# Why the ICC Should Operate Within Peace Processes

*Kenneth A. Rodman**

Is it ethical for the prosecutor at the International Criminal Court (ICC) to consider political factors, such as peace processes, in selecting situations to investigate or cases to prosecute? During the early years of the court, a number of documents and statements from the Office of the Prosecutor (OTP) suggested that there were occasions when it was. Two OTP policy papers issued in 2003 recommended that the prosecutor assess "all circumstances prevailing in the country or region concerned, including the nature and stage of the conflict and any intervention by the international community," and whether prosecution might "exacerbate or otherwise destabilize a conflict situation."[1] In the same spirit, the ICC's chief prosecutor, Luis Moreno-Ocampo, referred to his decision-making as a "dialogue between many actors" with a "strategic dimension . . . [that] involves all stakeholders."[2] This language suggested a process of consultation and coordination with local and international actors involved in conflict resolution to adapt international criminal justice to on-the-ground political realities.

Today, Moreno-Ocampo denies that he is party to any peace negotiations. While he promises to work constructively with other actors involved in conflict resolution, he construes his legal mandate as independent of all political considerations.[3] This means that the ICC is part of a transitional process only in the sense that prosecution of those most responsible for criminal violence is necessary for a lasting peace, and this is a binding legal obligation with which other actors must comply, not something that can be adjusted to their needs.

This vision of "law above politics" is based on the cosmopolitan values that animate the anti-impunity movement—the coalition of nongovernmental organizations and international lawyers that was instrumental in the court's creation.[4] It assumes that there are certain wartime atrocities or human rights abuses that

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are so corrosive of the common bonds that unite all peoples that such practices should be removed from the realm of normal politics and treated as international crimes.[5] As a result, for the ICC and its state parties, ensuring prosecution of those most responsible for these crimes is a duty that should not be compromised by political factors, including peace processes. This latter position is informed by what Judith Shklar calls "legalism," which envisions a just world order based on the globalization of law and which disparages politics as a defect to be eradicated if that ideal is to be realized.[6] Hence, one of the achievements of the anti-impunity movement was the establishment of an independent prosecutor who could investigate situations on his or her own initiative rather than being dependent on the directives of states. As Moreno-Ocampo noted, this independence "ensures the requirement of justice will prevail over any political decision."[7]

This essay makes a consequentialist case against the strict separation of law from politics, particularly in situations of ongoing political violence. In part, this is because the ICC lacks enforcement capabilities comparable to those in domestic legal systems. More important, it is because resolving armed conflicts or ameliorating their consequences relies primarily on the willingness of political actors to wield nonjudicial instruments—force, sanctions, diplomacy, peacekeeping, humanitarian relief—that are employed independently of the court. While the use of force or sanctions to defeat or isolate the perpetrators can empower prosecutions, the other instruments make the process of international criminal justice more complicated because they are premised on the cooperation of the very individuals likely to be subject to criminal scrutiny. Since that cooperation has an impact on actual or potential victims of atrocity crimes—what Ben Schiff's contribution to this roundtable identifies as the central criterion for judging the ethics of the ICC—the court should pursue accountability in ways that do not undermine mediation efforts or humanitarian access. To do this, it should engage in a process of dialogue and mutual accommodation with other actors involved in and affected by peace processes so that the court operates within, rather than above, international efforts at conflict resolution.

## The Dependence of Law on Politics

The ICC's effectiveness in gaining custody of suspects and deterring criminal violence is dependent on political factors beyond its control. That is due, in part, to a tension between the cosmopolitan ambitions of the ICC's founding Rome Statute

and its dependence on the voluntary cooperation of states for the enforcement of its decisions. Former ICC president Philippe Kirsch describes this arrangement as a "two pillar" system. The judicial pillar is the court, which makes its decisions based on law and evidence. The operational pillar is composed of states, which are responsible for those tasks that would be routinely carried out by apolitical law enforcement agencies in a domestic legal system, such as arresting and extraditing suspects or providing access to evidence.[8]

