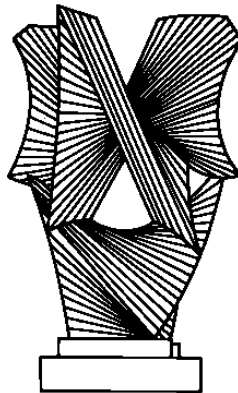


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THE CLASH OF COMMITMENTS AT THE INTERNATIONAL CRIMINAL COURT

Tom Ginsburg

THE LAW SCHOOL
THE UNIVERSITY OF CHICAGO

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THE CLASH OF COMMITMENTS AT THE INTERNATIONAL CRIMINAL COURT

Tom Ginsburg*

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I. INTRODUCTION

On July 10, 2008, International Criminal Court (“ICC”) Prosecutor Luis Moreno-Ocampo informed members of the UN Security Council that he would be issuing an indictment against Sudanese President Omar Hassan al Bashir on charges of genocide and crimes against humanity for events in Darfur.¹ The indictment, issued July 14, brought into stark relief the consequentialist debate over international criminal justice. Opponents of impunity celebrated the possibility that the international community might at last be willing to take concrete steps toward ending the Darfur genocide. On the other hand, aid groups on the ground feared retaliation and expulsion, and diplomats argued that the indictments would make a peace deal in Darfur more difficult to achieve.² These varying responses echoed larger concerns over the ICC and the international criminal law enterprise more broadly.

This Article examines the problem of international criminal justice as a problem of competing efforts to make credible commitments. States, it has been argued, want to make their promises to deter mass atrocity credible and so join the international court to ensure that this outcome will be obtained. The ICC itself has a legal and political imperative to make its promises of prosecution credible, or risk irrelevance. These efforts point in the direction of a functionalist need for international criminal prosecutions. On the other hand, states and the international community may sometimes need to make another type of credible promise, namely a promise *not* to prosecute or to grant an amnesty. The ICC seeks to make such promises impossible. The tension between these

* Professor of Law, University of Chicago Law School. Thanks to Daniel Abebe, John Hagan, Eric Posner and Brad Roth for comments and helpful discussions, and to Emily Winston for excellent research assistance.

¹ Lydia Polgreen and Marlies Simons, *The Pursuit of Justice vs. the Pursuit of Peace*, NY Times A7 (July 11, 2008). The indictment had been issued in response to a referral from the UN Security Council under Security Council Res No 1593, UN Doc S/RES/1593 (2005). Prior to its request for an arrest warrant for Bashir, the Office of the Prosecutor indicted two other individuals in connection with its Resolution 1593 investigation. On February 27, 2007 the prosecutor initiated a case against Ahmad Harun and Ali Kushayb for crimes against humanity and war crimes. The Pre-Trial Chamber issued arrest warrants for both these individuals on April 27, 2007. The warrants are yet to be executed by the government of Sudan although as of this writing, Kushayb has been arrested under Sudanese domestic law. [Ahmad Harun maintains his post as Minister of State for Humanitarian Affairs. Office of the Prosecutor, International Criminal Court, *Pre-Trial Chamber 1: Public Summary of Prosecutor’s Application under Article 58* (July 14, 2008), available online at <<http://www.icc-cpi.int/library/cases/ICC-02-05-152-ENG.pdf>> (visited Oct 31, 2008).

² Polgreen and Simons, *The Pursuit of Justice*, NY Times A7 (cited in note 1).

commitment strategies means that conflict at some point is inevitable. I call this the clash of commitments. The decision to indict Bashir brings the clash of commitments to a head.

The clash of commitments provides a challenge and an opportunity to the ICC. Ocampo's decision to indict a sitting head of state of a party to the Rome Statute is a high-risk one. If it succeeds, it will do much to highlight the successful institutionalization of the ICC as an independent player on the international scene. If it fails, it will relegate the enterprise to the marginal position in which it now sits: politically subservient to powerful state interests. Which outcome is more likely cannot yet be predicted with confidence. But the dynamics are already quite clear.

The final section of the Article reflects on this strategy of institutional development for a young court, analogizing to domestic and international predecessors. International judges, like domestic judges, must take institutional factors into account when making decisions. Given the scarcity of enforcement at the international level, the ICC judges need to establish a reputation of producing decisions that generate compliance. The clash of commitments provides a challenge and an opportunity to the international judges that run the ICC—their institution may be immeasurably strengthened or harmed by the outcome of this case. The Article concludes that the high-risk strategy of the prosecutor is a novel one that is likely, but not guaranteed, to fail.

The Article is organized as follows. Section II discusses the ICC and the debate over its efficacy. Section III briefly describes the Bashir Indictment. Section IV presents what I have called the clash of commitments. Section V shows that, though one can imagine that such high-profile cases have the potential to solidify the reputation of a young court like the ICC, the conditions for such a result are unlikely in the context of international criminal law. Section VI concludes.

