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# Doing Justice to the Political: The International Criminal Court in Uganda and Sudan

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## Abstract

*International criminal justice has become a weapon in political struggles in Uganda and Sudan. In this light, this article discusses the political meaning of the International Criminal Court's judicial interventions. It argues that the ICC, presented by its advocates as a legal bastion immune from politics, is inherently political by making a distinction between the friends and enemies of the international community which it purports to represent. Using original empirical data, the article demonstrates how in both Uganda and Sudan warring parties have used the ICC's intervention to brand opponents as *hostis humani generis*, or enemies of mankind, and to present themselves as friends of the ICC, and thus friends of the international community. The ICC Prosecutor has at times encouraged this friend–enemy dichotomy. These observations do not result in a denunciation of the Court as a 'political institution'. On the contrary: they underline that a sound normative evaluation of the Court's activities can be made only when its political dimensions are acknowledged and understood.*

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*To show that justice has its practical and ideological limits is not to slight it. . . .  
The entire aim is rather to account for the difficulties which the morality of justice faces in a  
morally pluralistic world and to help it recognize its real place in it –  
not above the political world but in its very midst.*

J. Shklar, *Legalism: Law, Morals and Political Trials* (1986), at 122–123.

## 1 The Politics of Justice

When Sudanese trade organizations wished to submit petitions to the International Criminal Court (ICC or ‘the Court’) as an annex to an *amicus curiae* application, the Registry sent the boxes back to the sender. The organizations opposed an arrest warrant against the Sudanese President. But the Registry argued, *inter alia*, that ‘*le dépôt de ce type de documents, qui, par nature, s’inscrivent dans le domaine de compétence d’organes politiques ou législatifs, ne saurait être considéré comme relevant du ressort d’une juridiction pénale internationale*’. In its view, the Court is ‘*un organe judiciaire, lequel n’a pas vocation à être une tribune politique*’.<sup>1</sup> The Registry’s response must have pleased those drafters of the Rome Statute of the ICC<sup>2</sup> who had cautioned that the Court ‘should not be seen as a way of pursuing political goals.’<sup>3</sup>

Other organs of the Court, too, have presented their work as outside the political realm. The Court’s then President reassured states that ‘[t]here’s not a shred of evidence after three-and-a-half years that the court has done anything political. The court is operating purely judicially.’<sup>4</sup> He has also argued that ‘*la situation au Darfour illustre . . . les difficultés pour la CPI d’opérer dans un environnement politique*’,<sup>5</sup> presenting the Court as an apolitical body. The Prosecutor, in turn, has stated ‘I apply the law without political considerations. But the other actors have to adjust to the law.’<sup>6</sup>

The message conveyed by Court’s officials is unambiguous: it is up to the Court’s organs to stay clear of politics, to subordinate politics to law, and to speak law to power. Politics, in other words, is portrayed as external to law, as something that needs to be overcome by independent organs acting on the basis of pre-given rules and principles. In this understanding, the Court’s fight against impunity is also a struggle with, or even against, politics. The aim of the fight is to establish individual criminal accountability before an independent court which is not compromised by political

<sup>1</sup> *Conclusions du Greffier en vertu de la Norme 24bis du Règlement de la Cour en Réponse au Document Intitulé ‘Clarification for the Record of Annex 4 to the Application under Rule 103’*, ICC-02/05-222, Le Greffier, 1 May 2009, at para. 6. Unless otherwise provided, all ICC documents are available at [www.icc-cpi.int](http://www.icc-cpi.int). All weblinks were effective on 10 June 2010.

<sup>2</sup> Rome Statute of the International Criminal Court, Rome, 17 July 1998, 2187 UNTS 90 (RS).

<sup>3</sup> ‘Summary records of the meetings of the forty-sixth session, 2 May–22 July 1994’, *Yrbk Int’l Law Comm.*, i, A/CN.4/Ser.A/1994, at 23, para. 28.

<sup>4</sup> Herman, ‘Japan’s Expected to Support International Criminal Court’, *Voice of America*, 6 Dec. 2006, available at: [www.amazines.com/article\\_detail.cfm/183987?articleid=183987](http://www.amazines.com/article_detail.cfm/183987?articleid=183987).

<sup>5</sup> ‘La Primauté du Droit et la Realpolitik: Entretien avec Philippe Kirsch’, *Global Brief* (2010), available at: <http://globalbrief.ca/blog/2010/02/19/sur-la-primaute-du-droit-et-la-realpolitik/>.

<sup>6</sup> ‘Keynote address Mr. Luis Moreno-Ocampo, Prosecutor of the International Criminal Court, Council on Foreign Relations’, Washington DC, 4 February 2010.

bargaining, immunity of political superiors, or the non-justiciability of political questions. As Chérif Bassiouni claimed at the conclusion of the Rome Conference, ‘The ICC reminds governments that realpolitik, which sacrifices justice at the altar of political settlements, is no longer accepted.’<sup>7</sup>

While there is nothing wrong with attempts to protect the Court from political interference, portraying it as fighting the political has a serious disadvantage: it blinds us to the politics of the ICC itself. Depending on one’s definition of politics, there are various ways in which the ICC is inextricably intertwined with politics. For instance, the Court was created by political decisions, it adjudicates crimes which are frequently related to politics, and it depends on a mysterious and seemingly magical ‘political will’ for the enforcement of its decisions. The political is not something external to the Court, not just a force which potentially compromises the independence of the Court and needs to be overcome. To paraphrase Martti Koskeniemi, the ICC does not replace politics but enacts them.<sup>8</sup>

This article aims to shed light on the political meaning of the ICC’s judicial interventions. It does so by examining the Court’s interventions in two of the first states subject to ICC investigations, Uganda and Sudan.<sup>9</sup> The situation in northern Uganda was referred to the Court by the Ugandan government itself. (Subsequently, the Democratic Republic of the Congo (DRC) and the Central African Republic (CAR) followed this example of a so-called ‘self-referral’.) Darfur (a region in the west of Sudan) was referred to the Court by the Security Council. The difference in the ways in which the Court became involved in these two situations makes it possible to assess the political relevance of the specific mechanisms by which the Court’s jurisdiction was activated.<sup>10</sup>

<sup>7</sup> As recapitulated in M.C. Bassiouni, *The Legislative History of the International Criminal Court* (2005), at 121.

<sup>8</sup> M. Koskeniemi, *The Gentle Civilizer of Nations: The Rise and Fall of International Law 1870–1960* (2002), at 177.

<sup>9</sup> The data on developments in Uganda and Sudan have been gathered as part of empirical research for ‘Complementarity in Conflict: Law, Politics and the Catalysing Effect of the International Criminal Court in Uganda and Sudan’, Sarah Nouwen’s PhD thesis, defended at Cambridge University in June 2010, forthcoming as *Complementarity in the Line of Fire: The Catalysing Effect of the International Criminal Court in Uganda and Sudan*, Cambridge Studies in Law and Society (2011). It examines whether the principle of complementarity as embodied in the Rome Statute has functioned as a catalyst for domestic proceedings and reform of criminal justice systems. As part of this research over 300 semi-structured interviews were conducted with key actors in the Ugandan and Sudanese legal sector (prosecutors, judges, police officers, investigators, defence lawyers, legal counsel), politicians (ministers, parliamentarians, local representatives), army officials, representatives of rebel movements, civil society actors, scholars, journalists, NGO staff, ICC officials, and representatives of embassies and international organizations in Uganda, Sudan, The Netherlands, Germany, Switzerland, London, New York, and Washington throughout 2006–2009. In Uganda, substantial research assistance was provided by Céline Korthals and Wendy Hanson. The Gates Cambridge Trust, the Arts and Humanities Research Council, and the Smuts Fund for Commonwealth Studies have made this research financially possible. In the present article interviewees’ names and exact locations and dates of the interviews have been replaced by a general description of their positions and a more general indication of the place and date of interviews, for reasons of confidentiality and security.