From Kirsch's perspective, the ICC's dependence on states is not a valid reason to allow political considerations to enter the court's decision-making. Rather, it is the states that should comply with their obligations under international law to assist the court. If the ICC has run into problems in its investigations, it has been from the unwillingness of states to accept these duties, which one OTP legal advisor has referred to as "the responsibility to enforce."[9]

This responsibility to enforce has been particularly problematical when states subject to investigation obstruct cooperation, as Sudan is currently doing vis-à-vis the Darfur referral from the Security Council. In such cases, state cooperation depends on the willingness of powerful third parties to become what Victor Peskin calls "surrogate enforcers," who use inducements and penalties to alter the incentives facing recalcitrant regimes in favor of compliance. Peskin's study of the International Criminal Tribunal for the former Yugoslavia (ICTY) found that, over time, prosecutors were able to secure the cooperation of Western governments and institutions to link reconstruction aid and a path to European Union membership to cooperation with the tribunal. This, in turn, persuaded the Croatian and Serbian governments to surrender individuals who were seen by local nationalists as war heroes, the most recent example of which was the May 2011 arrest and extradition of former Bosnian Serb general Ratko Mladić.[10] By contrast, there has been no comparable third-party pressure on Sudan despite efforts by the prosecutor to shame the Security Council into action—or, as Moreno-Ocampo put it: "The international community has a three-pronged [approach to Darfur]: humanitarian assistance, security and political agreement, ignoring justice."[11]

There is, however, an important contextual difference between the Balkans and Darfur in terms of the prospects for a successful strategy of surrogate enforcement. In the former case, external pressures were used against Belgrade and Zagreb only after the wars had ended and those responsible for the ethnic cleansing campaigns were no longer in power. As a result, these threats and inducements served as a

countervailing force on successor governments against the fears of nationalist backlash, tipping the balance in favor of compliance. In Sudan, by contrast, the political violence is ongoing, and those most responsible remain in power. Given the complicity of the most senior members of Khartoum's political and military elite in the violence in Darfur, a comparable strategy is unlikely to be successful.

This distinction is important in understanding the political preconditions for the effectiveness of international criminal tribunals. When international prosecutors target the leaders of an entrenched regime or an active rebel movement in an ongoing war, meaningful cooperation involves something more than complying with the formal mandates of the Rome Statute or obtaining third-party assistance in executing arrest warrants or requests for information. In such circumstances, impunity is a function of power realities on the ground and is only likely to end if external actors deploy nonjudicial instruments (force or sanctions) to weaken or defeat the perpetrators. In other words, some form of intervention—triggered, for instance, by the responsibility to protect principle—to stop and prevent criminal behavior is a prerequisite to empowering international criminal tribunals to punish those most responsible.[12] Conversely, without a commitment to the responsibility to protect, there is little prospect for a meaningful responsibility to enforce.

Consider the ICTY, which had little impact during the Bosnian war, either in deterring violence against civilians or obtaining custody of significant perpetrators. This was not because of "the lack of political will . . . to support and enforce the orders of the tribunal," as ICTY Prosecutor Richard Goldstone subsequently wrote.[13] Rather, it was due to the reluctance of the United Nations and NATO to use or threaten force against paramilitaries involved in ethnic cleansing or to protect vulnerable civilians. That is because their preferred conflict management strategy involved impartially mediating a negotiated settlement and deploying neutral peacekeepers to protect humanitarian relief operations, both of which required working with the same power realities on the ground that enabled criminal violence.[14] It was only when NATO used military coercion to change those power imbalances—directly through Operation Deliberate Force, and indirectly by supporting Croatian and Bosnian counteroffensives—that impunity for ethnically-based violence ended.[15] That shift toward an enforcement-oriented conflict resolution strategy was also a prerequisite for the subsequent Western strategy of linkage that led to the arrest and surrender of politically powerful actors indicted by the tribunal.