II. THE INTERNATIONAL CRIMINAL COURT AND THE DEBATE OVER EFFICACY

The ICC surely must hold the record among international tribunals for the highest ratio of scholarly literature to output.³ Widely anticipated, and adopted with great fanfare at the Rome Conference in 1998, the ICC has issued a total of twelve arrests involving four different African conflicts since it came into being in 2002.⁴ To date it has heard cases related to two situations, one involving the Democratic Republic of the Congo and the other the Central African Republic.⁵

The ICC's jurisdiction is subject to the regime of complementarity described in Article 17 of the Rome Statute, under which the ICC must find a case inadmissible if it is being prosecuted by competent national authorities.⁶ The complementarity regime virtually assures that the ICC will not hear cases against major international military actors such as the US. Because a state can avoid prosecution of its nationals by initiating

³ A Westlaw search shows that 487 law review articles mention "International Criminal Court" in the title, as well as many books (last checked Nov 7, 2008).

⁴ International Criminal Court, *Situations and Cases*, available online at <<http://www.icc-cpi.int/cases.html>> (visited Oct 31, 2008).

⁵ Two other situations, involving Uganda and Darfur, have led to indictments but no transfers of suspects to the Hague. *Id.*

⁶ Rome Statute of the International Criminal Court (1998), art 17(a), 37 ILM 999, 1012.

a credible investigation or prosecution, the only states likely to have their nationals prosecuted are those that either (1) want the prosecution to go forward (say because of a domestic regime change) *and* wish the international community to bear the costs of prosecution; or (2) have too little state capacity to initiate a credible prosecution or investigation. Sudan forms a potential third category: a recalcitrant state that wishes to avoid prosecution. It remains to be seen whether prosecution can be effectively obtained in this case.

The vast scholarly commentary on the ICC has generally been positive, with scholars arguing that it fulfills the promise of ending impunity for the most serious international crimes, deters further wrongdoing, and reduces conflict.⁷ Some celebrate the ex post punishment of mass atrocities as allowing the international community to fulfill both its duty to protect and the post-Nuremberg promise of ending genocide.⁸ Other scholars have been more skeptical, noting that the type of defendants sought by the court are unlikely to be deterred because they are irrational;⁹ that selective punishment is unlikely to have much of a deterrent effect;¹⁰ and that amnesties are sometimes necessary. One trenchant line of critique is that the international criminal law enterprise might in fact make things worse. When faced with indictment and punishment, a human rights abuser might in fact dig in his heels, and refuse to give up or compromise. He might take further steps to destroy evidence and witnesses, exacerbating the abuses the indictment was designed to deter.¹¹

Empirical literature on these questions is relatively rare. In one important exception examining an array of post-conflict devices used in civil wars from 1989 through 2003, including international and domestic criminal trials, amnesties and truth commissions, Jack Snyder and Leslie Vinjamuri show that international prosecutions fail to deter human rights abuses, consolidate democracy, or help build peace.¹² They highlight that the two largest criminal courts, the International Criminal Tribunals for the Former

⁷ See, for example, William A. Schabas, *An Introduction to the International Criminal Court* (Cambridge 2001); Bruce Broomhall, *International Justice and the International Criminal Court* (Oxford 2003); M. Cherif Bassiouni, *Introduction to International Criminal Law* (Transnational 2003).

⁸ Leila Nadya Sadat, *Summer in Rome, Spring in the Hague, Winter in Washington? U.S. Policy Towards the International Criminal Court*, 21 Wisc Intl L J 557, 594–95 (2003).

⁹ Julian Ku and Jide Nzelibe, *Do International Criminal Tribunals Deter or Exacerbate Humanitarian Atrocities?*, 84 Wash U L Q 777, 781 (2006). See also Mirjan Damaska, *What is the Point of International Criminal Justice?*, 83 Chi Kent L Rev 329, 339 n 16 (2008), quoting Richard Goldstone, *Letter to the Editor: Crime and Punishment in War*, Wall St J A13 (July 7, 2000) (asserting that deterrence is “hopelessly idealistic” in maintaining that international criminal justice serves an effective deterrent purpose); *Prosecutor v Tadic*, Case Nos IT-94-1-A and IT-94-1-Abis, ¶ 48 (ICTY Jan 26, 2000) (finding that deterrence should not be given “undue prominence”).

¹⁰ Mark A. Drumbl, *Atrocity, Punishment, and International Law* 170–72 (Cambridge 2007); Tom J. Farer, *Restraining the Barbarians: Can International Criminal Law Help?*, 22 Hum Rts Q 90, 92, 98 (2000).

¹¹ See note 9 and accompanying text.

¹² Jack Snyder and Leslie Vinjamuri, *Trials and Errors: Principle and Pragmatism in Strategies of International Justice*, 28 Intl Security 5, 20 (2003/2004) (“Evidence from recent cases casts doubt on the claims that international trials deter future atrocities, contribute to consolidating the rule of law or democracy, or pave the way for peace.”).

Yugoslavia and Rwanda have failed to deter subsequent atrocities locally or globally, as witnessed by the ongoing genocide in Darfur, among other places.¹³

Besides the substantive challenges the ICC faces by virtue of its appointed task, it also faces generic challenges as a new institution. New institutions such as the ICC are subject to great scrutiny, and need to establish their own credibility to accomplish their assigned tasks. The challenge is similar to that faced by other international tribunals as well as by national constitutional courts exercising the power of judicial review. If a new institution is able to prove itself useful to some constituency in its early years, it may draw new cases and establish a reputation for quality. If, on the other hand, it disappoints, it may become irrelevant and seek to develop new lines of business to ensure its success.