<sup>10</sup> The third way by which the Court’s jurisdiction can be triggered is a Pre-Trial Chamber’s authorization of a *proprio motu* investigation by the Prosecutor. When this article was being finalized, the Court authorized such an investigation, for the first time, with respect to Kenya in *Decision pursuant to Article 15 of the Rome Statute on the Authorization of an Investigation into the Situation in the Republic of Kenya*, ICC-01/09-19, Pre-Trial Chamber II, 31 Mar. 2010.

An analysis of the ‘political’ requires a delimitation of this elusive notion. For the purposes of this article, two popular understandings of the concept are not applicable. The first is that of the political as a negative counterpart of law, according to which law is by definition apolitical. Many of the above-cited statements by ICC officials use the term in this sense. Comparable approaches can be discerned in scholarly writing, for example where authors celebrate the creation of the ICC as a move from politics to law,<sup>11</sup> where states in the ‘zone of law’ are set apart from states still operating in the ‘zone of politics’,<sup>12</sup> where the formal equality before the law is contrasted with the unequal workings of power in the political,<sup>13</sup> or where law’s objectivity is set off against the subjective and egoistic nature of (international) politics.<sup>14</sup> While it is not possible to argue that such conceptualizations are wrong in some objective sense, they render an examination of the politics of law itself impossible. As Morgenthau has argued:

The ‘legal’ and the ‘political’ are not at all an adequate pair of concepts that could enter into a determinate contrast. The conceptual counterpart of the political is formed by the non-political but not by the concept of ‘legal question’ which, for its part, can be both political and non-political.<sup>15</sup>

A definition of politics as the negative counterpart of law *a priori* excludes the possibility that law may be part of the political.

The second popular, but for this article unhelpful, concept of the political is one which covers all decision-making or social interaction. Critical studies of international law, for instance, while usually not defining ‘the political’ in any detail, use the notion in this sense when deconstructing the objectivity and impartiality of international legal rules and decisions.<sup>16</sup> They highlight that these are the result of human choice,<sup>17</sup>

<sup>11</sup> Bassiouni, ‘The Permanent International Criminal Court’, in P. Sands and M. Lattimer (eds), *Justice for Crimes Against Humanity* (2003) 173, at 210.

<sup>12</sup> Burley, ‘Law Among Liberal States: Liberal Internationalism and the Act of State Doctrine’, 92 *Columbia L Rev* (1992) 1907, at 1916–1922.

<sup>13</sup> Wippman, ‘The International Criminal Court’, in C. Reus-Smit (ed.), *The Politics of International Law* (2004) 151, at 157 citing Kahn, that the difference between law and politics is that ‘once the legal rules are set, the outcome should not depend on the relative power of the disputants’.

<sup>14</sup> See, e.g., Lauterpacht’s treatment of ‘politics’ as something which needs to be overcome by impartial, objective legal rules and, above all, impartial jurists who give meaning to those rules in concrete circumstances. For a discussion see Koskenniemi, *supra* note 8, chap. 5. See also M. Shaw, *International Law* (2008), at 12 (footnotes omitted): ‘Power politics stresses competition, conflict and supremacy and adopts as its core the struggle for survival and influence. International law aims for harmony and the regulation of disputes. It attempts to create a framework, no matter how rudimentary, which can act as a kind of shock-absorber clarifying and moderating claims and endeavouring to balance interests.’

<sup>15</sup> H. Morgenthau, *Die Internationale Rechtspflege, ihr Wesen und ihre Grenzen* (1929), at 62. The translated quotation is taken from Koskenniemi, *supra* note 8, at 442.

<sup>16</sup> See for example M. Koskenniemi, *From Apology to Utopia: The Structure of International Legal Argument* (2006), at 571: ‘The politics of international law is what competent international lawyers do. And competence is the ability to use grammar in order to generate meaning by doing things in argument’ (emphasis in original).

<sup>17</sup> See, e.g., the way in which Koskenniemi has recently argued that his 1990 article on the politics of international law lacked a clear conception of the political: ‘Nor did it explain what it meant by “politics” in its title beyond the kind of issues that lawyers had always pointed to when they discussed the use of “discretion” in the law’: Koskenniemi, ‘The Politics of International Law – 20 Years Later’, 20 *EJIL* (2009) 7, at 8. In this article Koskenniemi argues that nowadays the ‘politics’ of international law consists in the choice for a particular technical idiom and the expertise and structural biases that come with it.

and in doing so reveal the 'political' nature of international legal decision-making.<sup>18</sup> While these broad conceptualizations are not inherently wrong either, they have little distinctive value as a result of their submerging all law into the political and leaving the category of the non-political empty.

For the purposes of this article we will focus on one particular aspect or function of the political: the act of distinguishing between friends and enemies. For Carl Schmitt this was the essence of the political.<sup>19</sup> He recognized that collectivities have external friends ('allies') and enemies. The ally is important because he can provide not merely material support but also recognition and legitimacy. The enemy is the 'other' which a collectivity 'potentially' fights.<sup>20</sup> The word 'potentially' indicates that for Schmitt the political does not reside in armed struggle itself – let alone in glorifying war – but 'in the mode of behaviour which is determined by this possibility',<sup>21</sup> by the ever-looming possibility of armed conflict.

While we delimit the political in a way indebted to Schmitt, we also deviate from his understanding of politics in an important respect. For Schmitt, the friend–enemy distinction constitutes the essence of the political – it signifies what politics *is*.<sup>22</sup> Our reading of the political is less essentialist: there is more to politics than friend–enemy distinctions,<sup>23</sup> for example the organization of the polity or the art of bringing a political community together. Nonetheless, even such broader definitions of the political need to account for the fact that communities constantly make – and need to make – friend–enemy distinctions. It is therefore not surprising to find that non-Schmittians, too, have acknowledged the importance of the friend–enemy distinction for an understanding of the political, for instance when they define politics as 'the activity of aggregating and defending our friends, and dispersing and fighting our enemies'.<sup>24</sup> Echoes of this approach can be found in the work of Otto Kirchheimer, who took some seminars from Schmitt in the 1920s and the 1930s and developed into one of his major critics.<sup>25</sup> Kirchheimer builds on the friend–enemy distinction when he speaks of 'political trials'. 'In its simplest and crudest terms', Kirchheimer argues, the function of political trials is that 'the courts eliminate a political foe of the regime according to

<sup>18</sup> H. Laswell, *Politics: Who Gets What, When and How* (1936) provides another example of a (classical) definition of politics which makes it difficult to find space for the non-political.

