, the Ugandan government appeared to have a renewed interest in tracking down and arresting Kony. Still, given their remoteness in northeastern DRC, apprehending the LRA suspects would not be a simple task. It would require coordination between Uganda, its neighbors, and international actors that might lead to a renewal of armed conflict. Furthermore, the possibility of returning to the bargaining table still existed. In July, Ugandan officials again met with LRA representatives to try to persuade Kony to sign the peace agreement. During this period, the prosecutor's office reminded the Ugandan government of its responsibility to arrest Kony. Said Beatrice Le Fraper du Hellan, a top aide to the chief prosecutor: “Uganda has to do it and Uganda has to be leading all the efforts.”<sup>150</sup> In late November 2008, Kony was given another chance to sign a final peace agreement. When Kony once again failed to appear, the Ugandan government and its neighbors turned to military action. The United States reportedly helped coordinate and fund the military operation<sup>151</sup> and, by so doing, demonstrated its willingness to facilitate the ICC's work, at least when it served American interests.

In unprecedented regional cooperation, Uganda, in conjunction with the armies of the DRC and south Sudan, launched an attack on Kony's camp in its hideaway near Garamba National Park in northeastern DRC. News of the December 2008 raid raised hopes at the ICC that Kony might soon be captured and sent to The Hague for trial,<sup>152</sup> but the raid was botched,<sup>153</sup> and, once again, Kony eluded capture. Worse, the attack triggered LRA retaliation,

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147. *ICC Calls for Arrest of Ugandan LRA-Leader Kony and Commanders*, DEUTSCHE PRESSE-AGENTUR, 6 Oct. 2008.

148. Int'l Crisis Group, *Northern Uganda: The Road to Peace, With or Without Kony*, AFRICA REPORT 146, 10 Dec. 2008, at 14.

149. *Id.* at 14.

150. Caroline Ayugi & Peter Eichstaedt, *ICC Calls for End to LRA Aid*, AFRICA UPDATE NO. 171 (INST. FOR WAR & PEACE REPORTING), 23 May 2008.

151. Jeffrey Gettleman & Eric Schmitt, *U.S. Aided a Failed Plan to Rout Ugandan Rebels*, N.Y. TIMES, 7 Feb. 2009, at A1.

152. Interview with ICC official, The Hague (Dec. 2008).

153. Peter Eichstaedt, *More Robust International Action in DRC Needed*, AFRICA UPDATE NO. 207 (INST. FOR WAR & PEACE REPORTING), 27 Mar. 2009; Gettleman & Schmitt, *supra* note 151.

leading to “catastrophic”<sup>154</sup> consequences for Congolese civilians who were not adequately protected by the troops.<sup>155</sup> LRA attacks in late 2008 and early 2009 have resulted in the massacre of more than 1,000 Congolese civilians, the abductions of hundreds of children, and the forced displacement of close to 200,000 people in northeastern DRC.<sup>156</sup> The LRA attacks following the December raid initially seemed to reinforce Ugandan resolve. “It is better to fight the LRA and finish them instead of leaving them to continue committing these atrocities,” a Ugandan army spokesperson said in February 2009.<sup>157</sup> But a month later the Ugandan army decided to end its military campaign and return home after receiving a request from the Congolese government to leave. In northern Uganda and southern Sudan, fears of future LRA attacks have now also returned.<sup>158</sup> As the situation deteriorated in this part of troubled northeastern DRC in early 2009, state parties to the Rome Statute and other international actors were far from eager to heed the prosecutor’s clarion call to apprehend Kony. This was amply seen in the response of the European Union, ostensibly the strongest backer of the ICC. The EU called the LRA atrocities “appalling,” but would only go as far as urging Kony’s army to stop killing civilians and lay down its arms.<sup>159</sup>

## VI. CONCLUSION

Even as the International Criminal Court resembles the other contemporary international war crimes tribunals in key respects, it stands as a court apart. As an institution that aspires to be permanent in duration, global in scope, and universal in acceptance, the ICC must fulfill a broader and more difficult mandate. To build an enduring foundation, the Court must expand the number of state parties belonging to the ICC and deepen the support it receives from states that have already ratified the Rome Statute. Therein lays the best hope to attain global legitimacy and obtain the international political support critical to wresting cooperation from state and non-state

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154. UN Emergency Relief Coordinator John Holmes gave this assessment of the LRA attacks. See *Push on LRA Rebels “Catastrophic,”* BBC NEWS, 10 Feb. 2009. The UN peacekeeping force based in Congo has also been criticized for not doing enough to protect vulnerable people from LRA attacks. See *UN in Congo “Gives LRA Free Rein,”* BBC NEWS, 4 Feb. 2009.

155. Gettleman & Schmitt, *supra* note 151, at A1.

156. Eichstaedt, *More Robust International Action in DRC Needed,* *supra* note 153.

157. *Push on LRA Rebels “Catastrophic,” supra* note 154.