In short, the stakes are high for the ICC at this juncture in its life. How it handles the various challenges it faces will have ramifications beyond the institution itself, and will reflect on the international criminal law project more generally. It is in this context that the Bashir indictment arose.

III. THE BASHIR INDICTMENT

The indictment of President Bashir marks the first time the ICC has indicted a sitting head of state, and raises interesting issues of immunity, jurisdiction, and joint criminal responsibility that are beyond the scope of this brief comment.¹⁴ Sudan is not a state party to the ICC, and is obligated to comply only by virtue of the UN Security Council Resolution 1593, adopted under Chapter VII of the UN Charter, which referred the situation to the ICC's Office of the Prosecutor ("OTP").¹⁵ As mentioned above, were it a signatory, the complementarity regime would allow Sudan to escape prosecution by initiating a credible investigation or prosecution into the allegations. To say that the current government of Sudan is unlikely to prosecute Bashir, however, is an understatement of significant proportions.

President Bashir is being charged with three counts of genocide for encouraging actions intended to bring about the destruction of the Fur, Masalit, and Zaghawa ethnic groups. He is being charged with five counts of crimes against humanity for directing the killing, torture, and displacement of various other ethnic groups. The state actions against these other ethnic groups were deemed insufficient to constitute genocide. He is also charged with two counts of war crimes for attacking civilians and pillaging towns.¹⁶

Bashir is being charged as an individual under Article 25(3)(a) of the Rome Statute, which, as the OTP's Application for Warrant of Arrest indicates, criminalizes

¹³ Id.

¹⁴ Marko Milanovic, *ICC Prosecutor Charges the President of Sudan With Genocide, Crimes Against Humanity and War Crimes in Darfur*, 12 Am Socy Intl L Insights 15 (July 28, 2008), available online at <<http://www.asil.org/insights080728.cfm>> (visited Oct 31, 2008).

¹⁵ Id.

¹⁶ Id.

“indirect perpetration or perpetration by means.”¹⁷ The prosecutor asserts that the mobilization of the state apparatus constitutes evidence of a plan by the president to destroy entire ethnic groups. Bashir’s destructive intent is further evidenced by the fact that the 2.7 million people who have been displaced to camps are almost all members of those three groups and have received no government assistance. The OTP asserts that these displacements constitute genocide according to the Genocide Convention.¹⁸

The OTP estimates that thirty-five thousand people have been killed outright by the apparatus of the government of Sudan. The OTP further estimates that at least another hundred thousand have died of starvation in the displacement camps in the desert.¹⁹ Rape is cited as an integral part of the plan of destruction in these camps.²⁰ Recognizing that governments have a sovereign right to use force, the OTP declares that the destruction in Sudan cannot be characterized as collateral damage of any legitimate military campaign.²¹

Before the prosecutor initiated his case against President Bashir, in June 2008, the Security Council completed a mission to Africa during which it met with President Bashir and his advisor. The Security Council members urged the government of Sudan to cooperate with the ICC’s investigations of Ahmad Haran and Ali Kushayb, two officials previously indicted by the ICC.²² Both the president and his advisor stated that Sudan is not a party to the Rome Statute and that they had no intention of cooperating with the ICC.²³ This set up the current clash of commitments.

IV. THREE COMMITMENT PROBLEMS

Every promise, in politics or markets, has value only if the promisee believes that it will be kept.²⁴ This is the generic problem of credibility. One way to make promises credible is to ensure that the promisee will be paid in the event the promisor violates the

¹⁷ Office of the Prosecutor, *Summary of the Case: Prosecutor’s Application for Warrant of Arrest under Article 58 Against Omar Hasan Ahmad Al Bashir* (July 14, 2008), available online at <<http://www.icc-cpi.int/library/organs/otp/ICC-OTP-Summary-20081704-ENG.pdf>> (visited Oct 31, 2008).

¹⁸ *Id.*

¹⁹ *Id.*

²⁰ International Criminal Court Press Release, *ICC Prosecutor Presents Case against Sudanese President, Hassan Ahmad Al Bashir, For Genocide, Crimes Against Humanity and War Crimes in Darfur*, (July 14, 2008), available online at <http://www.icc-cpi.int/pressrelease_details?id=406&1-en.html> (visited Oct 31, 2008).

²¹ Office of the Prosecutor, *Summary of the Case* (cited in note 17).

²² See note 1.

²³ United Nations, *Report of the Security Council Mission to Djibouti (on Somalia), the Sudan, Chad, the Democratic Republic of the Congo and Côte d’Ivoire, 31 May to 10 June 2008*, UN Doc S/2008/460, ¶ 60 (2008). In mid-October, Sudan arrested Kushayb and promised to try him locally. Jeffrey Gettelman, *Sudan Arrests Militia Chief Facing Trial*, NY Times A9 (October 13, 2008).