For comparable reasons, the ICC has been most successful in apprehending suspects in Ituri, a region in northeastern Congo where ethnic violence increased following the peace agreement that formally ended the Second Congo War. In response, Moreno-Ocampo persuaded the Congolese government to refer the situation to the court, and was subsequently able to obtain custody of three of the four militia leaders it had indicted. The reason for this high success rate lies in the evolution of conflict resolution strategies that parallels the experience of the war in Bosnia. During the initial violence, the *Economist* referred to the UN peacekeeping mission for the Congo, whose French acronym is MONUC, as "the world's least effective peacekeeping force," given that it was a poorly trained and underresourced operation that could not carry out its mandate to protect civilians, and that its problems were compounded by the revelation that some peacekeepers and a civilian administrator had been implicated in the sexual abuse of Congolese children.[16] In response to these highly publicized failures, the Security Council authorized the deployment of a French-led EU force, Operation Artemis, to enforce the protection of civilians; and it reinforced MONUC with a more robust mandate to confront militias, thereby pacifying the region.[17] By tasking MONUC to disarm those the ICC was likely to investigate, the UN put justice and conflict resolution on parallel tracks.

In Darfur, by contrast, law and politics are pulling in opposite directions. Unlike its actions in Ituri (and, more recently, in Libya and Côte d'Ivoire), the UN Security Council has not complemented a criminal justice process with meaningful enforcement measures designed to punish or stop behavior deemed to be criminal. Instead, its strategy of conflict resolution has been one of impartial mediation, consensual peacekeeping, and humanitarian relief—all of which are dependent on the cooperation of the very government officials subjected to criminal scrutiny.[18] As long as the international community continues this consent-based approach to conflict resolution, the impact of the ICC on ending impunity in Darfur is likely to remain limited.

## The Consequentialist Case for Political Discretion

Since the ICC's effectiveness is dependent on political factors beyond its control, should the prosecutor consider such factors in his discretion? Official OTP policy rejects such an approach as incompatible with the court's "duty of independence." OTP policy papers drafted in 2006 and 2007 suggest that the selection of

situations and cases should not be influenced by the likelihood of state cooperation, nor by the broader concerns of peace and security, which are the responsibility of other institutions.[19] In defending this position, one OTP analyst wrote that the court should maintain its duty to follow only the law and the evidence, even without political backing, as a way of increasing its legitimacy and reputational influence to galvanize state support in the long run. This is what happened when international prosecutors indicted Radovan Karadžić and Ratko Mladić in 1995, Slobodan Milošević in 1999, and Charles Taylor in 2003. Initially, each decision lacked political support and was criticized by some mediators involved in peace negotiations. Eventually, the international community adapted itself to the new legal reality and each of the indicted individuals was stigmatized, removed from power, and eventually arrested and surrendered for trial. Hence, to bend law to the needs of politics ignores "the capacity of the legal process to influence state behaviour."[20]

Yet there are costs and risks to this approach if the law moves too far in front of politics. If mediators are bound by the new legal reality, it would exclude from negotiations those indicted by the court. Such a mandate may comport with conflict resolution strategies designed to defeat or isolate the perpetrators. However, if those accused of criminal violence retain significant power, and if external actors are unwilling or unable to defeat or marginalize them, then the international community will have to seek a negotiated solution. Such strategies succeed only to the extent to which they persuade the parties that it is in their interest to end the war because they are in a "mutually hurting stalemate" in which no one can win and all will be worse off over time.[21] In such circumstances, successful mediation involves bringing to the table as many powerful parties as possible, regardless of past behavior.[22] If insistence on prosecution is part of the package, then it is more difficult to persuade those whose cooperation is necessary to end violence that a negotiated settlement is in their interest. Some proponents of international criminal justice, such as Richard Goldstone, are willing to accept this potential trade-off: "If you have a system of international justice, you've got to follow through on it. If, in some cases, that's going to make peace negotiations difficult, that may be the price that has to be paid."[23] Yet if peace processes fail, that price is likely to be paid by civilians in war zones, increasing the prospect of the very kinds of crimes that international tribunals are designed to deter.