<sup>19</sup> Another application of Schmitt's work to international criminal courts can be found in Gustafson, 'International Criminal Courts: Some Dissident Views on the Continuation of War by Penal Means', 51 *Houston J Int'l L* (1998–1999) 51.

<sup>20</sup> C. Schmitt, *The Concept of the Political* (trans. G. Schwab, 1996).

<sup>21</sup> *Ibid.*, at 35.

<sup>22</sup> For an analysis see G. Slomp, *Carl Schmitt and the Politics of Hostility, Violence and Terror* (2009), at 8: 'Schmitt's break from the mainstream does not follow from his claim that distinguishing friends and enemies is what politics *does* but from the claim that that is what politics *is*.'

<sup>23</sup> See also J. Shklar, *Legalism: Law, Morals and Political Trials* (1986), at 149.

<sup>24</sup> Bobbio, 'Politica', in N. Bobbio, N. Matteucci, and G. Pasquino (eds), 2 *Diccionario de política* (1982) 1240, at 1247–1248. Bobbio is quoted in Arditì, 'On the Political: Schmitt contra Schmitt', 142 *Telos* (2008) 7, at 7, as well as in Slomp, *supra* note 22, at 8.

<sup>25</sup> For a discussion of the relationship between Schmitt and Kirchheimer see W.E. Scheuerman, *Between the Norm and the Exception: The Frankfurt School and the Rule of Law* (1997). We thank the anonymous reviewer who pointed out the relevance of Kirchheimer's work for our analysis.

some prearranged rules'.<sup>26</sup> Kirchheimer's definition ('according to prearranged rules') recognizes that the political nature of a trial does not necessarily preclude its legal character.<sup>27</sup> The point of a political trial is precisely to use the integrity of the legal system for a political fight. Courts, unlike many alternative instruments to fight the enemy, provide a specific form of legitimation for the struggle. The more courts are perceived as being independent and impartial, the greater the legitimacy bonus for the political regime. However, the integrity of courts also confronts political leadership with a dilemma: '[i]s the prestige advantage it draws from the validation of its claims by such agency worth the corresponding loss of direction in dealing with its foes?'<sup>28</sup> The integrity of courts thus presents the political leadership with an opportunity to fight an enemy legitimately, but at the same time constitutes a considerable risk: in order to receive backing from independent courts, a regime must be willing to render control.

With a focus on this particular function of the political, this article proceeds with an examination of the politics of the ICC's interventions in Uganda (section 2) and Sudan (section 3). The article concludes with an analysis of how international criminal justice has become a weapon in struggles in Uganda and Sudan and how the ICC has become implicated in the distinction, and thus construction, of friends (allies) and enemies.

As a final prefatory comment, while arguing that the ICC's work is inherently political, the aim of this article is not to denounce the Court as a 'political institution'. Quite the contrary: a sound normative assessment of the Court should be based on an acknowledgement and understanding of the political aspects of the ICC. Defining away the ICC's political dimensions eventually undermines the Court by making it look either hypocritical or utopian.

## 2 Uganda

### *A Creating Enemies of Mankind*

In December 2003, the Republic of Uganda referred the 'Situation concerning the Lord's Resistance Army' to the ICC.<sup>29</sup> Three months earlier and just in office, the

<sup>26</sup> O. Kirchheimer, *Political Justice: The Use of Legal Procedure for Political Ends* (1961), at 6. See also Shklar, *supra* note 23, at 149, who defines a political trial as a trial in which 'the prosecuting party, usually the regime in power aided by a cooperative judiciary, tries to eliminate its political enemies'. As with the use of Schmitt's understanding of the political, we do not argue that Kirchheimer's understanding of 'political trials' should be understood as exhaustive, as if the political contains an identifiable essence which can be captured in a single definition. But for the purposes of this article it is a useful starting point for the analysis of the politics of ICC actions.

<sup>27</sup> Contrast this with the more common conceptions according to which 'political trials' are by definition in violation of law. Posner, 'Political Trials in Domestic and International Law', 55 *Duke LJ* (2005) 75, at 77, for instance, suggests a logical opposition between law and politics where he argues that the ICC 'will continue to be political, rather than legal'. He seems to exclude the possibility that a trial can be political yet fair, for instance when he defends the *Hiss* trials (1949) as not being political on the ground that they 'seem to have been fair' (at 82, note 9).

<sup>28</sup> Kirchheimer, *supra* note 26, at 5.

<sup>29</sup> ICC, 'President of Uganda Refers Situation Concerning the Lord's Resistance Army (LRA) to the ICC', ICC-20040129-44-En, 29 Jan. 2004.

Court's first Prosecutor had publicly stated his intention to follow the situation in the eastern DRC closely and had invited states to refer this situation to the Court.<sup>30</sup> At the time, the International Court of Justice (ICJ) was adjudicating on the DRC's claims that Uganda had violated international law in its involvement in the eastern DRC.<sup>31</sup> Some of Uganda's foreign legal advisors suggested to both the Ugandan government and the ICC's Office of the Prosecutor (OTP) that Uganda had a situation on its own territory that would be ideal for the ICC.<sup>32</sup> The OTP welcomed the idea.<sup>33</sup> This brokering resulted in the first referral ever to the ICC.

For Uganda, in the words of a lawyer who advised the Ugandan government in the matter, 'the referral was an attempt to engage an otherwise aloof international community by transforming the prosecution of LRA leaders into a litmus test for the much celebrated promise of global justice'.<sup>34</sup> The Solicitor General of Uganda explained, as summarised by the ICC's Pre-Trial Chamber:

[W]hilst the national judicial system of Uganda was 'widely recognised for its fairness, impartiality, and effectiveness', it was the Government's view that the Court was 'the most appropriate and effective forum for the investigation and prosecution of those bearing the greatest responsibility for the crimes within the referred situation'. This view was based on several considerations, including (i) the scale and gravity of the relevant crimes; (ii) the fact that the exercise of jurisdiction by the Court would be of immense benefit for the victims of these crimes and contribute favourably to national reconciliation and social rehabilitation; (iii) Uganda's inability to arrest the persons who might bear the greatest responsibility for the relevant crimes.<sup>35</sup>

The Ugandan government triggered the Court's jurisdiction in a way which is provided for in the Rome Statute, a referral by a state party, but few at the Rome Conference had anticipated that a state would refer to the Court a situation on its own

<sup>30</sup> 'Report of the Prosecutor of the ICC to the Second Assembly of States Parties to the Rome Statute of the International Criminal Court', 8 Sept. 2003, at 4.

<sup>31</sup> In *Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v. Uganda)* [2005] ICJ Rep 168, at para. 207 (see also paras 211 and 250), the ICJ would later establish that the Ugandan armed forces (UPDF) had committed 'massive human rights violations and grave breaches of international humanitarian law' on the territory of the DRC.

<sup>32</sup> Interview with a Ugandan cabinet minister (Kampala, Oct. 2008). See also B.N. Schiff, *Building the International Criminal Court* (2008), at 198. The idea of the ICC's investigating the situation in northern Uganda was not entirely new. Even before the entry into force of the Rome Statute organizations such as UNICEF had suggested northern Uganda as a good case for the ICC (T. Allen, *Trial Justice: The International Criminal Court and the Lord's Resistance Army* (2006), at 82–83).