²⁴ Douglas G. Baird, Robert H. Gertner, and Randal C. Picker, *Game Theory and the Law* 51 (Harvard 1998).

promise.²⁵ Another way is to impose costs on the promisor directly so as to disincentivize breach. A credible commitment device is one that disincentivizes breach, making the promise more valuable to both promisor and promisee at the outset.²⁶

This section describes the three commitment problems that the ICC regime addresses. First it considers the commitment by signatory governments to prosecute violators of international criminal law. Second it considers the inverse problem, namely how to credibly promise *not* to prosecute in the event of an amnesty. Third, it considers the need for credibility by the ICC itself.

A. GOVERNMENTAL COMMITMENT TO PROSECUTE (AND BE PROSECUTED)?

In a recent paper, Beth Simmons and Allison Danner argue that the ICC solves a commitment problem for state parties that are fighting civil wars and insurgencies.²⁷ By signing the Rome Statute, and making the government potentially prosecutable for offenses, they argue that a state ties its hands in terms of the tactics that can be used to fight rebels. If the government uses illegal tactics, it will be subject to sanction by the ICC. This makes accession to the ICC regime costly, and sends a signal to domestic opponents. The ICC becomes a kind of international monitor of domestic behavior, a particularly important function that would otherwise be difficult to obtain in the absence of domestic accountability mechanisms.²⁸

Although the ICC does involve commitment, Simmons and Danner's analysis is incomplete at several key junctures. Their argument depends on a number of assumptions. First, it assumes that signatory states cannot find ways to avoid prosecution by the ICC. The complementarity regime seems to undercut this assumption, as a state can simply announce investigations and prosecutions of those responsible for abuses, without actually convicting them.²⁹ It is difficult to imagine a rebel group believing that the state's hands were really tied under such a regime. Still, it would be up to ICC's pretrial chamber to verify that the prosecution was actually effective and sincere, and so there is some marginal element of commitment embodied in accession to the regime.

Simmons and Danner predict, and present evidence finding, that the ICC will be especially popular among rich peaceful countries and war-torn autocracies without strong

²⁵ See Oliver Williamson, *The Mechanisms of Governance* 377 (Oxford 1996) (A credible commitment is "a contract in which a promisee is reliably compensated should the promisor prematurely terminate or otherwise alter the agreement.").

²⁶ See J. Mark Ramseyer and Frances M. Rosenbluth, *The Politics of Oligarchy* 163 (Cambridge 1993) (focusing on credibility problems of legislators).

²⁷ Beth Simmons and Allison Danner, *Credible Commitments and the International Criminal Court*, Paper prepared for the Annual Meeting of the International Studies Association (forthcoming 2009) (February 1, 2008 draft at 3–4), available online at <http://www.allacademic.com/meta/p_mla_apa_research_citation/2/5/2/6/2/pages252629/p252629-1.php> (visited Oct 31, 2008).

²⁸ See generally Tom Ginsburg, *Locking in Democracy: Constitutions, Commitment and International Law*, 38 NYU J. INT'L L. AND POLITICS 707, 729-32 (2006).

²⁹ Consider William Burke-White, *Proactive Complementarity: The International Criminal Court and National Courts in the Rome System of International Justice*, 49 Harv Intl L J 53 (2008).

mechanisms of domestic accountability. The former countries sign onto the ICC because it costs them nothing. The latter countries, they believe, adopt the ICC for the purpose of making credible commitments.³⁰

This finding, however, is consistent with another view of the commitments actually being made. The governments in question may indeed be trying to make a strong commitment to prosecute, without necessarily committing to *being* prosecuted. Simmons and Danner point out that state capacity may be weak so commitment to the ICC helps make it clear that state officials will be well prosecuted. But this argument applies as well to the rebels, who will be subject to the same prosecutorial regime either at the national or international level. Signing onto the ICC seems to expand the prospective likelihood of the *rebels* being prosecuted. In this sense, one can view the ICC as a device by weak states to credibly commit to prosecutions. It will ensure prosecutions even if subsequent political regimes are too corrupt or poor to carry them out locally.³¹

This effect is asymmetric vis-à-vis the potential prosecutions of governmental officials that Simmons and Danner highlight. While it may seem that signing up to the ICC expands the prospective likelihood of governmental officials being prosecuted as well, the government holds the keys to complementarity. The government can initiate prosecutions of its own functionaries and avoid international prosecution. Thus the effective quality of prosecution under the ICC regime is more likely to improve vis-à-vis rebels than governmental officials. The reason states sign the Rome Statute may be to ensure prosecution of their opponents, not themselves.

Ensuring that rebels will be prosecuted by international, as opposed to domestic, prosecution agents may also be attractive given the costs involved. War-torn autocracies tend to be poor, and so signing onto the ICC essentially sloughs off the costs of prosecutions onto the international community. For these reasons, I am somewhat skeptical of Simmons and Danner's interpretation of the commitment problem, though they are surely right that there is a commitment problem involved. The government is tying its own hands to ensure that prosecutions will go forward, but not trying to tie its hands with regard to tactics.

B. GOVERNMENTAL COMMITMENT NOT TO PROSECUTE: THE AMNESTY PROBLEM

This subsection focuses on the flipside of the commitment argument articulated by Simmons and Danner. They emphasize the power of the ICC to allow states to credibly commit to prosecute and be prosecuted.³² ICC signature, however, begets another credible commitment problem for states, namely how to credibly commit *not* to prosecute. In some cases, the fear of prosecution may keep human rights abusers entrenched when they would otherwise be persuaded to leave. By taking the power to give effective amnesties away from government, we may in fact exacerbate some of the worst human rights abuses.

