

**INDICTING LEADERS DURING CONFLICT: A PATH TO PEACE OR FUEL
FOR THE FIRE?**

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List of Abbreviations

ICC- International Criminal Court
ICRC- International Committee of the Red Cross
ICTY- International Criminal Tribunal for the former Yugoslavia
JEM- Justice and Equality Movement
LRA- Lord's Resistance Army
NATO- North Atlantic Treaty Organization
OTP- Office of the Prosecutor
RUF- Revolutionary United Front
SCSL- Special Court for Sierra Leone
TRC- Truth and Reconciliation Commission
UN- United Nations

*“The International Criminal Tribunal demonstrates that far from being irreconcilable, peace and accountability, realities and ideals, are inextricably interlinked. But this interlinkage must be understood and evaluated in a broader context—one that looks beyond immediate pragmatic concerns to long-term considerations of how criminal justice contributes to peace and stability.”*¹

- Payam Akhavan, former Legal Advisor to the Prosecutor’s Office of the International Criminal Tribunals for Former Yugoslavia and Rwanda

“Grave crimes against humanity and impunity under the guise of sovereignty should not be unaccounted for. The credit goes to International Criminal Court with you as its Chief Prosecutor to render an unprecedented service to humanity.”

- Darfur Diaspora message to Luis Moreno-Ocampo²

Introduction

Since the Nuremberg and Tokyo Tribunals after World War II, prosecutors from international justice mechanisms have issued indictments and arrest warrants for high-level officials during conflicts, peace negotiations, and ceasefire situations. Most recently, the chief prosecutor for the International Criminal Court (ICC), Luis Moreno-Ocampo, requested a formal indictment and arrest warrant for Sudanese President, Omar al-Bashir, for genocide, crimes against humanity, and war crimes.³ The indictment has reignited debate around a classic international criminal law question: can peace be achieved without justice?

Critics of mid-conflict indictments argue that legal action ultimately interrupts, delays, and destroys the potential for peace in volatile situations.⁴ Specifically, Sudan’s allies fear an indictment would spark increased violence and lead to a collapse of humanitarian assistance in Darfur. Moreover, any international justice mechanism inevitably plunges into complicated geopolitical relationships and balancing acts. For example, the Arab League has already denounced al-Bashir’s indictment as a political

tool.⁵ In consideration of these issues, the Rome Statute of the ICC allows for delays “in the interest of justice” and leaves room for United Nations Security Council involvement.⁶ To encourage peace and preserve sovereignty for Sudan, some members of the international community favor delaying legal action against al-Bashir, while others advocate for immediate accountability.⁷

Prosecution alone will not prevent, remedy, or halt violations of international humanitarian law. However, human rights organizations, activists in Darfur, and proponents of international criminal law argue that an immediate arrest warrant for al-Bashir will preserve lives, facilitate peace, and validate the work of the Court.⁸ Former prosecutors from the International Criminal Tribunal for the former Yugoslavia (ICTY) and Special Court for Sierra Leone (SCSL) have recently pointed to their own experiences to bolster support for al-Bashir’s arrest.⁹

This paper will demonstrate, through empirical examples, that indictments of high-level military and political leaders actually facilitate peace negotiations, increase national and international opposition to dangerous regimes, and build the foundations for a strong rule of law in post-conflict states. Part I briefly outlines the development of individual liability for conflict-related crimes. Part II examines the indictments issued for political and military leaders by the ICTY. Part III explores the implications of the SCSL’s indictment of former Liberian president, Charles Taylor. Part IV concerns the complicated situation in Uganda, where the ICC issued arrest warrants for rebel leaders in the midst of conflict. Finally, Part V considers the potential ramifications of al-Bashir’s indictment in light of empirical examples. The next steps in Sudan may determine the fate of the ICC. As Nicholas Grono of the International Crisis Group argued, “it is

critically important that the ICC gets convictions under its belt...if it is continuously trumped by peace processes it will never have a deterrent effect.”¹⁰

I. Individual Accountability and “Those Most Responsible”

The concept of individual accountability for violations of international humanitarian law stems from the jurisprudence developed in the post-World War II tribunals in Germany and Japan.¹¹ For the first time, the international community did not punish aggressor states. Instead, military, political, and public figures answered for wartime crimes.¹² As a result, the International Committee of the Red Cross (ICRC) and the international community updated the Geneva Conventions to codify individual violations on international humanitarian law.¹³

Despite its significance, post-World War II jurisprudence forms an imperfect foundation for contemporary international criminal law. Many scholars and legal experts point to the “victor’s justice” inherent in the post-conflict Nuremberg and Tokyo Tribunals, where the “winners” directly prosecuted the “losers.” Recent jurisprudence suggests an intentional effort away from “victor’s justice.” For example, the United Nations seated the ICTY in an international setting to avoid perceptions of rewarding or punishing one side.¹⁴ Additionally, both the ICTY and ICC have issued indictments for each party involved in situations under consideration.¹⁵

Today, with the jurisprudence from World War II tribunals and subsequent international criminal law developments, ad-hoc tribunals in Yugoslavia and Rwanda, hybrid tribunals throughout the world, and the ICC prosecute individuals who violate international humanitarian law. In the interest of economic and temporal efficiency,

these new international criminal law tribunals often prosecute the “most responsible” perpetrators of war crimes, crimes against humanity, and other crimes¹⁶ or persons accused of committing the “most serious” crimes.¹⁷ Accordingly, modern international criminal jurisprudence usually involves high-level military, political, and public figures.

Like the Nuremberg and Tokyo trials, contemporary international prosecutions of high-level individuals inevitably involve some level of political maneuvering and a potential for “victor’s justice.” However, since the concept of individual responsibility for violations of humanitarian law emerged during World War II, the international community frequently indicts individuals *before* violence ends and one side clearly wins or loses. Mid-conflict indictments create new questions about implications on peace negotiations, escalating violence, and post-conflict rule of law. The next sections of this paper explore the ramifications of indictments in the former Yugoslavia, Sierra Leone, and Uganda to demonstrate that peace and justice are not mutually exclusive.