In Bosnia, for example, the U.S.-led mediation strategy that produced the Dayton Peace Accords used sanctions and force to persuade Milošević that his

Bosnian Serb allies would steadily lose ground to their Croatian and Bosnian opponents, and thus, it was in his interest to end the war. Goldstone's decision to issue arrest warrants for Karadžić and Mladić may have been taken independently, but it comported with the U.S. strategy of getting Milošević to speak for and rein in the Bosnian Serb leadership, who were seen as unreliable spoilers. Indicting Milošević, by contrast, would have undermined this strategy because his cooperation was necessary to negotiate Dayton and ensure its implementation in the postconflict environment.[24] Goldstone's successor, Louise Arbour, only indicted Milošević four years later during the eighth week of the Kosovo war, after the United States came to view Milošević as the primary threat to regional stability rather than as the key to the peace process.[25]

The timing of the indictments raises the question of whether the ICTY prosecutors were exercising some degree of political discretion. Both Goldstone and Arbour deny that the status of negotiations played any role in their decision-making and contend that such considerations are illegitimate for a prosecutor.[26] A more nuanced view of the relationship between politics and law is presented by former EU mediator Lord David Owen in an interview with Pierre Hazan:

> When I met Goldstone or the people close to the Tribunal, I did not recommend against indicting Milošević or the others. Such a recommendation would not have been wise, since I did not have a word to say about whether they must or must not issue an indictment. On the other hand, I explained to them the details of the negotiations, showed the difficulties [we faced]. The conclusion that they could easily draw was that it would not be very wise to indict the heads of state if we wanted to arrive at a negotiated peace between them and with them. I believe that Goldstone and [his successor Louise] Arbour had this pragmatic attitude, this common sense judgment, and the tribunal only indicted Milošević when the prosecutor understood that he was no longer an obstacle, politically. Because after Kosovo there were no means to negotiate with Milošević.[27]

If Owen is correct that the prosecutors made pragmatic adjustments to the dilemmas of peacemaking, would such an approach be ethical?

To the strongest supporters of international criminal justice, such pragmatic considerations are appropriate for diplomats, but not for prosecutors, whose duty is to prevent politics from infiltrating the judicial process. Nonetheless, international prosecutors operate in a political environment in which legal norms have a limited impact in ending violence. To insist on criminal justice—and that peace facilitators accept it as a binding legal obligation—is to rule out conflict resolution

processes that may include negotiations with those accused of criminal violence. The only alternatives would then be military intervention, regime change, or coercion that excludes cooperation with the target (as was the case with Milošević after the war in Kosovo, in contrast to the Dayton process). If these interventionist options are impractical or counterproductive, as mediators believed they were in Bosnia, then criminal justice blind to the dynamics of conflict resolution would perpetuate wars whose primary victims are civilians.

In contrast to the prosecutors at the ICTY, Moreno-Ocampo has adopted a legal strategy that has challenged the political boundaries of conflict resolution in Sudan—initially in his June 2008 report to the Security Council attributing the atrocities in Darfur to "the entire state apparatus," and the next month by applying for an arrest warrant for Sudan's president, Omar Hassan al-Bashir.[28] In an interview with *Foreign Policy* magazine, Moreno-Ocampo made clear the consequences of the confirmation of the arrest warrant for mediators: "We need negotiations, but if Bashir is indicted, he is not the person to negotiate with. Mr. Bashir could not be an option for [negotiations on] Darfur or, in fact, for the South. I believe negotiators have to learn how to adjust to the reality. The court is a reality."[29]