³⁰ Simmons and Danner at 26 (cited in note 27). [Professor: 26 seemed to be a more accurate pincite. Let us know if you disagree.]

³¹ Id at 15.

³² Id.

This old critique of the ICC seems borne out by recent events in Uganda surrounding the Lord's Resistance Army ("LRA"), the pseudo-Christian insurrection that has wreaked havoc in northern Uganda and the southern Sudan for over twenty years. The LRA has engaged in a brutal campaign of kidnapping, sexual abuse and enslavement, murder, and employment of child soldiers.³³ In 2005, the ICC charged the LRA's leader, Joseph Kony and four senior commanders, Vincent Otti, Okot Odhiambo, Dominic Ongwen, and Raska Lukwiya, with crimes against humanity and war crimes.³⁴ The arrest warrants were issued in response to the request of the Ugandan government under Article 14 of the Rome Statute, which allows state parties to request a prosecution. However, even before the warrants were issued, Ugandan President Yoweri Museveni asked the ICC to drop the charges.³⁵ The government has now asserted that traditional justice will be an effective tool for dealing with most of the crimes, with a special chamber in Uganda's High Court to be utilized for the leaders of the LRA.³⁶ Under the Rome Statute, however, there is no way for a government to withdraw a request.³⁷ Nor is it likely that local processes of dispute resolution would satisfy the requirement under the complementarity regime that effective local prosecution be pursued.³⁸ The Kony arrest warrants thus have created what many in Uganda believe to be a barrier to the conclusion of a peace deal.³⁹

³³ See generally Hema Chatlani, *Uganda: A Nation in Crisis*, 37 Cal W Intl L J 277 (2007).

³⁴ See Office of the Prosecutor, International Criminal Court, *Pre-Trial Chamber II: Warrant of Arrest for Joseph Kony Issued On 8 July 2005 As Amended On 27 September 2005*, (Sept 27, 2005), available online at <http://www.icc-cpi.int/library/cases/ICC-02-04-01-05-53_English.pdf> (visited Nov 7, 2008); Office of the Prosecutor, ICC, *Pre-Trial Chamber II: Warrant of Arrest for Raska Lukwiya* (July 8, 2005), available online at <http://www.icc-cpi.int/library/cases/ICC-02-04-01-05-55_English.pdf> (visited Nov 7, 2008); Office of the Prosecutor, ICC, *Pre-Trial Chamber II: Warrant of Arrest for Okot Odhiambo* (July 8, 2005), available online at <http://www.icc-cpi.int/library/cases/ICC-02-04-01-05-56_English.pdf> (visited Nov 7, 2008); Office of the Prosecutor, ICC, *Pre-Trial Chamber II: Warrant of Arrest for Dominic Ongwen* (July 8, 2005), available online at <http://www.icc-cpi.int/library/cases/ICC-02-04-01-05-57_English.pdf> (visited Nov 7, 2008). Lukwiya and Otti have subsequently died. Trial Watch, *Vincent Otti*, available online at <http://www.trial-ch.org/en/trial-watch/profile/db/facts/vincent_otti_395.html> (visited Nov 7, 2008); Trial Watch, *Raska Lukwiya*, available online at <http://www.trial-ch.org/en/trial-watch/profile/db/facts/%20raska_lukwiya_396.html> (visited Nov 7, 2008).

³⁵ Alex K. Kriksciun, *Uganda's Response to International Criminal Court Arrest Warrants: A Misguided Approach?*, 16 Tulane J Intl & Comp L 213, 214 (2007).

³⁶ *Might the Lord's Resisters Give Up?*, The Economist 59 (Mar 15, 2008).

³⁷ The only exception is that Article 53 allows the prosecutor to inform the pretrial chamber that a prosecution is not in the "interests of justice" and therefore should not go forward. See Rome Statute, art 53, 37 ILM at 1029. In addition, Article 16 of the ICC Statute allows the Security Council to defer a prosecution or an investigation for a renewable period of twelve months. See Rome Statute, art 16, 37 ILM at 1012.

³⁸ See Joan B. Kroc Institute for Peace and Justice, University of San Diego, *The Relationship between International Criminal Justice and Conflict Resolution: Focus on the International Criminal Court*, December 12–13, 2005 at 3, available online at <<http://peace.sandiego.edu/documents/reports/ConferenceReports/wpm/2005/Report.pdf>> (visited Nov 7, 2008) (citing Justice Goldstone).

³⁹ Chatlani, 37 Cal W Intl L J at 291–92 (cited in note 33) (quoting local commentators as asserting the ICC had committed a "blunder").

The presence of the ICC thus makes the promise of an amnesty less credible. Even if the government is sincere in promising an amnesty, the operative decisions to prosecute are no longer under the direct control of the government. This lack of control has the effect of increasing the reservation price of a potential bargain between the government and resistance forces, reducing the scope of a deal. A government that wants to make a decision to forgive cannot do so, once it has signed the Rome Statute.