II. International Criminal Tribunal for the Former Yugoslavia

The United Nations established the ICTY in 1993 to respond to the humanitarian crisis during the wars in the former Yugoslavia.¹⁸ In addition to prosecuting violations of international humanitarian law, the UN created the Tribunal to deter future war criminals and to “contribute to the restoration of peace.”¹⁹ For the first time since World War II, the international community sought to hold high-level military and political individuals accountable for their actions during the conflict. Controversially, the ICTY Office of the Prosecutor (OTP) issued indictments for Radovan Karadzic, the President of the Republica Srpska, Ratko Mladic, the most senior general of the Bosnian Army, and later,

for Slobodan Milosevic, the sitting President of Serbia in the midst of negotiations or peace talks. Although, critics feared a collapse of peace negotiations, the indictments actually facilitated talks by removing hardliners, spurring opposition, and increasing respect for the rule of law.

a. Radovan Karadzic and Ratko Mladic during Dayton Accords

Just before the 1995 Dayton Accords where international mediators and representatives from warring parties in the former Yugoslavia met to draft a peace agreement, the ICTY indicted two key senior officials, Radovan Karadzic and Ratko Mladic.²⁰ The indictments included charges of genocide, crimes against humanity, and war crimes based on activities and leadership in the territory of Bosnia-Herzegovina.²¹ The OTP outlined specific crimes against humanity including unlawful confinement, murder, rape, torture, mass deportations of civilians, deliberate and indiscriminate targeting of civilians and destruction of cultural property.²²

Prior to the indictment, the Dayton Accord mediators and the UN Secretary General viewed Karadzic and Mladic as indispensable voices for the peace process.²³ Critics feared that talks would collapse without the indicted leaders. Moreover, some observers warned that the indicted leaders would use the ICTY as a bargaining chip and fight for an amnesty agreement.²⁴ Fortunately, the indictments of Karadzic and Mladic did not destroy the Dayton Peace Accords. Instead, the ICTY indictments facilitated talks, increased national and international opposition to the leaders and bolstered respect for the rule of law.

i. Facilitating Peace Negotiations

Ultimately, Karadzic and Mladic did not risk arrest to attend the Dayton peace negotiations. Accordingly their hard-line political positions could not influence or impede discussion.²⁵ In fact, the former ICTY Chief Prosecutor, Richard Goldstone, says Karadzic's indictment ensured broader participation at Dayton.²⁶ Specifically, he observed, "the indictment of Karadzic allowed Dayton to happen. If Karadzic hadn't been indicted, he would have...gone to Dayton...and there's no way that the Bosnian leaders would have entered the same room or sat at the same table as Karadzic."²⁷ In a widely criticized move, the Dayton Accord mediators allowed Slobodan Milosevic to represent the views of the Republic Srpska.²⁸

Moreover, the absence of the indicted leaders allowed representatives from the warring parties to include to cooperate with the Tribunal in the agreement.²⁹ The Constitution of Bosnia-Herzegovina, contained in Annex 4 of the Dayton Accords, mandates that

No person who is serving a sentence imposed by the International Tribunal for the Former Yugoslavia, and no person who is under indictment by the Tribunal and who has failed to comply with an order to appear before the Tribunal, may stand as a candidate or hold any appointive, elective, or other public office in the territory of Bosnia and Herzegovina.³⁰

This provision of the Dayton Accords forced Karadzic to relinquish his presidency, to halt all political appearances, media communications, and electoral activity, and to step down as head of his political party.³¹ Although Karadzic retained some political influence, his public and official capacity as a leader permanently ended with the ICTY indictment.³² If Karadzic participated at Dayton, this language would not have been included in the agreement, and he would have retained the presidency.³³ In 1995, after

successful negotiations, Bosnia-Herzegovina, Croatia, and the Federal Republic of Yugoslavia signed The Dayton Peace Agreement at the Paris Peace Conference and pledged to cease hostilities.³⁴

ii. Increased Domestic and International Opposition and Regime Change

A Croatian diplomat, Muhamed Sacirbey, remembered the prevailing climate in the former Yugoslavia after Dayton:

I remember, immediately after the Dayton Agreement was signed, all of a sudden people like Karadzic and Mladic all started disappearing like cockroaches when the light was turned on. And then, strange things started happening between the people of Bosnia. People started to move across this inter-entity boundary line, the[re] were actually Muslims working in Serb areas, Serbs working in Muslim areas, people visiting each other, people visiting graves. And time went on.³⁵

While the public adjusted to the post-indictment climate, new political leaders in the Republica Srpska took actions to isolate Karadzic and Mladic.

For instance, the new President of the Republica Srpska, Biljana Plavsic made public denouncements of Karadzic and dismissed Mladic from his post as Commander of the Bosnian Army because “international opposition made it impossible for him to remain.³⁶ Furthermore, Bosnian-Serb politicians increased international connections to distance themselves from Karadzic’s policies.³⁷ Next, as fugitives from international justice, both men went into hiding. Karadzic eventually adopted a new identity until his recent arrest, while Mladic retreated into an isolated mountain bunker before running from Serbian police.³⁸

When faced with the alleged crimes in the indictment, international leaders, diplomats, and policy makers increasingly viewed Karadzic and Mladic as the “primary

aggressors” of ethnic cleansing in Bosnia.³⁹ As former United States Assistance Secretary of State John Shattuck commented, “isolation and political pariah status will go along with those who maintain their resistance to the Tribunal.”⁴⁰ International leaders no longer respected the political legitimacy of either indictee and did not strive to cooperate, support, or safeguard their positions. Domestically, the ICTY indictments created space for new political voices while discrediting the indicted leaders internationally.

iii. Rule of Law

After the Dayton Accords, several high ranking Bosnian Serb politicians and military commanders who feared arrest turned themselves over to international authorities.⁴¹ Although individuals in the midst of the conflict continued to commit numerous atrocities in the former Yugoslavia, including the genocide at Srebrenica, the indictments did create an awareness of potential arrest and prosecution. The first United States Ambassador-at-Large for War Crimes Issues, David J. Scheffer, observed,