<sup>33</sup> In 'The Tenth Anniversary of the ICC and Challenges for the Future: Implementing the Law', London School of Economics, 8 Oct. 2008, the ICC Prosecutor claims to have invited the referral. See also Clark, 'Grappling in the Great Lakes: The Challenges of International Justice in Rwanda, the Democratic Republic of Congo and Uganda', in B. Bowden, H. Charlesworth, and J. Farrall (eds), *The Role of International Law in Rebuilding Societies after Conflict: Great Expectations* (2009) 244, at 261.

<sup>34</sup> Akhavan, 'Developments at the International Criminal Court: The Lord's Resistance Army Case: Uganda's Submission of the First State Referral to the International Criminal Court', 99 *AJIL* (2005) 403, at 404.

<sup>35</sup> *Decision on the Admissibility of the Case under Article 19(1) of the Statute*, ICC-02/04-01/05-377, Pre-Trial Chamber II, 10 Mar. 2009, at para. 37.

territory and concerning its own nationals.<sup>36</sup> The debate had focused on how states could prevent ICC intervention. It had been assumed that states would consider such intervention as costly to their sovereignty and reputation.<sup>37</sup>

The Ugandan government, however, perceived the referral of the LRA to the ICC as new means to defeat the relentless Ugandan rebel movement. President Museveni had long promoted a military solution,<sup>38</sup> but after 17 years of combat and aborted peace negotiations, the Ugandan government had proven unable either to vanquish or come to a settlement with the LRA. A military operation aimed at annihilating the LRA in Sudan had backfired in northern Uganda, resulting in among others a surge in the number of displaced persons from around 400,000 to 1.6 million, with numbers still rising at the time of the referral.<sup>39</sup> The failing military operations and corruption scandals, the rapidly deteriorating humanitarian situation, and the classification of northern Uganda by the UN Under-Secretary General for Humanitarian Affairs as the ‘most forgotten and neglected crisis in the world’<sup>40</sup> were beginning to tarnish the government’s reputation. Riots in the streets of Kampala arising from prosecutions of the government’s political opponents increased the image problem for what had been a ‘donor darling’ government. International donors, funding between 35 and 50 per cent of Uganda’s budget,<sup>41</sup> added their voice to local leaders’ criticism of the government’s failure to resolve the conflict in the North and to calls to end the government’s

<sup>36</sup> See, for instance, Louise Arbour interviewed in Llewellyn and Raponi, ‘The Protection of Human Rights through International Criminal Law: A Conversation with Madame Justice Louise Arbour, Chief Prosecutor for the International Criminal Tribunals for the Former Yugoslavia and Rwanda’, 57 *U Toronto Faculty of Law Rev* (1999) 83, at 97: ‘I can’t think of a single state that will voluntarily defer to the jurisdiction of the ICC if one of their nationals is implicated.’

<sup>37</sup> For instance, see Akhavan, ‘The International Criminal Court in Context: Mediating the Global and Local in the Age of Accountability’, 97 *AJIL* (2003) 712, at 716. Mégret, ‘Qu’est-ce qu’une juridiction “incapable” ou “manquant de volonté” au sens de l’article 17 du traité de Rome? Quelques enseignements tirés des théories du déni de justice en droit international’, 17 *Revue québécoise de droit international* (2004) 185, at 188, and Schabas, ‘The International Criminal Court: Jurisdiction, Trigger Mechanism and Relationship to National Jurisdictions’, in M. Politi and G. Nesi, *The Rome Statute of the International Criminal Court: A Challenge to Impunity* (2001) 197, at 204.

<sup>38</sup> ‘Uganda: Interview with President Yoweri Museveni’, *IRIN*, 9 June 2005, available at: [www.irinnews.org/Report.aspx?ReportId=54853](http://www.irinnews.org/Report.aspx?ReportId=54853) (‘There are those who believe in the magic of the peace talks – which I do not believe in. However, I do not want to be obstructive to those who wish to pursue this avenue – if you believe that you can convince evil to stop being evil, go ahead. But in the meantime, I do not want to give up my option [the military option].’) More sceptical observers have argued that President Museveni could use the existence of the conflict to silence political opposition, unite his political constituency in southern Uganda, and secure his power base in the army by maintaining a disproportionately high defence budget for an unreformed military.

<sup>39</sup> Lomo, ‘The International Criminal Court Investigations: Implications for the Search for Peaceful Solutions to the Conflict in Northern Uganda’, Working Paper No. 2, All Party Parliamentary Group on the Great Lakes and Genocide Prevention, July 2004, at 3. By 2005 numbers of internally displaced persons in northern Uganda were estimated at well over 2 million, a figure which did not include those who had taken flight in major urban centres such as Kampala whose numbers remain uncounted. See Refugee Law Project, ‘What About Us? The Exclusion of Urban IDPs from Uganda’s IDP Related Policies and Interventions’, Briefing Paper, Dec. 2007, and the special bulletins on urban IDPs available at: [www.refugeelawproject.org/other\\_reports.php](http://www.refugeelawproject.org/other_reports.php).

<sup>40</sup> J. Egeland, *A Billion Lives: An Eyewitness Report from the Frontlines of Humanity* (2008), at 201.

<sup>41</sup> The figure depends on the way in which the budget is composed.



human rights violations in combating the LRA. Pressure for a peaceful solution was building.

Against this background, the Ugandan government decided to refer the LRA to the ICC as part of a military strategy and international reputation campaign, rather than out of a conviction about law and justice. Initiated in the Ministry of Defence – not Justice – the referral was aimed ‘to intimidate these thugs [the LRA], to show that they were sought by many more’.<sup>42</sup> The referral could also, so it was thought, rally international assistance for the arrest of the government’s military opponents. It was in this vein that the Minister of Defence answered a parliamentary question, conflating the ICC and the International Tribunal for the former Yugoslavia and skipping over the fact that enforcement is the weakest chain in the ICC’s operations:

How does ICC operate? . . . They have the office of the prosecutor; they carry out investigations and actually the international community supports them. So, for this Serbian, for example, there is an international force, which is hunting for that person. So, should Kony be indicted, and should he be indicted before we capture him, who will look for him in order to compel him to appear before this committee? It is not Uganda; if they ask us we shall lend a hand, but actually it will be international forces.<sup>43</sup>

The ICC’s legal and the Ministry’s military approaches thus shared the avowed aim of catching the LRA, the former with a view to legal proceedings, the latter in order to defeat the enemy. The Ugandan government hoped that the ICC, with its international reach, might succeed where the Ugandan military had thus far failed in achieving this goal. A second strategic reason for the referral was that it gave the Ugandan government an alternative to declaring war on the Sudanese government.<sup>44</sup> It was thought that the latter, wishing to be on the ‘good’ side in the ‘war on terror’ and under pressure on account of the conflict in Darfur, would try to avoid association with persons sought by the ICC and to that end discontinue its support to the LRA.

The Ugandan government thus redefined the conflict in northern Uganda in terms of international criminal law in order to use international criminal justice as another instrument to defeat its enemy. Following the Ugandan government’s previous attempts to brand the LRA as ‘irrational’, ‘religious fundamentalists’, or ‘terrorists’, the ICC could brand the LRA as internationally wanted ‘criminals’. The ICC could turn the LRA from enemies of the Ugandan government into enemies of the international community as a whole.