To be sure, the problem existed before the ICC was created, simply because of the threat of prosecution in third countries. The Pinochet case, for example, showed that the Chilean amnesty was good only within Chile, and indeed, the amnesty was eventually overturned in the aftermath of the British cases.⁴⁰ Nevertheless, the issue of whether we are better off in any particular situation with an amnesty or a prosecution is not clear, and likely to depend on local rather than universal factors.

Oddly, the possibility of an amnesty depends on *some* probability of prosecution. If there were no prosecutions, the offer of amnesty would have little value. I am in no way trying to suggest that all prosecutions for war crimes and genocide are problematic. Rather the question is who has the power to make the decision. In a world with 194 sovereigns it may sometimes be preferable to leave the decision to the local actor rather than require blanket prosecution in every available case.

This discussion is relevant to the Sudan case because there is some evidence that the international community would like to make a deal with Bashir. In the UN Security Council's most recent vote reauthorizing peacekeeping forces for Darfur, the US abstained because of concerns that the British-drafted text was seeking to undermine the ICC and signal a potential deal to Bashir.⁴¹ Such a deal, like all deals, will require some credibility to secure, credibility that may be difficult to obtain in the wake of the ineffective amnesty offered to Charles Taylor of Liberia.⁴² The international community may wish to make a commitment that it is now unable to make.

C. ICC COMMITMENT TO PROSECUTE

Much of the normative argument about the ICC involves, implicitly, recognition that one or the other of these commitment frameworks should dominate and guide the ICC in its decisionmaking. For proponents of ending impunity, the ICC can best fulfill its moral and political function by prosecuting rigorously and uniformly, without regard to the particular complexities of any particular situation and whether or not it will make things worse. The ICC should not be used as a political tool.⁴³ For pragmatists, the ICC should pay careful attention to the local political situation and consider whether or not its intervention will lead to better consequentialist outcomes.

⁴⁰ Madeleine Davis, *The Pinochet Case* 24–25 (University of London Institute of Latin American Studies 2003).

⁴¹ Louis Charbonneau, *UN Renews Security Council Mandate on Darfur, US Abstains*, Mail & Guardian Online (Aug 1, 2008), available online at <<http://www.mg.co.za/article/2008-08-01-un-renews-darfur-peacekeeping-mandate-us-abstains>> (visited Nov 7 2008).

⁴² Linda M. Keller, *Achieving Peace With Justice: The International Criminal Court and Ugandan Alternative Justice Mechanisms*, 23 Conn J Intl L 209, 242 (2008). See also Leila Sadat, *Exile, Amnesty and International Law*, 81 Notre Dame L Rev 955, 1031 (2006).

⁴³ Sadat, 81 Notre Dame L Rev at 1034 (cited in note 42).

In light of these competing political imperatives, what should the ICC do? Some have argued that the ICC should recognize that amnesties are sometimes necessary and so should take pragmatic considerations into account.⁴⁴ The ICC Prosecutor says that he regularly obtains communications from states, NGOs, and parties to various conflicts asking him to refrain from initiating prosecutions so that a peace deal can be worked out.⁴⁵

Yet, giving in to pleas for pragmatism invites moral hazard. Parties to conflicts will engage in strategic negotiation, holding out the promise of a peace deal to avoid prosecution. Once the ICC becomes involved in evaluating individual circumstances, it may lose its own credibility as a prosecutorial body. The ICC is hardly in a position to evaluate the various claims for deterrence, peace, and amnesty, which require careful local assessments of the political situation that a faraway court and a prosecutor are hardly equipped to handle.

In light of these concerns, the ICC faces its own credibility problem: that of a new court trying to ensure that it has a role to play. To avoid having to take on considerations that it is poorly equipped to handle, the ICC has an incentive to be firm and apply a clear rule of prosecuting all who fall within the ambit of the statute, without regard to local politics. It needs to tie its own hands with regard to future deals in order to have any impact at all. Thus, the prudent thing may be the strategy that has been adopted by Ocampo: to ignore all pleas for pragmatism and commit to prosecuting whenever the factual predicate for ICC action can be met.

Indeed, if the deterrent effect of the ICC is unclear, it is also empirically unclear that international prosecutions in fact disrupt the peace process. Many diplomats opposed the indictment of Mr. Milosevic before the International Criminal Tribunal for the Former Yugoslavia in 1999, as a hindrance to peace negotiations.⁴⁶ Yet today there is peace—if not warmth—in former Yugoslavia. When the Special Court for Sierra Leone issued its arrest warrant for Liberian President Charles Taylor, analysts predicted grave consequences.⁴⁷ Yet the amnesty eventually given to Mr. Taylor by Liberia broke down and today he sits in the dock at the ICC in the Hague.⁴⁸

D. CONFLICT AMONG THE COMMITMENTS

We thus see three competing commitment problems. Weak states want to commit to prosecution and so sign the Rome Statute. They can tie their hands and limit their abilities to deliver amnesties. In light of this, it would be a failure for the ICC, which no doubt has worse information on the prospects for local peace, to choose to evaluate issues on a case-by-case basis and sometimes refrain from prosecution. It is in the prosecutor's

⁴⁴ See generally Carsten Stahn, *Complementarity, Amnesties and Alternative Forms of Justice: Some Interpretative Guidelines for the International Criminal Court*, 3 J Intl Crim Just 695 (2005) (discussing how amnesties should be handled).