We know from experience in Bosnia that local authorities--camp commanders and temporary local 'officials'--sometimes do what they can to improve the circumstances of those under their care once they know that the international community will investigate and punish those who fail to respect human rights standards.⁴²

The indictments of Karadzic and Mladic certainly highlighted flaws in the ICTY’s ability to deter war criminals and preserve peace. For example, the ICTY indicted Milosevic for genocide and continued atrocities after he worked with international mediators for peace in Dayton. However, the indictments also paved the way for contemporary high-level indictments and demonstrated that post-indictment peace negotiations are viable,

preferable, and successful. Ultimately, “the ICTY survived the Dayton Peace Agreement and has been recognized as an essential ingredient of peace building in the former Yugoslavia.”⁴³

b. Slobodan Milosevic during NATO negotiations

In 1999, after continued aggression toward ethnic Albanians in Kosovo, the ICTY indicted the President of the Federal Republic of Yugoslavia, Slobodan Milosevic, during negotiations with the North Atlantic Treaty Organization (NATO).⁴⁴ The Prosecutor’s indictment alleged crimes against humanity including deportation, persecution, murder, torture, destruction of property, war crimes, and genocide in Bosnia-Herzegovina and Croatia.⁴⁵

Initially, NATO and Russian diplomats feared an end to all negotiations with Milosevic.⁴⁶ Russian envoy Viktor Chernomyrdin said the “indictment pulled the rug out from under the negotiating process”⁴⁷ and Chinese diplomats argued that the OTP indicted Milosevic, a sitting head of state, for political purposes.⁴⁸ Other skeptics feared that the indictment would encourage “Milosevic to stay in power permanently or lead his forces to adopt an even more brutal approach on the ground in Kosovo.”⁴⁹ Despite voracious warnings from members of the negotiating team, the indictment of Milosevic did not shut down negotiations. Like the indictments of Karadzic and Mladic, Milosevic’s indictment and arrest warrant actually facilitated negotiations, increased domestic and international opposition, and bolstered the rule of law in the former Yugoslavia.

i. Facilitating Negotiations

First, it is important to note that NATO's bombing campaign against Serbia substantially diminished Milosevic's negotiating power. Initially, members of the international community viewed the United States-lead bombing of Serbian forces in Kosovo as an unnecessary reach into a domestic conflict. According to former Secretary of State Madeline Albright, the indictment actually strengthened support for the United States-led NATO campaign. She observed, "From our perspective the indictment isolates Milosevic and the immediate group around him and makes very clear why we had to undertake this air campaign."⁵⁰

Even though the bombing substantially weakened his position, Milosevic had military options and political authority as head of state; he still represented one party at the negotiating table. Despite the doomsday fears of skeptics, the indictment did not cripple talks with NATO and Russia. The Russian envoy delayed a single diplomatic trip to Belgrade to symbolize its disapproval, but peace talks continued after the quick delay.⁵¹ After the bombing and the indictment, a weakened Milosevic acquiesced to NATO demands, allowed Kosovar refugees to return home, and withdrew Serbian forces.⁵² Madeline Albright agreed that the indictment strengthened NATO's bargaining power.⁵³

ii. Increased Domestic and International Opposition and Regime Change

Domestically, opposition groups like Otpor capitalized on the indictment to garner support for regime change.⁵⁴ On Milosevic's birthday, for instance, Otpor posted a message to Milosevic throughout Belgrade reading,

Thank you for the childhood you have taken from us, for the unforgettable war scenes you have given us, for all the crimes you have committed in the name of Serbs, for all the lost battles. ... Thank you for the unforgettable convoys of our brothers, for the sound of air raid sirens, for all the lives lost in vain.... Happy birthday, Mr. President, may you celebrate the next one with your nearest and dearest on a deserved holiday in The Hague.⁵⁵

Although Milosevic won the next elections in Serbia, an outraged public protested the results, and Milosevic resigned as President of Serbia.⁵⁶ Next, opposition politicians in Serbia attempted to try Milosevic for crimes he allegedly committed during his tenure in office. When domestic charges did not hold up, Serbian leadership turned him over to ICTY officials in 2003.⁵⁷

Like the indictments of Karadzic and Mladic, the indictment of Milosevic ensured international isolation and aggressor status.⁵⁸ The ICTY indictment encouraged foreign leaders including the former British Prime Minister, Tony Blair, to call for regime change in Yugoslavia.⁵⁹ Diplomats like Madeline Albright, who worked with Milosevic in Dayton, no longer viewed Milosevic as a legitimate partner in peace. Albright told reporters, “Milosevic initiated four wars during the 1990s, including a devastating campaign of ethnic cleansing in Kosovo which killed thousands and drove almost a million people from their homes.”⁶⁰

Increased opposition and the subsequent regime change in Serbia facilitated the transition to peace in Serbia, removed hard-line politicians from power, and ultimately bolstered support for legal remedies to violations of international humanitarian law in the region.

iii. Rule of Law

By indicting and issuing an arrest warrant for a sitting head of state, the ICTY set a new precedent in international criminal law. Today, international leaders increasingly understand that impunity for sitting heads of state, high-level military leaders, and public figures has substantially eroded. Furthermore, the ICTY indictments demonstrate that peace and justice are not mutually exclusive. In fact, if Milosevic had been indicted with Karadzic and Mladic, peace may have come sooner to the Balkans.

While the trial of Milosevic was not without faults, a greater appreciation for post-conflict justice in The Hague has slowly spread throughout Serbia and other new states in the former Yugoslavia. Today, the ICTY works with legal experts in the former Yugoslavia to encourage continued war crimes investigations.⁶¹ Recently, Serbia created its own Special Court for Organized Crimes and War Crimes⁶² and Bosnia-Herzegovina created a special hybrid war crimes chamber within its National State Court to try cases from the war.⁶³

c. ICTY Legacy

The ICTY's mid-conflict indictments of high-ranking leaders, military commanders, and a sitting head of state broke new ground in international criminal law. During the Dayton Accords and the NATO negotiations, critics feared that prosecution would crush diplomatic efforts and strengthen dangerous regimes. However, in each case, the indictment eased peace talks when hard-liners were barred from participating or substantially weakened. Also, the ICTY indictments spurred domestic and international

opposition to the indicted leaders that resulted in eventual regime change. Most importantly, the indictments signified the end of impunity for conflict related crimes and spurred further investigations and accountability mechanisms in other conflict and post-conflict societies.