The Security Council, however, has not adjusted to this new legal reality by adopting a more enforcement-oriented strategy of conflict resolution. Instead, it has continued what amounts to a Chapter VI approach, emphasizing (1) the impartial mediation of the peace processes, both for Darfur and for implementing the Comprehensive Peace Agreement (CPA) that ended a twenty-year civil war between the north and the south; (2) consensual peacekeeping; and (3) the world's largest humanitarian relief operation for the more than 2 million Darfuris whom the war has internally displaced or rendered dependent on foreign assistance. Since each of these policies requires Sudanese cooperation, and since peacekeepers and humanitarian organizations need to maintain their impartiality within Sudan, criminalization puts these efforts at risk. This was central to the case put forward by critics of the arrest warrant, such as Alex de Waal, and those risks were demonstrated by the expulsion of thirteen international humanitarian organizations after the arrest warrant was confirmed by the Pre-Trial Chamber.[30] Ironically, the means by which the international community mitigated the adverse consequences of the expulsions was to maintain engagement with Khartoum through ministers directly answerable to Bashir, something that may have comported with the letter of the arrest warrant but certainly not its broader meaning.[31] While this explains

why some of the worst-case scenarios projected by ICC critics did not materialize, it also demonstrates the weakness of anti-impunity norms in driving state behavior and the risks of prosecutorial strategies that move too far ahead of the political consensus.

Another set of "peace versus justice" challenges emerged from the ICC's investigations of rebel movements in those states that have voluntarily referred situations on their own territories to the court. As of 2011, Moreno-Ocampo has accepted self-referrals from three countries: Uganda, the Democratic Republic of Congo, and the Central African Republic. While this practice is attractive to the prosecutor from the vantage point of securing state cooperation, it poses two ethical dilemmas for the court. First, the ICC risks being co-opted by less than fully democratic governments as a means of stigmatizing their enemies without improving their own human rights and accountability practices. Second, since these investigations are taking place during active hostilities, there is a risk that the court's "no impunity" mandate will complicate peace negotiations and bias the conflict resolution process toward military solutions. As a result, the OTP should consult broadly with mediators, humanitarian organizations, and local stakeholders in order to craft a legal strategy that does not foreclose negotiated settlements or undermine human security.

Both of these issues were sources of controversy in the ICC's case against Joseph Kony and the top commanders for the Lord's Resistance Army (LRA)—a rebel group that has forcibly recruited over 25,000 children in a campaign of terror, directed primarily against the Acholi people in northern Uganda, whom they claim to represent. The ICC's involvement was opposed from the start by the most prominent Acholi civil society groups because they feared it would foreclose the possibility of a negotiated end to the war. They prioritized peace over prosecution because they viewed the continuation of the war—which led to large-scale internal displacement—as the principal source of their human security problem. Moreover, they blamed the Museveni government, which referred the case to the court, as bearing significant responsibility for their victimization given that as part of its counterinsurgency campaign against the LRA, the Uganda People's Defence Force (UPDF) forcibly relocated most of the northern population into camps that lacked adequate security, food, or medicine, and where the UPDF often subjected them to torture, extrajudicial killings, rape, and extortion. Because Moreno-Ocampo announced his decision to accept the case in a joint statement with Museveni, and because he has not initiated a case against

the UPDF, the ICC is widely perceived within northern Uganda—fairly or not—as an instrument of state policy.[32]

The prosecutor initially responded to these civil society objections by meeting with representatives of Acholi community groups both opposed to and supportive of prosecution, and by establishing an outreach program in northern Uganda. He nonetheless applied for and obtained arrest warrants within a few months of those meetings.[33] And when, during the subsequent peace negotiations between the Ugandan government and the LRA, Kony insisted on the withdrawal of the arrest warrants as a condition for laying down his arms, the prosecutor contended that the warrants were not negotiable and analogized the call for their removal as the equivalent of giving in to blackmail.[34] After Kony refused to show up to finalize a peace agreement (ostensibly over the lack of clarity about accountability measures), Moreno-Ocampo contended that negotiating with Kony reinforced his impunity by providing him a respite during which he could rebuild his forces.[35] From the OTP's perspective, this demonstrated how divisions among the ICC, local actors, and international mediators and humanitarians undermined the unity of purpose necessary for an effective responsibility to enforce.[36]