⁴⁵ Remarks at the American Society for International Law Meeting 2008, 102 Am Soc Intl L Proceedings (forthcoming 2008).

⁴⁶ Polgreen and Simons, *The Pursuit of Justice*, NY Times at A7 (cited in note 1).

⁴⁷ Id (quoting Kofi Annan's predictions of grave consequences).

⁴⁸ See Sadat, 81 Notre Dame L Rev 955 (cited in note 42).

interest to adopt a stance of carrying out all prosecutions, and to be unaffected by outside information on political consequences. To do otherwise is to invite cheap talk about the prospects for deals, which the prosecutor is in a poor position to evaluate. Further, if the prosecutor backs down in one case, he will be expected to do so in every case. Removing the warrant against Kony, for example, would ensure that the ICC would become no more than a tool of political negotiation, a stick to be balanced against carrots—hardly the dream of the founders. Ocampo has forcefully eliminated that position.

The incentives of defendants, on the other hand, are to hold out. Knowing that the prosecutor's best strategy is to ignore local calls for pragmatism, so dramatically illustrated in the Uganda case, the defendant must assume that prosecutions will go forward and hence will not surrender. The prosecutor's commitment strategy means the defendants will not give up.

All of this comes to a head in the case of Sudan. Because Ocampo has issued the indictment, with an arrest warrant likely to follow, and has already demonstrated resolve not to back down in the Kony case, Bashir's ability to travel has been effectively limited to nonsignatories and those signatories willing to ignore their obligations to arrest him. One possible response may be intensification of the conflict—precisely what locals on the ground fear.⁴⁹ Ocampo will either end up with a spectacular arrest—or renewed and widespread criticism that the ICC has made life *worse* for the beleaguered residents of Darfur. A middle ground would be ineffectuality, hardly a desirable outcome for the ICC.

V. COURTS, COMPLIANCE, AND CRISIS

The above discussion illustrates an interesting theme from constitutional studies, which bear some structural similarities to international law.⁵⁰ As in the international sphere, a central issue for constitutional courts is how to generate compliance with their decisions. Famously lacking the purse or the sword, courts are able to generate compliance only by convincing others, either government officials or the public, that their decisions are worth upholding.

Most courts build up reputations over time and serve the interests of powerful actors in doing so. For example, the US Supreme Court did not challenge major national policies for many decades after the establishment of judicial review was announced in *Marbury v Madison*.⁵¹ Rather, the Court served the national agenda in policing countervailing state laws.⁵² Other courts have played a relatively cautious role in building up the power of judicial review.⁵³ They must be careful not to overreach, and to ensure that their decisions are respected.

⁴⁹ Polgreen and Simons, *The Pursuit of Justice*, NY Times at A7 (cited in note 1).

⁵⁰ See generally Jack Goldsmith and Daryl Levinson, *Law For States: Constitutional Law, International Law, Public Law*, Harv L Rev (forthcoming May 2009) (manuscript on file with authors).SNC

⁵¹ 5 US (1 Cranch) 137 (1803).

⁵² See Robert McCloskey, *The American Supreme Court* PINCITE(Chicago 4th ed 2005) (Sandy Levinson, ed).

⁵³ Tom Ginsburg, *Judicial Review in New Democracies* 104 (Cambridge 2003).

How can they do this? One recent line of argument has emphasized judges' abilities to generate decisions that are self-enforcing, meaning that it is in the interests of parties to comply with the decisions.⁵⁴ Coordination problems—like the paradigmatic example of the rules of the road—are those in which both parties have an interest in finding a shared outcome, even when they may disagree over which outcome is best. Because there is no “best” answer, conflict can be resolved based on expectations as to what the other party's action is likely to be. Third parties, such as courts, can help the parties choose among possible outcomes by providing focal points. By signaling that one or the other party is correct, the court can generate compliance even without external enforcement of the decision, because the court will change parties' expectations of each others' strategies. Of course, the court can only do so if the parties believe its decision is a sound one, or at least believe it is one that *other* people will think is sound.

To be sure, the relevant “game” in our context of international criminal law is more complex than simple dispute resolution, which has a possibility of self-enforcing decisions. From the point of view of the defendant, surrender is almost always a bad idea, and it will take more than coordination on a focal point to induce submission to a court. In Martin Shapiro's classic framework for understanding what courts do, the international criminal law project is more akin to social control than to dispute resolution.⁵⁵ Still, even in this context, coordination is at work. Courts engaged in social control are able to do so only because other state actors—police, prosecutors, prison officials—follow their orders. The relevant actors must agree on whom to arrest, when to do so, and how to punish them. The coordination game here is among enforcers, not a dispute between the criminal and the state. The ICC, which has no police force of its own, is thus directing its efforts as much at powerful states as it is at Bashir.