III. SCSL Indictment of Charles Taylor at Accra Talks

From 1991 to 2002, conflict between three main groups, the Revolutionary United Front (RUF), the Armed Forces Revolutionary Council, and the Civil Defense Forces raged throughout Sierra Leone.⁶⁴ In 1999, the Government of Sierra Leone and the UN created the Special Court for Sierra Leone (SCSL) with the specific mandate to “bring justice to those who bear the greatest responsibility for serious violations of international humanitarian law and Sierra Leonean law committed in the territory of Sierra Leone.”⁶⁵ The Court has issued critical decisions in international criminal law, including a 2004 holding that heads of state are not immune from prosecution before an international court.⁶⁶

In March of 2003 as peace talks for the civil war in Liberia started, the SCSL unsealed an indictment for the sitting President of Liberia, Charles Taylor.⁶⁷ The indictment alleges seventeen counts of crimes against humanity, war crimes, and other serious violations of international humanitarian law, including terrorizing the civilian population, murder, rape, sexual slavery, and use of child soldiers.⁶⁸ The SCSL prosecutor at the time, David Crane, issued the indictment during internationally based peace talks in hopes of arresting Taylor outside of Liberia.⁶⁹

Criticism of Taylor’s indictment arrived from various sources. First, West

African and international leaders who labored strenuously for the peace talks in Ghana criticized the timing and argued that the indictment would end all negotiations.⁷⁰ When the news of the indictment broke in Accra, Ghanaian President John Kufuor, “suffered considerable loss of face.”⁷¹ Other critics said the SCSL issued the indictment as a publicity stunt to damage the prospects for peace in West Africa.⁷² Finally, some humanitarian organizations feared that Taylor’s supporters in Monrovia would riot, pillage, or attack civilians.⁷³ Fortunately, the parade of terribles never transpired and “the impact was overall quite positive.”⁷⁴ Peace talks did not fail, opposition to Taylor’s regime increased as he exiled to Nigeria, and the post-conflict rule of law culture strengthened.

a. Facilitating Peace Negotiations

In the hours after his indictment, Taylor stood before the opening session at the Accra peace negotiations and said, “If I am the problem and seem to stand in the way... of peace, I will remove myself from the process to allow peace to come to our country.”⁷⁵ Later that day, after other leaders at the talks ignored him, Taylor returned to Liberia.⁷⁶ Like the indictments of Mladic and Karadzic, the SCSL indictment of Taylor served to eliminate extreme voices from negotiations. After Taylor’s departure, the representatives in Accra determined a plan of action for a transitional Liberian government that did not include former President Charles Taylor.⁷⁷ The indictment eliminated Taylor’s extreme views from talks and ensured that he would not have a political future in Liberia.

b. Increased Opposition and Regime Change

After his indictment, Taylor resigned as president and negotiated an exile agreement with Nigeria on the condition that he abstain from all political activity in Africa.⁷⁸ In recent elections, opposition candidates won the majority of seats and Liberians elected the first female head of state in Africa. Today, most people in West Africa agree that Taylor should be held accountable for the violence he perpetrated in Liberia and Sierra Leone.⁷⁹ On the day Taylor was taken into custody, people gathered at the Special Court to commemorate the day.⁸⁰

Outside of elections, opposition groups used the indictment to discredit Taylor's presidency. The alleged leader of Liberians United for Reconciliation and Democracy, Sekou Conneh, recently said the indictment meant an end to Taylor's constitutional authority as president.⁸¹ The SCSL shifted the political landscape by encouraging opposition movements to take advantage of Taylor's damaged reputation and eventual absence.⁸²

Internationally, several governments joined opposition to Charles Taylor's exile. For example, the United States offered a two million dollar reward for capturing Taylor.⁸³ Moreover, the United States tried and convicted Charles Taylor's son, Chuckie Taylor, for torture during the conflict in Liberia.⁸⁴ Many international activists viewed the indictment as a critical moment for international criminal law. For instance, John Prendergast, of the International Crisis Group and Save Darfur Coalition told reporters, "the precedent of removing an indictment against Taylor would be disastrous for years to come in encouraging impunity and making a mockery of attempts at establishing

accountability for crimes against humanity throughout the world.”⁸⁵ These groups worked to garner support for the indictment and arrest of Taylor.

c. Rule of Law

The indictment created an environment of accountability in Liberia and led to the eventual creation of a Truth and Reconciliation Commission (TRC) to complement international prosecutions. The TRC provides victims with an outlet for participation while bolstering the general culture of responsibility for involvement in the conflict.⁸⁶ Moreover, that Nigeria agreed to hand Taylor over to SCSL authorities demonstrates the international and regional support for ending impunity.⁸⁷

Accountability is especially important in Liberia, where leaders traditionally ruled violently without consequences.⁸⁸ For instance, in 1996 Charles Taylor threatened the Liberian people with another civil war unless they elected his supporters to political office.⁸⁹ Ultimately, prosecuting Liberian elites like Taylor reverses historical trends and serves as “a crucial step on the way to lasting peace.”⁹⁰

d. Legacy of the Taylor Indictment

The Taylor prosecution demonstrates that indictments issued in the midst of negotiations do not destroy prospects for peace, escalate long-term violence, or create more determined war criminals. Like indictments issued by the ICTY, the SCSL indictments encouraged moderate solutions at peace talks, increased opposition to dangerous regimes, and imbued a deeper appreciation for the rule of law throughout West Africa. Today, Taylor is on trial at the International Criminal Court facilities, where the

peace without justice issue remains consistently relevant and the international community awaits the results of the ICC's initial mid-conflict indictments.