A strong case could be made that the prospects for a negotiated solution were low because Kony is what is referred to in the conflict resolution literature as a "total spoiler"—one who would never agree to disarm and had used the peace process to regroup and return to violence.[37] If that was the case, however, the alternative was not as simple as Moreno-Ocampo's call for "doing more to arrest Kony," because if he is arrested, we "will have peace tomorrow."[38] It should be frankly acknowledged that this implies military action, not police work. Yet given the failure of earlier UPDF campaigns against the LRA and their consequences in terms of increased bloodshed and dislocation, there is a need to address the question of why the outcome of a new military effort would be different,[39] particularly since the negotiations had been accompanied by a cease-fire that dramatically improved the human security situation in the north.[40] As a result, the reservations about prosecution expressed by local stakeholders should not be viewed simply as weakening the operational pillar of justice. Instead, they should be seen as representing important values that could be put at risk by prosecution and that should be engaged as part of the prosecutor's decision-making process before deciding to move forward with a formal investigation.

## Conclusion

In *Just and Unjust Wars*, Michael Walzer captures the ethic of legalist justice by citing an article by a legal scholar who argues that the subject of war crimes can be understood with "tolerable clarity and brevity" since law is "a matter of definite rules, well-known procedures, and authoritative judges." Moral reasoning, by contrast, is viewed as little more than "endless talk" in which no one's position has any more authority than any other.[41] One hears echoes of Walzer's legal scholar in Moreno-Ocampo's response to some of the criticisms of his decisions: "The issue is no longer whether we agree or disagree with the pursuit of justice in moral or practical terms; we must follow the law."[42]

There are two problems with this vision of law trumping moral and political argument. First, it overestimates the power of international criminal law, exaggerating its capacity for deliverance in the absence of politics. Second, it promotes a discourse that seeks to delegitimize those who express moral or practical reservations about the application of international criminal law to specific conflicts. Some of those objections do come from rights-abusive states seeking to maintain repressive privilege and third parties who want to preserve political and economic ties with them. Others, however, reflect genuine tensions between criminal justice and other values relevant to ending or ameliorating the kind of violence that the court is tasked to prosecute. In addressing these concerns, the prosecutor should not frame the issue as a binary choice between legal purity and the infiltration of politics. Rather, there should be a negotiation between law and politics in which the prosecutor consults widely with a broad range of local and international actors to craft a strategy that comports with conflict resolution and humanitarian activities. Doing so would not make the prosecutor a political actor who takes instructions from others. While the court should maintain its judicial independence, it should also acknowledge its interdependence with other actors, and work in coordination with rather than above other efforts at conflict resolution. Perhaps that acknowledgment should take place outside of public view in order to maintain the moral authority of the court, as Michael Struett's contribution to this roundtable suggests. Nonetheless, there is a need for the ICC to engage in a genuine dialogue between many actors—a three-dimensional discourse that addresses not only the law but also the political and moral consequences of its enforcement, rather than dismissing such debates as endless and unprincipled talk.

NOTES

[1] International Criminal Court, Office of the Prosecutor (ICC-OTP), *Draft Regulations of the Office of the Prosecutor*, June 3, 2003, p. 47; and ICC-OTP, *Paper on Some Policy Issues Before the Office of the Prosecutor*, September 2003, p. 2.

[2] ICC-OTP, "Informal Meeting of Legal Advisors of Ministries of Foreign Affairs," New York, October 24, 2005, p. 9.

[3] ICC-OTP, *Policy Paper on the Interests of Justice*, September 2007, p. 7.

[4] See Claude E. Welch and Ashley F. Watkins, "Extending Enforcement: The Coalition for the International Criminal Court," *Human Rights Quarterly* 33, no. 4 (November 2011), pp. 971–87.