158. Samuel Richard Egadu, *Congo Withdrawal Sparks Panic,* Africa Update No. 206 (INST. FOR WAR & PEACE REPORTING), 17 Mar. 2009; *Fear of Fragmentation,* ECONOMIST, 11 Apr. 2009, at 47.

159. Declaration by the Presidency on behalf of the European Union on the Current Situation in Province Orientale, DRC (LRA), Council of The European Union, Brussels, 20 Feb. 2009.

actors complicit in mass atrocity. How then should the ICC chief prosecutor go about building the Court's authority and bolstering the prospects of receiving cooperation from targeted states as well as from international actors obligated to press these states?

In his first four years, Chief Prosecutor Moreno-Ocampo proceeded cautiously. The prosecutor became a consummate diplomat, trying to cultivate allies and convince skeptics that the ICC could not only be a viable court, but also a court that would respect the sanctity of state sovereignty while complementing, and perhaps even deferring to, the pursuit of peace. Instead of initiating investigations of state-sponsored atrocities, the prosecutor developed a policy of seeking invitations from states such as Uganda and then focused his investigations on the crimes of the state's enemies. For Moreno-Ocampo, this strategy of encouraging state referrals was the most feasible way to fulfill his prosecutorial mandate because, as he said, it increased "the likelihood of important cooperation on the ground."<sup>160</sup> His only charges against individuals implicated in state abuses came in response to the Security Council's referral of the Darfur situation to the ICC. Even then, he initially proceeded carefully with the Sudanese government, in an apparent effort to enhance the prospects of some cooperation.

Yet, in time, the limits and even risks of relying on a conciliatory strategy became evident. By mid-2007, the Court had one suspect in custody from the DRC, but no others. In Sudan and Uganda, the prospects of bringing suspects to trial in The Hague looked increasingly bleak, given President Bashir's defiance and President Museveni's decision to seek peace with the Lord's Resistance Army. As Sudan and Uganda succeeded in marginalizing the ICC—and as international backing for arrests waned amid the quest for negotiated peace with actors implicated in war crimes—conciliation threatened to further weaken Moreno-Ocampo's leverage by exposing the prosecutor's unwillingness or inability to defend the Court on the international stage. In this unfavorable political context, the prosecutor's deference no longer seemed a promising route to fulfill the Court's primary mandate of prosecutions or its secondary goals of fostering the legitimacy and universality of this nascent international court.

In this context, Moreno-Ocampo took a more resolute stand, employing the instrument of shame. In the language of the "trials of cooperation" framework introduced earlier, Moreno-Ocampo launched a virtual "prosecution" of non-cooperative states, Sudan in particular, and raised pressure on

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160. Office of the Prosecutor, International Criminal Court, Report on the activities performed during the first three years (June 2003–June 2006) 2 (12 Sept. 2006), available at [http://www.icc-cpi.int/NR/rdonlyres/70CB178C-15C7-4BDB-B09E-9E93CEF0E165/143610/3yearreport20060914\\_English.pdf](http://www.icc-cpi.int/NR/rdonlyres/70CB178C-15C7-4BDB-B09E-9E93CEF0E165/143610/3yearreport20060914_English.pdf).

would-be “surrogate enforcers”<sup>161</sup> in the international community to come to the Court’s side. Of course, as Sudan’s entrenched defiance and international reticence have shown, there are no guarantees that the strategic use of confrontation will trump the hard power of recalcitrant states.

As significant as Moreno-Ocampo’s transformation has been, he still resembles his former self in key respects. His bid to prosecute President Bashir of Sudan notwithstanding, he has remained reluctant to target state atrocities elsewhere, to initiate investigations under his own authority, or to expand his prosecutorial scrutiny beyond Africa. Yet, notably, the Office of the Prosecutor is currently assessing whether to open formal investigations in Colombia, Afghanistan, Cote d’Ivoire, Kenya, and Georgia.<sup>162</sup> A decision to launch an investigation of the August 2008 Georgian-Russian conflict could open up a new frontier for the ICC insofar as even great powers such as Russia may not be exempt from the prosecutor’s scrutiny.

Without enforcement powers of their own, the pursuit of cooperation remains the most vexing problem for today’s international war crimes tribunals. Still, the ICC and its chief prosecutor are not without legal and political tools. At key junctures, the prosecutor has the capacity to shape the struggle for cooperation, and the strategies he employs can either advance or undermine the pursuit of international justice as well as the quest for peace. While the chief prosecutors’ courtroom strategies have been a matter of great interest in the tribunal literature, their political strategies outside of court have received much less scholarly focus. This article underscores the importance of deepening our understanding of the dynamics and consequences of the ICC prosecutor’s actions in the complex arena of international politics.

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161. PESKIN, INTERNATIONAL JUSTICE IN RWANDA AND THE BALKANS, *supra* note 15, at 12.

162. Fifteenth Diplomatic Briefing of the International Criminal Court, Statement by Deputy Prosecutor Fatou Bensouda, The Hague (7 Apr. 2009).