IV. ICC Indictment of Joseph Kony During On-going Negotiations and Violence

In 2002, violence in Uganda intensified between Joseph Kony's Lord's Resistance Army (LRA) and the Ugandan Army.⁹¹ After Uganda requested an ICC investigation, the OTP issued indictments and arrest warrants for Kony and other members of the LRA leadership. The Ugandan referral marked the first time the ICC received jurisdiction under Articles 13(a) and 14 of the Rome Statute.⁹² The indictment charges over 33 violations of international humanitarian law including sexual enslavement, rape, attacks on civilians, employing child soldiers, enslavement, cruel treatment, and murder.⁹³

Today, peace negotiations have stalled in part because the LRA will not sign a peace agreement when the potential for arrest and international trial looms.⁹⁴ Moreover, LRA members want the government to honor pre-ICC amnesty agreements. The ICC Chief Prosecutor, Luis Moreno-Ocampo will not consider rescinding the arrest warrants. He has told reporters, "asking the Prosecution to use its discretionary powers to adjust to situations on the ground, to indict or withdraw indictments according to short term political goals...calling for amnesties, the granting of immunities are not consistent with the Rome Statute."⁹⁵

Critics of the ICC point to the situation in Uganda as an example of how indictments during conflicts prolong violent conflicts and stave off options for speedy solutions. However, it is important to note that many LRA members have already

surrendered to the government, that domestic and international opposition to the LRA has never been stronger, and that the Ugandan people increasingly favor legal remedies for LRA violence.

a. Impact on Peace Negotiations

Although peace talks have temporarily stalled in Uganda, many early indictment opponents have conceded that ICC involvement actually encourages peace negotiations by putting pressure on the LRA and its supporters.”⁹⁶ Like Milosevic, who unconditionally agreed to NATO’s demands after his indictment, some LRA’s members have emerged to negotiate with the government.⁹⁷ Moreover, Uganda’s chief negotiator says that if Kony wants to be considered a legitimate leader, he must meet with Ugandan authorities and submit to the ICC.⁹⁸ The LRA’s unwavering refusal to negotiate while indictments are outstanding has cost the organization its credibility and decreased domestic and international support. Ultimately, Luis Moreno-Ocampo’s investigation in Uganda has convinced him that “the best way to finally stop the conflict after 19 years is to arrest the top leaders.”⁹⁹

Moreover, the situation on the ground Uganda presents different challenges from the environments in the former Yugoslavia, Liberia, and Sudan, where political and military figures with fixed offices, representatives, and public personalities received indictments. Empirically, international diplomatic pressure encourages leaders to negotiate or resign after an indictment. However, as the situation in Uganda demonstrates, that same pressure may not influence a rebel leader to acquiesce to the demands of the international community. While direct diplomatic pressure may not

immediately shift the power dynamics in Uganda, the ICC indictment has led to reduced financial, logistical, and ideological support for the LRA. As Joseph Kony loses support, peace increasingly becomes a reality.¹⁰⁰

b. Increased Domestic and International Opposition

Waning domestic support for indicted officials in Yugoslavia and Liberia provided essential opportunities for stronger opposition movements and regime change. Similarly, since the indictment in Uganda, opposition to the LRA has increased. Support for an LRA amnesty has dropped and most Ugandans now favor an accountability mechanism for the LRA.¹⁰¹ A survey conducted by the International Center for Transitional Justice and the Human Rights Center found that three quarters of respondents favored an accountability mechanism for the LRA.¹⁰² Of the respondents who were aware of the ICC's work in Uganda, ninety-one percent thought the Court would contribute to peace, and eighty-nine percent thought that it would contribute to justice.¹⁰³

The Taylor and Kony indictments show that the ICC's international reach and permanent treaty status have the potential to immediately discredit indicted leaders at the international level.¹⁰⁴ For example, The United States has implemented sanctions against the LRA because of its failure to cooperate with the Ugandan government or the ICC.¹⁰⁵ Moreover, the Government of Sudan stopped providing support to the LRA after the indictment and measurably weakened the LRA's military capability, encouraged significant defections among LRA commanders, and forced otherwise defiant leaders to the negotiating table. All of these developments are in sharp contrast to the period

preceding the referral, when LRA atrocities reached a new peak.”¹⁰⁶

Activists and international human rights organizations are also pushing for Uganda and the ICC to follow through on the LRA arrest warrants in order to deter future war criminals and to encourage strong support for the court.¹⁰⁷ Most recently, Kony had international mediators, the government of Uganda, and the people of Uganda excited over a renewed possibility for peace. In November 2008, the government of Uganda invited Kony to attend peace talks to sign an agreement, without a guarantee that the ICC arrest warrant would be suspended. When Kony failed to attend the talks, opposition strengthened and support for an amnesty weakened.¹⁰⁸

c. Rule of Law and Legacy of LRA Indictments

The ICC indictments in Uganda demonstrate that the Court has real power to alter the dynamics of a conflict and to increase acceptance for legal remedies to war crimes. The International Crisis Group found that the ICC “has already had a positive impact on the peace process by sobering the LRA and influencing Khartoum to reduce support.”¹⁰⁹ Moreover, the international survey demonstrates deeper support for a legal liability for crimes committed in Northern Uganda.¹¹⁰

At the same time, Uganda provides a lesson for future ICC situations. Although the ICC has the power to facilitate peace, the international community did not develop the Court to resolve ongoing conflicts or to end violence. In the former Yugoslavia and Liberia, indictments came during conflicts where diplomacy, military force, and international financial pressure worked in tandem with legal prosecution to further prospects for peace. In Uganda, on the other hand, the “government views the ICC as a

means of ending the conflict rather than as a way to bring violators to justice.”¹¹¹

Although the ICC action in Uganda has not resulted in immediate peace, the indictment and subsequent arrest warrants have not prompted violence or encouraged LRA leaders to ramp up attacks. In fact, many LRA members have negotiated with the government of Uganda, peace talks continue without LRA members, international and domestic opposition to Kony strengthens, and the people of Uganda increasingly believe in the work of the ICC.