<sup>42</sup> Interview with a government minister, Kampala, Oct. 2008.

<sup>43</sup> ‘Statement Defence Minister Mbabazi’, *Hansard*, Thursday, 29 July 2004, available at: [www.parliament.go.ug/index.php?option=com\\_wrapper&Itemid=33](http://www.parliament.go.ug/index.php?option=com_wrapper&Itemid=33).

<sup>44</sup> Interview with a government minister, Kampala, Oct. 2008 and IRIN, *supra* note 38: ‘The involvement of the ICC in hunting Kony is very important, mainly because it enables us to deal with Khartoum. Khartoum is fully aware of the consequences of dealing with somebody under the ICC’s indictment. If Kony is in Uganda or in the areas of Sudan where Khartoum has allowed us to operate, then we do not need assistance – we shall catch him ourselves. But if Kony goes deeper into Sudan, beyond where Sudan has allowed us to pursue him, we need the ICC’s assistance to get the Sudanese government to cooperate with us and help us to get him. That is why we need the ICC.’

## B *Befriending Mankind*

While branding the LRA as humanity's enemy, the referral portrayed the Ugandan government as a defender and friend of mankind. The Ugandan government calculated that as a result of the ICC's investigations into the LRA, ICC supporters would no longer treat the LRA and the government as equals. Instead they would view President Museveni's administration as a legitimate government fighting a criminal movement. Indeed, the referral could re-characterize the Ugandan government, the first to refer a situation to the ICC, as a champion of international criminal justice. Linking the arrest of the LRA leadership to the credibility of the ICC,<sup>45</sup> European governments – staunch ICC supporters – would replace their criticism of UPDF abuses and of the Ugandan government's failure to ameliorate the humanitarian situation in the North with renewed support for a legitimate government, committed to international justice, fighting a *hostis humani*.<sup>46</sup> Finally, a referral of the situation concerning the LRA would make the ICC's Prosecutor dependent on the cooperation of the Ugandan government; and he might hesitate to jeopardize such cooperation by charging his cooperative friends with crimes committed in neighbouring DRC.

Theoretically the ICC could also brand state actors as 'war criminals' for their conduct in northern Uganda. As Kirchheimer has argued, this is the dilemma that political trials present to a regime. It risks losing control over the court which it intended to use for its own validation by prosecuting its enemy – only its enemy. However, having referred only the 'situation concerning the Lord's Resistance Army', the Ugandan government has always been convinced that the ICC would prosecute exclusively the LRA. The Ugandan Minister of Defence, for instance, informed the Ugandan parliament that the OTP had examined whether there was 'sufficient basis to proceed with formal investigations that will eventually lead to the international criminal prosecution of the LRA terrorists in the ICC'.<sup>47</sup> In the Minister's words, the Prosecutor had decided 'to formally initiate an investigation in relation to the situation concerning atrocities committed by LRA terrorists against the people of Northern Uganda'.<sup>48</sup> The Minister guaranteed Parliament that 'the number of people to be handled by the ICC does not exceed five', again revealing the Government's confidence in its having a firm grip on ICC proceedings.<sup>49</sup>

To date, many of the Ugandan government's calculations have proved right. Using the argument that it was the first to refer a situation to the Court, Uganda has convinced the Assembly of States Parties to the Rome Statute that Kampala should be elected as host of the ICC Review Conference. The ICC's arrest warrants against the

<sup>45</sup> See also Akhavan, *supra* note 34, at 404.

<sup>46</sup> Interview with a person involved in the referral, The Hague, June 2008. See also Branch, 'International Justice, Local Injustice', 51(3) *Dissent* (2004), unnumbered pages available at: [www.dissentmagazine.org/article/?article=336](http://www.dissentmagazine.org/article/?article=336) and 'Uganda's Civil War and the Politics of ICC Intervention', 21(2) *Ethics and Int'l Affairs* (2007) 179.

<sup>47</sup> Statement of Defence Minister Mbabazi, *supra* note 43.

<sup>48</sup> *Ibid.*

<sup>49</sup> *Ibid.*

LRA leaders have helped the Ugandan government to convince the Congolese government to allow the Ugandan army to pursue the LRA on its territory. They also have helped silence international criticism of the UPDF's operations: there was hardly any when the UPDF's military operation in DRC only further dispersed the LRA and hundreds of civilians were killed or displaced.<sup>50</sup> Indeed, the Security Council 'welcome[d] the joint efforts . . . made [by states in the region] to address the security threat posed by LRA'.<sup>51</sup> The Ugandan government has also proved right, so far, in expecting that the Prosecutor would not prosecute cooperative friends. To date, he has not opened an investigation into alleged crimes by state actors, officially on the basis of (a dubious application of) gravity as selection criterion.<sup>52</sup>

### C Distinguishing Friends from Enemies

The Court, in particular the OTP, has in several ways actively used the friend–enemy dichotomy, presenting the Ugandan government as its friend and the LRA as an enemy of mankind. At the announcement of the referral, the ICC Prosecutor presented the Ugandan government as its partner in combating international crimes when demonstratively shaking hands with President Museveni at a joint news conference. The announcement of the referral of the situation 'concerning the Lord's Resistance Army'<sup>53</sup> implied that only the LRA, and not the Ugandan government, would be the subject of investigations. In response to criticism by NGOs the OTP subsequently re-titled the situation as 'situation in northern Uganda' or 'situation in Uganda', but it never opened an actual investigation into crimes committed by the UPDF. Indeed, headlines in a Ugandan newspaper have announced that the ICC has 'clear[ed]' the UPDF.<sup>54</sup> The article quotes an ICC outreach official to the effect that 'the Prosecutor said there was evidence against Kony and not against the UPDF commanders'.<sup>55</sup> Ugandan officials feel legitimized by the absence of ICC proceedings against high UPDF officers for crimes committed on a widespread or systematic scale, arguing that

<sup>50</sup> 'DRC–Uganda: Deadly LRA Attacks Prompt Exodus in Northeastern DRC', *IRIN*, 30 Dec. 2008, available at: <http://www.irinnews.org/Report.aspx?ReportId=82140>, and Eichstaedt, 'Uganda: Offensive against Kony Backfires', *Institute for War and Peace Reporting*, 8 Jan. 2009, available at: [www.friendsforpeaceinafrica.org/news/17-lra-updf-war/332-offensive-against-kony-backfires-iwpr.html](http://www.friendsforpeaceinafrica.org/news/17-lra-updf-war/332-offensive-against-kony-backfires-iwpr.html).

<sup>51</sup> S/PRST/2008/48.