In a recent contribution, David Law argues that courts can, counterintuitively, enhance their power by making unpopular or risky decisions—so long as the decisions generate compliance.⁵⁶ The key is to think of the court as interested in developing a reputation for generating effective focal points, in the form of decisions that are complied with. As the court is successful in issuing such decisions, people will adjust their expectations of others' responses to future decisions, generating a potential cascade of compliance. Furthermore, from the perspective of an audience member evaluating the probability of compliance in a future case, it is surely more impressive that the court has generated compliance in an *unpopular* case than in a popular one. A risky and unpopular decision actually shores up the court's long-term reputation for generating focal points.⁵⁷

From this perspective, Ocampo's strategy may pay big dividends. If the ICC can announce a high profile indictment and eventually issue an arrest warrant for a sitting head of state who has promised to defy the ICC, and *if* the ultimate result is a trial for

⁵⁴ See generally Tom Ginsburg and Richard McAdams, *An Expressive Theory of International Adjudication* 45 Wm & Mary L Rev 1229 (2004).

⁵⁵ Martin Shapiro, *Courts* 14 (Chicago 1981).

⁵⁶ David Law, *A Theory of Judicial Power and Judicial Review*, 97 Georgetown L J (forthcoming 2009) (August 9, 2008 draft at 62–64), available online at <http://papers.ssrn.com/sol3/Delivery.cfm/SSRN_ID1214022_code383976.pdf?abstractid=1112613&mirid=1> (visited Oct 31, 2008).

⁵⁷ *Id.*

Bashir, the ICC will have established itself as a credible institution. Other leaders will recognize that they are unlikely to be able to defy the ICC, and may act differently in anticipation of potential prosecutions. Importantly, states that have been marginal supporters of the ICC may come to believe that other states support the ICC, and hence will seek to appear to support it as well. This could lead them to avoid the embarrassment of, for example, failing to arrest indictees who are within their jurisdictions, making the overall enforcement regime more effective. The commitment to prosecute will have trumped the impulse to amnesty.

Consider, however, the alternative result. If Bashir gets away with defying the ICC, the ICC's reputation for providing focal points will lay in tatters. Other parties, be they states considering volunteering enforcement resources for the court, or potential defendants, will view the ICC as a paper tiger, whose decisions do not produce action even among supporters of the ICC. This will become a self-fulfilling cycle: all but the most ardent state supporters are likely to condition their support on the expectation that others will also support the ICC. Noncompliance indicates that no one takes the ICC seriously, leaving the few ardent supporters to appear to be wasting resources.

Which result is more likely to obtain? Ocampo's efforts are even more of a long shot than they appear. If Bashir ignores the international community, as seems likely, the ICC may lose support. If Bashir does a deal with the Security Council to end the genocide in return for some kind of amnesty or delay in the prosecution, the ICC's credibility will also be harmed, as it will have undermined its own commitment to prosecute.⁵⁸ Future dictators will discount the threat of prosecution. Only if the ICC succeeds in getting states with enforcement capacity to coordinate on its favored outcome, namely the arrest and prosecution of a sitting head of state, will its credibility be enhanced.

It seems likely that the judges of the ICC—who are its de facto managers—are aware of the risks inherent in the prosecutor's strategy. This may be one reason that they have delayed issuing the arrest warrant that was requested by the prosecutor.⁵⁹ As a young institution, the ICC cannot afford a spectacular failure. By delaying, the judges allow for the possibility that Sudan's leader will take steps to end the genocide, which might encourage the Security Council to block the prosecution. But this is precisely the type of bargained solution that the prosecutor seeks to avoid.

VI. CONCLUSION

The ICC has generated much fanfare—and criticism—since the adoption of the Rome Statute in 1998. It has been variously portrayed as a harbinger of a global era of non-impunity, an irrelevance, and a dangerous device that risks undermining American sovereignty. Its performance so far has belied the most extreme claims on either side: by design, the ICC is hardly positioned to pose a risk to rich countries, but it is also unable to take on significant cases without support from those same states.

⁵⁸ Some evidence that the Security Council is interested in a deal can be seen in the reported French overture to Bashir to block prosecution in exchange for concrete steps to stop the genocide and to turn over the two previous indictees to the ICC. Gettelman, *Sudan Arrests Militia Chief*, NY Times A9 (cited in note 23).

⁵⁹ Reuters, *ICC Seeks More Information on Bashir Arrest Request* (Oct 17, 2008), available online at <<http://africa.reuters.com/top/news/usnJOE49G03K.html>> (visited Oct 23 2008).

One interpretation of the ICC, offered by Professors Simmons and Danner, is that it is a body designed to resolve commitment problems.⁶⁰ This interpretation is certainly plausible, though this Article disagrees with their characterization of the problem. But while the ICC resolves one set of commitment problems, it exacerbates another, making commitments to amnesty more difficult when it would be useful. It was inevitable that these two competing commitment imperatives would clash as the ICC confronted its mandate. That clash now seems to have emerged with the indictment of a sitting head of state, President Bashir of Sudan, for war crimes and genocide.

The prosecutor has chosen a difficult case. The logic of coordination suggests that it will lead to a spectacular success for the ICC or a spectacular failure. A betting person would lean toward the latter at the moment. But only time will tell.

⁶⁰ Consider Simmons and Danner, *Credible Commitments* (cited in note 27).

Readers with comments may address them to:

Professor Tom Ginsburg
University of Chicago Law School
1111 East 60th Street
Chicago, IL 60637
tginsburg@uchicago.edu

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