V. Implications for the ICC Situation in Sudan

The most recent conflict in Darfur started in 2003 between the government of Sudan and rebel groups including the Sudan Liberation Army/Movement and the Justice and Equality Movement (JEM). The rebel groups claim that the government of Sudan intentionally underdeveloped and diverted resources from the Darfur area. Moreover, evidence indicates that the Government of Sudan funded, trained and supplied Arab militiamen, the Janjaweed, who perpetuated massive attacks against the Fur, Zaghawa and Masalit ethnic groups in Darfur.¹¹² Approximately 500,000 people have died from government attacks in Darfur¹¹³ and at least 2.5 million people have been displaced.¹¹⁴

Unlike the government of Uganda, which signed and ratified the Rome Treaty for the International Criminal Court, Sudan did not become a member to the ICC. In addition to holding members states accountable to the Rome Statute, the treaty allows for investigations into violations of international humanitarian law by non-treaty members.¹¹⁵ Accordingly, in March 2005, the UN Security Council passed Resolution 1593 to refer the situation in Darfur to the ICC prosecutor.¹¹⁶

After an extensive investigation the Office of the Prosecutor (OTP) at the ICC issued arrest warrants for two Sudanese officials, Ahmad Muhammad, the Sudanese Minister of Humanitarian Affairs and Ali Kushayb, a Janjaweed leader.¹¹⁷ Later, in July 2008, the OTP requested an arrest warrant for the sitting President of Sudan, Omar al-Bashir.¹¹⁸ Al-Bashir's warrant includes murder, extermination, forcible transfer, torture, rape, and three separate counts of genocide against the Fur, Masalit, and Zaghawa ethnic groups.¹¹⁹

a. Response to ICC action in Sudan

Al-Bashir rejects the jurisdiction of the ICC on two levels. First, the Sudanese government ardently believes that ICC investigations, legal proceedings, and general involvement in Sudan erode Sudanese sovereignty.¹²⁰ Secondly, Sudanese officials point to recent nationally sponsored investigations and prosecutions to show that the ICC principle of complementarity excuses Sudan from ICC action.¹²¹ Al-Bashir has warned against the increased violence, worsened humanitarian conditions, and potential for a collapse of any peace process if the ICC issues an arrest warrant.¹²²

Al-Bashir's government enjoys support from many members of the international community including UN Security Council member China and the Arab League.¹²³ These states fear that an indictment will end all possibilities of peace in Darfur. Furthermore, some humanitarian organizations favor delaying proceedings to avoid a collapse of government cooperation with aid agencies, worsening conditions or further violence. On the other hand, most human rights organizations and the United States applaud the ICC's work in Sudan.¹²⁴ Save Darfur, a coalition of Darfur advocacy groups,

fervently supports the prosecution of al-Bashir.¹²⁵

Lessons learned from the former Yugoslavia, Liberia and Uganda combined with on the ground changes in post-indictment Sudan indicate that peace will not be destroyed by an ICC arrest warrant. The ICC presence in Sudan has facilitated attempts at peace, increased domestic and international opposition to the regime in Khartoum, and increased the rule of law in Sudan.

b. Facilitating Peace Negotiations

Critics of the ICC work in Sudan unanimously fear that an arrest warrant would destroy future opportunities to negotiate peace in Darfur. Experience in Dayton and Accra shows that removing extreme leaders from peace talks actually facilitates solutions. Even the indictments of LRA leaders provide leverage that ensures the parties stay committed to negotiating.¹²⁶ ICC leverage is already at work in Sudan. When Moreno-Ocampo requested the arrest warrant, a peace process had not been launched in Darfur. Since his indictment, the government of Sudan has aggressively pushed for peace negotiations. In November, al-Bashir signed the Sudanese People's Initiative and promised to work for peace in Darfur, provide compensation to the people of Darfur, and institute stronger power sharing mechanisms.¹²⁷ Rebel leaders did not attend the People's Initiative talks and accused al-Bashir of using peace as a bargaining chip against accountability.¹²⁸

Al-Bashir's recent actions prove he is malleable in the face of ICC prosecution. Al-Bashir "knows that if he is formally charged- and particularly if the three counts of genocide are upheld- he will carry the mark of Cain."¹²⁹ Moreover, empirical examples

demonstrate that ultimately, accountability is necessary for lasting peace. David Crane, the former prosecutor at the SCSL says that fears about ending the peace process represent

[A] short term view...but if they use the Charles Taylor case as a good case study...you'll see that five years after I unsealed the indictment...despite the condemnations, despite the calls that this would hamper peace, Liberia is on a road of potentially a sustainable peace under the leadership of the first female head of state ever in Africa to be elected in a free and open and fair election in Liberia.¹³⁰

The ICC investigation in Darfur serves as a catalyst for action from al-Bashir's administration in Khartoum. If the ICC issues an arrest warrant, al-Bashir will be discredited and held accountable for crimes in Darfur while a legitimate peace process began in Sudan.

c. Increased Domestic and International Opposition to al-Bashir

Pre-peace indictments in the former Yugoslavia, Liberia and Uganda indicate that post-arrest warrant domestic opposition has the power to eliminate indicted leaders from political participation, to create regime change, and to encourage peace. Today, journalists in Sudan openly criticize the government and advocate for cooperation with rebel groups as per the 2005 Comprehensive Peace Agreement.¹³¹ One newspaper condemned government support for the Janjaweed and called the Government of Sudan "a racist regime that is in many respects worse than the apartheid regime in South Africa, which at least had the dignity not to employ rape as a tactic of suppression."¹³² Before the indictment, the government of Sudan severely punished this type of dissidence. The Darfur Diaspora, which includes many prominent Darfuris, also issued an official

document in support of Moreno-Ocampo's work in Sudan.¹³³

Politically, opposition parties like the Movement of New Democratic Forces and the Popular Congress Party have publicly called for Al-Bashir's resignation.¹³⁴ Although there is still widespread political support for al-Bashir in the National Assembly, the opposition is gaining momentum throughout Darfur and Sudan.¹³⁵ Like Milosevic, al-Bashir will have to answer to voters in the fast approaching 2009 elections. In fact, al-Bashir recently evoked Charles Taylor when he told reporters that he "is prepared to resign if it is in the interest of his people [and] if it is a pure Sudanese decision."¹³⁶