<sup>52</sup> ICC-OTP, 'Statement by the Chief Prosecutor on the Uganda Arrest Warrants', The Hague, 14 Oct. 2005. See also 'Statement by Luis Moreno-Ocampo, Prosecutor of the International Criminal Court, Fourth Session of the Assembly of States Parties', 28 Nov. – 3 Dec. 2005, The Hague, 28 Nov. 2005, attached to ICC-02/04-01/05-67, 2 Dec. 2005, at 2 ('We selected our first case based on gravity. Between July 2002 and June 2004, the . . . LRA . . . was allegedly responsible for at least 2200 killings and 3200 abductions in over 850 attacks. It was clear that we must start with the LRA.'). Irrespective of numerical differences in crimes committed by rebel movements and the government, it could be argued that a state's involvement in the commission of crimes against civilians is an independent and sufficient indication of gravity, because of the high risk of impunity for such crimes. See also Schabas, 'Prosecutorial Discretion v. Judicial Activism at the International Criminal Court', 6 *J Int'l Crim Justice* (2008) 731, at 748.

<sup>53</sup> ICC, *supra* note 29.

<sup>54</sup> Mugisa and Nsambu, 'ICC Clears UPDF in the North', *Saturday Vision*, 30 Aug. 2008.

<sup>55</sup> *Ibid.*

‘the ICC has not found anything’.<sup>56</sup> Apart from refraining from opening proceedings against Ugandan government officials, the OTP has nourished a team spirit with them by joint conduct of investigations into the LRA and leisurely activities such as a boat trip for senior Ugandan officials and senior OTP staff along the Dutch canals.<sup>57</sup> Moreover, the OTP has welcomed the referral by the Ugandan government without ever critically assessing the factors relevant to admissibility, leaving some Ugandans with the impression that it acts because the Ugandan government wants it to act.<sup>58</sup> It was only when the Ugandan government began to consider conducting domestic proceedings as an alternative to the ICC in order to convince the LRA to sign a peace agreement that the friendly ICC–Ugandan government relations seemed to sour.<sup>59</sup> But since LRA leader Kony never signed the Final Peace Agreement which his delegation had negotiated with the Ugandan government, the LRA has remained an enemy of the Ugandan government and the Ugandan government a friend of the Court.

By contrast, the OTP has branded the LRA leaders criminals from the moment it received the referral. When the Prosecutor had yet to conduct an official investigation the ICC press release announcing the referral already mentioned ‘locating and arresting the LRA leadership’ as a key issue.<sup>60</sup> The Prosecutor has continued to present the LRA as a criminal organization, even suggesting that for this reason the operations of those who combat the LRA cannot be questioned. When challenged in a public debate in London about the absence of investigations into the Ugandan government, the Prosecutor ‘interrupted one of his most insistent questioners and, pointing an accusatory finger, burst out: “If you want to support the LRA, fine! But you should know they are a criminal organization.”’<sup>61</sup> In a similar vein, the Prosecutor criticized those who had supported peace talks between the Ugandan government and the LRA,

<sup>56</sup> Interview with a senior army official, Kampala, Oct. 2008. See also (Lt. Col.) Kulayigye, ‘Otunnu’s Notion of Genocide in the North very Absurd’, *Monitor*, 4 Sept. 2009.

<sup>57</sup> Picture seen of Ugandan Defence Minister Mbabazi and his lawyers sitting side-by-side with officials of the Jurisdiction, Complementarity and Cooperation Division (JCCD) on a boat in Dutch canals, with the Prosecutor himself, dressed in leisure wear, at the helm.

<sup>58</sup> Arts 17 and 20(3) RS provide that a case is inadmissible before the Court if it is being, or has been, genuinely investigated or prosecuted by a state. Upon receiving the referral letter the OTP, however, did not discuss whether Uganda had conducted domestic proceedings. The OTP ignored the fact that the Ugandan Government once issued an arrest warrant for Joseph Kony. The Pre-Trial Chamber, for its part, instead of discussing the criteria for inadmissibility provided in the Statute, uncritically echoed Uganda’s extra-statutory arguments about the ICC being the ‘most appropriate and effective forum for the investigation and prosecution of those bearing the greatest responsibility’ (Warrant of Arrest for Joseph Kony, ICC-02/04-01/05-53, Pre-Trial Chamber II, 8 July 2005 as amended on 27 Sept. 2005, at para. 37).

<sup>59</sup> Ironically, given that one of Uganda’s stated reasons for referring the case to the ICC was its own inability to arrest the leadership of the LRA, the Registrar has argued that Uganda’s failure to execute the ICC warrants for the LRA leadership amounts to a lack of compliance with Uganda’s obligation effectively to cooperate with the Court: Assembly of States Parties, Sixth Resumed Session, side event for African States, New York, 2–6 June 2008.

<sup>60</sup> ICC, *supra* note 29.

<sup>61</sup> Branch, ‘What the ICC Review Conference Can’t Fix’, available at: <http://africanarguments.org/2010/03/what-the-icc-review-conference-can%E2%80%99t-fix/>.

arguing that LRA leader 'Kony [had been] allowed to use the time and the resources of the "Juba talks" to promote his criminal goals'.<sup>62</sup>

The ICC's approach can be explained by considering its institutional interests at the time of the referral. The Rome Statute had just obtained the 60 ratifications required for its entry into force in a surprisingly short period. The ICC's supporters who had campaigned to achieve this expected the ICC to prove its right to exist. This was given added urgency by the US's publicly espoused aim to destroy the Court. The ICC's newly appointed staff felt the pressure to select for the first investigations situations which would, at the least, reassure doubting states that the Court was not driven by a prosecutor zealously using *proprio motu* powers and, ideally, convince them of the Court's success and usefulness. The situation in Uganda appeared, in an OTP official's words, 'a perfect case for [the OTP's] first . . . investigation'.<sup>63</sup> Having referred the situation itself, the Ugandan government would not protest. Nor could any other state argue that the Court disrespected state sovereignty. States were expected to welcome the ICC's investigation of the internationally ostracized LRA. Even the US would not oppose the ICC's involvement, since it had already put the LRA on its international terrorist list and had secured its own nationals in Uganda through a 'bilateral immunity agreement'. Moreover, the OTP expected an investigation in Uganda to be relatively easy and therefore likely to be successful. *Vis-à-vis* situations already under preliminary analysis, for instance DRC and CAR, the situation in Uganda concerned fewer parties, involved a smaller territory and lacked the sensitivities of a transitional government.<sup>64</sup> The Ugandan government had promised cooperation. Arresting the LRA would remain difficult, yet the Prosecutor counted on international cooperation, particularly Sudan's.<sup>65</sup> Finally, the Ugandan referral suited the OTP in a legal-system and language battle. Most situations under preliminary examination in 2003 were in francophone and civil-law African states. Their orientation rendered the Court particularly dependent on cooperation from France and Belgium. The UK, however, had been one of the staunchest supporters of the Court and, in particular, of the election of the current Prosecutor. The favour could be returned by enhancing the UK's potential influence by opening an investigation in an anglophone, common-law, and Commonwealth-oriented state.<sup>66</sup> An investigation in an anglophone state would also to some degree justify the predominance of English-speaking staff in the OTP.<sup>67</sup> Finally,

<sup>62</sup> Moreno-Ocampo, 'Remarks by the Prosecutor of the International Criminal Court', Chicago, 9 Apr. 2008, at 5–6.

<sup>63</sup> Brubacher, 'Why Negotiating with War Criminals Is Sometimes a Bad Idea', in O.J. Francis and P. Wrangé (eds), *The International Criminal Court and the Juba Peace Process or Global Governance and Local Friction* (forthcoming).