[5] See Steven Roach, "Rawls's Law of Peoples and the International Criminal Court," in Roland Pierik and Wouter Werner, eds., *Cosmopolitanism in Context: Perspectives from International Law and Political Theory* (Cambridge: Cambridge University Press, 2010), pp. 179–94.

[6] Judith N. Shklar, *Legalism: Law, Morals, and Political Trials* (Cambridge, Mass.: Harvard University Press, 1964).

[7] Luis Moreno-Ocampo, "The Role of the International Community in Assisting the International Criminal Court to Secure Justice and Accountability," in René Provost and Payam Akhavan, eds., *Confronting Genocide* (New York: Springer, 2010), p. 281. Some international criminal justice supporters are skeptical of Moreno-Ocampo's claims and contend that he has been overly deferential to powerful states and the governments with whom he has partnered. Nonetheless, their critiques are premised on the view that law must remain separate from politics.

[8] ICC, *Eleventh Diplomatic Briefing of the International Criminal Court*, The Hague, October 10, 2007, p. 3.

[9] Rod Rastan, "The Responsibility to Enforce—Connecting Justice with Unity," in Carsten Stahn and Göran Sluiter, eds., *The Emerging Practice of the International Criminal Court* (Leiden, The Netherlands: Brill, 2009), pp. 163–83.

[10] Victor Peskin, *International Justice in Rwanda and the Balkans: Virtual Trials and the Struggle for State Cooperation* (Cambridge: Cambridge University Press, 2008), pp. 29–148. On the role of these factors in the arrests of Karadžić and Mladić, see Tim Judah, "Pride and Pragmatism," *Guardian*, July 31, 2008; and Stephen Castle, "Mladic Arrest Opens Door to Serbia's Long-Sought European Union Membership," *New York Times*, May 26, 2011.

[11] Elizabeth Allen, "Seven Questions: Prosecuting Sudan," *Foreign Policy*, February 12, 2009.

[12] See Alex J. Bellamy, *Responsibility to Protect* (Cambridge: Polity, 2009).

[13] Richard J. Goldstone, "Bringing War Criminals to Justice During an Ongoing War," in Jonathan Moore, ed., *Hard Choices: Moral Dilemmas in Humanitarian Intervention* (Lanham, Md.: Rowman & Littlefield, 1998), p. 202.

[14] Nicholas J. Wheeler, *Saving Strangers: Humanitarian Intervention in International Society* (Oxford: Oxford University Press, 2000), pp. 253–55.

[15] See Saadia Touval, *Mediation in the Yugoslav Wars: The Critical Years, 1990–1995* (Houndmills, U.K.: Palgrave, 2002), pp. 135–69.

[16] "Is This the World's Least Effective UN Peacekeeping Force?" *Economist*, December 4, 2004, p. 45.

[17] James Traub, *The Best Intentions: Kofi Annan and the UN in the Era of American World Power* (New York: Farrar, Straus & Giroux, 2006), p. 341.

[18] See Alex J. Bellamy and Paul Williams, "The UN Security Council and the Question of Humanitarian Intervention in Darfur," *Journal of Military Ethics* 5, no. 2 (June 2006), pp. 144–60.

[19] See James A. Goldston, "More Candour About Criteria: The Exercise of Discretion by the Prosecutor of the International Criminal Court," *Journal of International Criminal Justice* 8, no. 2 (May 2010), pp. 396–98.

[20] Rod Rastan, "Comment on Victor's Justice & the Viability of Ex Ante Standards," *John Marshall Law Review* 43, no. 3 (Spring 2010), pp. 601–602.

[21] See I. William Zartman and Saadia Touval, *International Mediation in Theory and Practice* (Boulder, Colo.: Westview, 1985), pp. 258–60.

[22] See Roy Licklider, "Ethical Advice: Conflict Management vs. Human Rights in Ending Civil Wars," *Journal of Human Rights* 7, no. 4 (October 2008), p. 378.

[23] Chris McGreal, "African Search for Peace Throws Court into Crisis," *Guardian*, January 9, 2007.