Post-indictment international opposition in the former Yugoslavia, Liberia and Uganda expedited peace negotiations, prompted a decrease in violence, and facilitated regime change. Al-Bashir's past reactions to international pressure demonstrate that his regime is not impermeable to criticism. For instance, in 1996, the UN Security Council imposed travel sanctions on members of the Sudanese Government and obliged all countries to reduce the number and the level of staff at Sudanese diplomatic missions to pressure the Government into surrendering three men suspected of attempting to assassinate Egyptian president Hosni Mubarak.¹³⁷ When faced with mounting international pressure and disapproval, al-Bashir did not lash out, instead he cooperated and helped with the investigation.¹³⁸ Additionally, leaders in Khartoum have already responded to ICC action; the government of Sudan stopped supporting the LRA when the indictments were issued for Kony.¹³⁹

Most international organizations and human rights advocates see the indictment as an opportunity to build international opposition to al-Bashir. At the same time, these groups understand the critical precedent the ICC may establish in Sudan. Elizabeth

Evenson, counsel in the International Justice Program of Human Rights Watch, has urged “ICC member states [to] speak out forcefully to promote (its) mission and to strongly defend the ICC's independence from political interference.”¹⁴⁰ Although not all ICC member states favor al-Bashir’s prosecution, the activists on the ground in Darfur are emphatically pushing for prosecution.

The Enough Project issued a report in favor of the indictment, using the Milosevic and Taylor indictments as proof that peace can come from justice. Moreover, Enough argues that ‘holding people accountable for war crimes is not only the right thing to do from a moral perspective- it directly promotes peace and makes future such abuses less likely.’¹⁴¹ Additionally, even though some members of the international community were hesitant to indict leaders in the former Yugoslavia, Liberia, and Uganda, each of these states ultimately saw regime change and peace negotiations shortly after ICC indictments were issued.

d. Rule of Law

As the situations in former Yugoslavia, Liberia and Uganda demonstrate, indictments may create a culture of reconciliation and responsibility in post-conflict societies.¹⁴² Since the indictment, opposition groups and the Sudanese media have launched campaigns for accountability mechanisms. For example, the Umma Party is investigating potential opportunities for the ICC to work within the Sudanese justice system.¹⁴³ Like the indictments of other leaders, the indictment of al-Bashir has started a culture of accountability in Sudan that could create more space for complimentary traditional or alternative reconciliation institutions.

The culture of accountability has spread throughout the political administration in Khartoum as well. Politicians in Khartoum fear prosecution and lower level politicians already realize that they may be “sacrificed” to the Court.¹⁴⁴ Furthermore, Khartoum as initiated its own investigation into crimes in Darfur. Most opposition leaders and rebel groups agree that any government-sponsored investigation will serve to absolve al-Bashir of any violations of international humanitarian law in Darfur. Therefore, many people in Darfur argue that an international trial for al-Bashir is essential to peace in the region. As one rebel leader remarked,

All [the government is] doing now is a reaction to counter the measures and the ICC [campaign]...are they going to try to al-Bashir? He is the one that ordered the crimes in Darfur. Or are they going after small fish?"¹⁴⁵

Most recently, Luis Moreno-Ocampo issued sealed indictments and arrest warrants for Darfuri rebel leaders in connection with attacks on humanitarian workers in September 2007. The fact that all rebel leaders have publicly committed to cooperating with the ICC shows that accountability is a viable option for Sudanese leaders.¹⁴⁶

Finally, the Court is not the only mechanism for pressuring al-Bashir, ending violence in Darfur, or facilitating regime change. In tandem with support for the indictment, the international community has a range of diplomatic, financial, and military tools to use with the government in Khartoum. The international community created the ICC to handle the very crimes the OTP accuses al-Bashir of committing in Darfur. At the same time, to prevent indictments from becoming barriers to conflict resolution, the Rome Statute allows the United Nations Security Council to adopt a resolution that suspends the ICC investigation for one year.¹⁴⁷ However, immediate action to stop

violence in Darfur, end impunity, and acknowledge the genocide clearly outweighs the dangers that come with international indictments.¹⁴⁸

V. Conclusion

In December 2008, Luis Moreno-Ocampo briefed the Security Council on his ongoing investigation in Sudan and encouraged member states to support his indictment of President al-Bashir.¹⁴⁹ The ICC Prosecutor told Security Council members that al-Bashir's threats to harm peacekeepers and civilians if the ICC issues an arrest warrant "incite violence" and "should be seen for what they are- a confirmation of criminal intentions."¹⁵⁰ Representatives from Security Council permanent members Russia and China have expressed a willingness to "invoke [their] power to defer Moreno-Ocampo's prosecution for at least a year, out of fear that an attempt to arrest a sitting president could wreak further havoc in Darfur."¹⁵¹ Other regional diplomats have also urged the Security Council to suspend ICC work in Sudan. For example, South African Ambassador Dumisani Kumalo "hope[s] that the council will take time, the necessary time, to have a discussion on deferring the prosecution."¹⁵² He continued, "We sit here having to make decisions ... to balance the two things between the maintenance of international security and for fighting impunity."¹⁵³

The international community responded with similar fears when international justice mechanisms indicted high-level political and military individuals during conflicts in the former Yugoslavia, Liberia, and Uganda. Despite these fears each indictment yielded an overall positive result. Indictments removed Radovan Karadzic, Ratko Mladic, and Charles Taylor from their respective peace talks and created space for moderation at the negotiation table. Likewise, arrest warrants substantially weakened the

negotiating positions of both Slobodan Milosevic, a sitting head of state, and Joseph Kony of the LRA.

Moreover, experience shows that indictments foster domestic and international opposition to dangerous leaders. In the former Yugoslavia, leaders of grassroots opposition movements, political parties, and the diplomatic community used the arrest warrants of Karadzic, Mladic, and Milosevic to isolate, weaken, and discredit the indicted leaders. For Charles Taylor, the indictment signaled the end of his political career in African politics. International opposition encouraged Nigeria to turn the former Liberian President over to authorities. In Uganda, ICC action and subsequent international opposition has resulted in fewer rebel attacks, as the LRA's logistical support from abroad dwindles.