<sup>64</sup> Discussion with a former ICC official.

<sup>65</sup> The OTP reasoned that, in the same way as Uganda had discouraged ICC proceedings against the UPDF in the DRC situation by extending cooperation in the LRA case, Sudan would cooperate in the LRA case in order to distract attention from the Sudanese government's role in Darfur. On Sudan's willingness to cooperate with the ICC in the LRA case see Allio, 'Sudan Predicts Kony End', *New Vision*, 17 Feb. 2004.

<sup>66</sup> This view was put forward in three interviews with former and current OTP officials. One former OTP official refuted it when asked about it. Another informant confirmed that French officials expressed dissatisfaction with the Ugandan referral since it 'stole the thunder from DRC'.

<sup>67</sup> The Registry, by contrast, was also known as 'little France'.

an investigation into a common-law state by anglophone staff could also influence the outcome of the veritable battle for Fashoda which has continued in The Hague, now between civil and common lawyers.

The ICC, more specifically several of its organs, became less friendly towards the Ugandan government when the respective interests began to diverge. While the Ugandan government had considered the ICC's involvement to be in its interests when it referred the situation in 2003, its assessment changed when the ICC had proved unable to arrest the LRA leadership and the latter refused to sign a peace agreement as long as the former was involved. When the delegations of the Ugandan government and LRA ultimately agreed on national proceedings, which could render ICC proceedings inadmissible in accordance with the Statute's principle of complementarity,<sup>68</sup> the Prosecutor did not seem willing to give them a chance. The OTP declared that it would 'fight any admissibility challenge in court',<sup>69</sup> apparently irrespective of the genuineness of eventual national proceedings. The ICC judges, too, have guarded 'their' Uganda case. When the Pre-Trial Chamber learnt of Ugandan plans for domestic proceedings as an alternative to the ICC, it decided of its own volition to initiate proceedings to assess complementarity,<sup>70</sup> with the sole purpose of establishing that 'it is for the Court, and not for Uganda' to determine the admissibility of cases before the ICC.<sup>71</sup> The Court wished to keep its case and needed the Ugandan government to cooperate.

### 3 Sudan

#### A *Creating Enemies of Mankind*

The situation in Sudan is in at least one important respect the reverse of the situation in Uganda: whereas the Ugandan government invited the Court by referring the situation in northern Uganda to the ICC, the Sudanese government rejects the Court because it was subjected to the Court's jurisdiction against its will. The Ugandan government used the Court to make the LRA an enemy of mankind; the Sudanese government perceives the Court as an attempt by western states in the Security Council to change the Sudanese government by arrest warrant. In this light the Government of Sudan depicts the ICC's intervention as yet another international attack on Sudan. After the Prosecutor requested an arrest warrant for the Sudanese president, persons arriving in Khartoum were greeted by rows of enormous billboards showing the President, with accompanying texts such as: 'Ocampo's plot: a malicious move in the siege', and 'Ocampo's conspiracy is: a desperate attempt to humiliate the Sudanese people'.

<sup>68</sup> See RS, Arts 17 and 20(3).

<sup>69</sup> OTP quoted in Glassborow, 'Uganda Insists Peace not at Odds with ICC', *Institute for War and Peace Reporting*, 14 Apr. 2008, available at: <http://iwpr.net/report-news/uganda-insists-peace-not-odds-icc>. See also ICC-OTP, 'OTP Statement in relation to Events in Uganda', 4 March 2008.

<sup>70</sup> *Decision Initiating Proceedings under Article 19, requesting Observations and Appointing Counsel for the Defence*, ICC-02/04-01/05-320, Pre-Trial Chamber II, 21 Oct. 2008.

<sup>71</sup> *Decision on the Admissibility of the Case under Article 19(1) of the Statute*, *supra* note 35, at para. 51.



'Ocampo's plot: a malicious move in the siege'



'Ocampo's Conspiracy is: a desperate attempt to humiliate the Sudanese people'

The Sudanese government considers the Security Council's referral to the ICC just as political an instrument against it, in other words just as much an instrument to brand it an enemy of the international community, as the international condemnations, arms embargo, the obligation to disarm the *Janjaweed*, and the imposition of UN peacekeepers in Darfur.<sup>72</sup> Government officials have argued that this political character of the referral is evinced by the fact that it came in the midst of the Security Council's other punitive decisions against the Sudanese government.<sup>73</sup> Moreover, it came only two months after the Sudanese government had made, in its view, far-reaching concessions in internationally mediated peace negotiations with the SPLM, an armed movement which fought for the right to self-determination for Southern Sudan.<sup>74</sup> The Sudanese government was 'rewarded for putting an end to the longest conflict in Africa with further sanctions and procedures', according to the Sudanese representative to the UN.<sup>75</sup> The fact that the US representative spoke of the Security Council's 'firm political oversight' of ICC proceedings<sup>76</sup> and that the US announced the request for Bashir's arrest warrant before the ICC Prosecutor<sup>77</sup> confirmed for the Sudanese government that 'international

<sup>72</sup> See, for instance, President Bashir in Dealy, 'Interview: Sudan's President Omar Al-Bashir', *Public Broadcasting Service*, 14 Aug. 2009, available at: [www.pbs.org/newshour/bb/africa/july-dec09/bashir-full\\_08-13.html](http://www.pbs.org/newshour/bb/africa/july-dec09/bashir-full_08-13.html), stating: 'We think that the ICC is a tool to terrorize countries that the West thinks are disobedient.' See also De Waal, 'Darfur, the Court and Khartoum: The Politics of State Non-Cooperation', in N. Waddell and P. Clark (eds), *Courting Conflict? Justice, Peace and the ICC in Africa* (2008) 29, at 34.

<sup>73</sup> The referral was made in the same week in which the Council imposed sanctions (SC Res 1591, 29 Mar. 2005). According to para. 3(c), sanctions can be imposed on those who impede the peace process, constitute a threat to stability in Darfur and the region, commit violations of international humanitarian or human rights law or other atrocities, violate the UN embargoes, or are responsible for offensive military overflights.

<sup>74</sup> The ruling party in the North had signed an agreement granting the South the right to self-determination, committing itself to sharing substantial parts of its wealth and power and consenting to the presence of 10,000 UN peacekeepers to monitor implementation of the agreement.

<sup>75</sup> S/PV.5158, Thursday, 31 Mar. 2005, at 12.

<sup>76</sup> *Ibid.*, at 3 ('[W]e expect that, by having the Security Council refer the situation on Darfur to the ICC, firm political oversight of the process will be exercised. We expect that the Council will continue to exercise such oversight as investigations and prosecutions pursuant to the referral proceed').