[24] Gary Jonathan Bass, *Stay the Hand of Vengeance: The Politics of War Crimes Tribunals* (Princeton, N.J.: Princeton University Press, 2000), pp. 232–37.

[25] See Steven L. Burg, "Coercive Diplomacy in the Balkans: The U.S. Use of Force in Bosnia and Kosovo," in Robert J. Art and Patrick M. Cronin, eds., *The United States and Coercive Diplomacy* (Washington, D.C.: United States Institute of Peace, 2003), pp. 94–96.

[26] See Richard J. Goldstone, *For Humanity: Reflections of a War Crimes Investigator* (New Haven, Conn.: Yale University Press), pp. 103, 107; and "Arbour, Milošević, and 'Yesterday's Men,'" Institute of War & Peace Reporting, Tribunal Update No. 128, June 5, 1999.

[27] Cited in Thomas Unger and Marieke Wierda, "Pursing Justice in Ongoing Conflict: A Discussion of Current Practice," in Kai Ambos et al., eds., *Building a Future on Peace and Justice: Studies in Transitional Justice, Peace and Development* (Berlin: Springer-Verlag, 2009), p. 267.

[28] Victor Peskin, "The International Criminal Court, the Security Council, and the Politics of Impunity in Darfur," *Genocide Studies and Prevention* 4, no. 3 (Winter 2009), pp. 317–20.

[29] Allen, "Seven Questions."

[30] See Alex de Waal and Gregory Stanton, "Should President Omar al-Bashir of Sudan Be Charged and Arrested by the International Criminal Court? An Exchange of Views," *Genocide Studies and Prevention* 4, no. 3 (Winter 2009), p. 331.

[31] Rob Crilly, "Aid Groups Return to Darfur—With New Names," *Christian Science Monitor*, July 16, 2009, p. 9.

[32] See Tim Allen, *Trial Justice: The International Criminal Court and the Lord's Resistance Army* (London: Zed Books, 2006); and Adam Branch, "Uganda's Civil War and the Politics of ICC Intervention," *Ethics & International Affairs* 21, no. 2 (Summer 2007), pp. 179–98.

[33] See William A. Schabas, *An Introduction to the International Criminal Court*, 4th ed. (Cambridge: Cambridge University Press, 2011), pp. 39–44.

[34] Luis Moreno-Ocampo, "Building a Future on Peace and Justice," in Ambos et al., eds., *Building a Future on Peace and Justice*, p. 13.

[35] Peter Eichstaedt, "ICC Chief Prosecutor Talks Tough," Institute for War & Peace Reporting, May 7, 2008.

[36] Rastan, "The Responsibility to Enforce," p. 176.

[37] Stephen John Stedman, "Spoiler Problems in Peace Processes," *International Security* 22, no. 2 (Fall 1997), p. 10.

[38] Eichstaedt, "ICC Chief Prosecutor Talks Tough."

[39] The case for a U.S. Special Forces intervention as an alternative to the UPDF was made by the executive director of Human Rights Watch, which is one of the strongest supporters of the ICC. See Kenneth Roth, "Get Tough on Human Rights," *Foreign Policy*, November 2010. Human Rights Watch officials have also made arguments in favor of military intervention in other situations under ICC scrutiny. See Corinne Dufka, "The Case for Intervention in the Ivory Coast," *Foreign Policy*, March 25, 2011; and comments of Tom Malinowski in Mark Landler and Dan Bilefsky, "Specter of Rebel Rout Helps Shift U.S. Policy on Libya," *New York Times*, March 16, 2011.

[40] International Crisis Group, "Northern Uganda: Seizing the Opportunity for Peace," Africa Report No. 124, April 26, 2007, p. 2.

[41] Michael Walzer, *Just and Unjust Wars: A Moral Argument with Historical Illustrations* (New York: Basic Books, 1977), p. 288.

[42] Moreno-Ocampo, "The Role of the International Community," p. 281.