Finally, empirical evidence indicates that international indictments increase appreciation for the rule of law in conflict and post-conflict societies. National courts in the former Yugoslavia have established their own war crimes sections in order to continue the work of the ICTY. In Liberia, the arrest of Charles Taylor brought an end to decades of impunity for leaders and encouraged national TRCs and alternate accountability mechanisms. In Uganda, the public increasingly favors legal recourse over an amnesty agreement and approves of the ICC's work. Last, despite an increase in high-level indictments, most state governments support prosecuting violations of international humanitarian law at ad-hoc courts, hybrid tribunals, TRCs, and the ICC. These leaders have agreed to the difficult task of separating legal questions from political questions and demanding justice *and* peace. Richard Goldstone presented the challenge to leaders when he indicted Milosevic,

I don't think it's appropriate for politicians--before and after the fact--to reflect on whether they think the indictment came at a good or bad time; whether it's helpful to a peace process. This is a legal, judicial process. The appropriate course of action is for politicians to take this indictment into account. It was not for me to take their efforts into account in deciding whether to bring an indictment, and at what particular time.¹⁵⁴

The indictment of al-Bashir has already generated similar results in Sudan. Since ICC involvement in Sudan, the government's bargaining position has weakened and al-Bashir has been forced to cooperate with rebel groups. At the same time, opposition voices in Sudan are gaining momentum and increasing calls for "real" peace that will not be driven by al-Bashir's pandering to the ICC.¹⁵⁵ International opposition from foreign governments, the Diaspora, and human rights groups is also intensifying. For example, Belgian Ambassador Jan Grauls warned that the Security Council should not "allow itself to be manipulated by blackmail by caving to al-Bashir's threats of more violence."¹⁵⁶ Opposition has the power to increase the potential for regime change and to drive support for accountability and the rule of law in Sudan.

Moreno-Ocampo charged al-Bashir with three separate counts of genocide. The international community developed the ICC to respond to these most serious crimes in the face of impunity, politics, and diplomatic maneuvering. Without ICC follow-through impunity will reign. The Ambassador from Costa Rica, Jorge Urbina underscores the immediacy and importance of a strong and independent ICC,

We know there could be reprisals, the situation could get even worse. Night is never so dark as before the dawn. We can't have this arm wrestle between the council and the Court and not allow responsibility to be taken for one's acts.¹⁵⁷

When compared with political fears and threats from an alleged perpetrator of genocide,

the chance for peace outweighs potential risks. Empirical evidence shows that an arrest warrant for al-Bashir could pave the way to peace, bolster the work of the ICC, and ultimately deter future war crimes.

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¹³³ See, *The People of Darfur Support the Chief Prosecutor of the ICC and Mr. Moreno-Ocampo in the indictment of Sudanese president Omar Hassan el Bashir*.

¹³⁴ Id.

¹³⁵ Id.

¹³⁶ *Al Bashir Says Willing to Step Down if Necessary*, SUDANESE MEDIA CENTER (Dec. 6, 2008) available at, <http://english.smc.sd/enmain/entopic/?artID=15463> (last visited Dec. 7, 2008).

¹³⁷ Mike Corder, *Rights Group Urges Support for War Crime Court*, ASSOCIATED PRESS (Nov 12, 2008) available at, <http://ap.google.com/article/ALeqM5hb2zSbNNUmPH1xj1aTETjNOw2NsgD94DCPC00> (last visited Nov. 30, 2008)

¹³⁸ Id.

¹³⁹ Okun, at 787.

¹⁴⁰ Corder.

¹⁴¹ Ochieng.

¹⁴² Okechukwu Oko, *The Challenges of International Criminal Prosecutions in Africa*, 31 FORDHAM INTERNATIONAL LAW JOURNAL 343, 364 (2008).

¹⁴³ See, *Rumblings of Dissent on Bashir Indictment*.

¹⁴⁴ Kastner, at 171.

¹⁴⁵ *Sudan to Conduct its own Darfur Trials*, BOR GLOBE (Oct. 13, 2008) <http://www.borglobe.com/politics-1/1245-sudan-to-conduct-its-own-darfur-trials.html> (last visited Nov. 30, 2008).

¹⁴⁶ Nora Boustany, *ICC Warrants Sought for 3 Sudanese Rebel Chiefs*, WASHINGTON POST (Nov 21, 2009) available at <http://www.washingtonpost.com/wp-dyn/content/article/2008/11/20/AR2008112003506.html> (last visited Dec. 4, 2008).

¹⁴⁷ Hanlon, at 325.

¹⁴⁸ Kastner, at 184.

¹⁴⁹ John Heilprin, *ICC Prosecutor: Sudan Leader 'Inciting Violence,'* THE WASHINGTON POST (Dec. 12, 2008) available at <http://www.washingtonpost.com/wp-dyn/content/article/2008/12/03/AR2008120301350.html> (last visited Dec. 7, 2008).

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Id.

¹⁵¹ Id.

¹⁵² Id.

¹⁵³ Id.

¹⁵⁴ Christopher Black & Edward S. Herman, Louise Arbour, *Role as Chief Prosecutor at International Criminal Tribunal Criticized*, 34 Canadian Dimension, 2, 31 (Mar. 1, 2000).

¹⁵⁵ See, Louis Charbonneau, *Bashir's Darfur Peace Promises are Empty: Groups*, THE WASHINGTON POST (Dec. 2, 2008) available at <http://www.washingtonpost.com/wp-dyn/content/article/2008/12/02/AR2008120200047.html> (last visited Dec. 8, 2008), reporting that "Khartoum has been working hard to convince the international community that it wants peace in Darfur in an attempt to pressure the Security Council into suspending the case against Bashir."

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John Heilprin, *ICC Prosecutor: Sudan Leader 'Inciting Violence,'* THE WASHINGTON POST (Dec. 12, 2008).

¹⁵⁷

Id.