<sup>77</sup> Statement of H.E. Abdulbasit Sabderat, Minister of Justice in the Republic of the Sudan before the AU Peace and Security Council, Addis Ababa, 21 July 2008, at para. 6.8; interview with SPLM MP, Khartoum, Nov. 2008.

criminal justice' is just another instrument in the toolbox of the US and its allies to topple an Islamic regime which they do not approve of.<sup>78</sup> It points to the double standards in the application of 'international criminal justice' to argue that the Court is not a neutral legal terrain but a political battlefield where certain western states fight their non-western enemies, while the US and UN peacekeepers are almost always exempted from the Court's jurisdiction and situations in which the aggressors are westerners, for instance Iraq, Afghanistan, and Israel, are not subjected to international criminal justice.<sup>79</sup>

The Prosecutor's request for an arrest warrant against the Sudanese President has reinforced the perception of a Court pursuing regime change. Execution of an arrest warrant against a president inevitably results, at least *de facto*, in a change of head of state. Moreover, the Prosecutor's charges, while based on the notion of individual criminal responsibility, essentially render the entire Sudanese state criminal by arguing that the Sudanese President committed crimes 'by using the state apparatus'<sup>80</sup> or where they claim that 'AL BASHIR ensured that *all components of the Sudanese government*, the Armed Forces and the Militia/Janjaweed worked together in carrying out his plan'.<sup>81</sup> In his statement to the Security Council the Prosecutor has made this accusation against the entire Sudanese state apparatus even more explicit:

The evidence shows that the commission of such crimes on such a scale, over a period of five years, and throughout Darfur, has required the sustained mobilization of the entire Sudanese state apparatus. The coordination of the military, security and intelligence services. The integration of the Militia Janjaweed. The participation of all Ministries. The contribution of the diplomatic and public information bureaucracies. The control of the judiciary.

The Sudanese President, for his part, has threatened that '[t]he enemies' recourse to the ICC would be counterproductive'.<sup>82</sup>

## B *Befriending Mankind*

In contrast to the Sudanese government, leaders of Darfuri rebel movements have welcomed the ICC and presented themselves as partners in the fight against *génocidaires*. The leader of JEM, one of the biggest movements, has stated:

We are admiring the ICC, we are fully supporting the ICC. We are ready to go to ICC including myself and we are ready to work as tool [for the] ICC to capture anybody.<sup>83</sup>

<sup>78</sup> See, for instance, Sudan Bar Association, 'Statement of the Sudan Bar Union to all People, 19 July 2008', in Sudan Bar Association (ed.), *Legal Studies of the Impact of a Memorandum Submitted by the Prosecutor of the ICC on Darfur* (2008), at 2: '[T]here are two states who are permanent members of the Council who adopt negative policies against the Sudanese government and who consider such government as being unworthy to exist.'

<sup>79</sup> Interview with senior judge, Khartoum, Dec. 2008; interview with SPLM parliamentarian, Khartoum, Nov. 2008; interview with former government minister, Dec. 2008; Sabderat Statement, *supra* note 77. See also De Waal, *supra* note 72, at 34.

<sup>80</sup> *Public Redacted Version of the Prosecutor's Application under Article 58*, ICC-02/05-157-AnxA, OTP, 12 Sept. 2008 (*passim*, but in particular at para. 62 and paras 250–343).

<sup>81</sup> *Ibid.*, at para. 269, emphasis added.

<sup>82</sup> 'Enemies' recourse to the ICC futile – Al Bashir', *Al-Rai Al-Aam*, 19 July 2010. For the Prosecutor's statement, see *infra* note 103, at 6.

<sup>83</sup> 'Darfur Rebels Vow Full ICC Cooperation Ahead of Ruling on Bashir Case', *Sudan Tribune*, 2 Mar. 2009.



The JEM leader announced that if a warrant were issued for Bashir it would be 'an end of his legitimacy to be president of Sudan' and his movement would 'work hard to bring him down', adding that if Bashir 'doesn't cooperate with the ICC, the war will intensify'.<sup>84</sup> True to its words, JEM, feeling strengthened by 'brother Ocampo', had increased its military activity against the Sudanese government after the announcement of the request for Bashir's warrant. Other rebel movements have refused to talk peace with the Sudanese government, arguing that one should not negotiate with 'war criminals'. For them, the terms 'war criminal' and '*génocidaire*' have become, in Mahmood Mamdani's words, labels 'to be stuck on your worst enemy, a perverse version of the Nobel Prize, part of a rhetorical arsenal that helps you vilify your adversaries while ensuring impunity for your allies'.<sup>85</sup> When seeing international justice operate to weaken their opponent more than themselves, leaders of Darfuri rebel movements have calculated that they should put negotiations on hold until international criminal justice has weakened the opponent to such an extent that they can obtain a peace agreement on their terms.<sup>86</sup> Meanwhile, they have extolled 'justice' and emphasized that they, unlike the Sudanese government, are willing to cooperate with the ICC. Rather than looking to the Court for accountability, these leaders' interest in the ICC lies in the fact that it brands their opponents as international criminals while they, by paying lip-service to fashionable international concepts, can gain international legitimacy. But as soon as rebel movements are in a militarily and politically weaker position and see the ICC as ineffective in changing the Sudanese government, they easily forget about the importance of 'justice'. In February 2010, when military support from Chad was at risk, JEM signed an agreement with the Sudanese government providing for, *inter alia*, '[i]ssuance of a general amnesty for the civil and military members of the Justice and Equality Movement . . . and the release of the war prisoners and convicted persons from both sides'.<sup>87</sup>

The Darfuri rebel leaders, even less than the Ugandan government, cannot be sure that the Court from which they draw validation will not prosecute them as well. Unlike the Ugandan government, the Darfuri rebel movements derive no influence over ICC proceedings on account of the OTP's depending on their cooperation. Indeed, at the Prosecutor's request, ICC judges have issued summonses to appear for three members of rebel movements on suspicion of attacking a peacekeeping base of the African Union.<sup>88</sup>

<sup>84</sup> *Ibid.*

<sup>85</sup> Mamdani, 'The Politics of Naming: Genocide, Civil War, Insurgency', *London Rev Books*, 8 Mar. 2007.

<sup>86</sup> See also Bashir cited in Dealy, *supra* note 72: 'We are not concerned with the ICC except for one issue: The methods that the Court followed had a dangerous impact in signaling a message to the armed rebel groups that they should not reach peace with this government because its president is wanted by international justice, which will definitely lead to the government's fall, and therefore there is no need to talk to the government which is perceived to have the international community against it. This is the most dangerous thing with this court.'

<sup>87</sup> 'Framework Agreement to Resolve the Conflict in Darfur between the Government of Sudan (GoS) and the Justice and Equality Movement', Doha, 23 Feb. 2010, art. 2.

<sup>88</sup> Decision on the Prosecutor's Application under Art. 58, ICC-02/05-02/09-1, Pre-Trial Chamber I, 17 May 2009 and Second Decision on the Prosecutor's Application under Art. 58, ICC-02/05-03/09, Pre-Trial Chamber I, 27 August 2009.

To date, however, the cases against the rebels have not altered the positive attitude of leaders of the main rebel movements towards the Court. They have stated that they ‘don’t fear at all’ the ICC.<sup>89</sup> The suspects are sought for crimes committed during an attack of which the leaders of the major movements have accused a marginalized splinter group. Proceedings against the leaders of the splinter group serve the leaders of the mainstream rebel movements almost as much as proceedings against government officials. Seeing the ICC not to threaten their interests, they have emphasized their cooperation with the ICC, making the rebel movements seem angels by comparison to the Sudanese government.

The splinter movement of one of the rebels, Idriss Abu Garda, and Abu Garda himself have *a fortiori* showcased their compliance with international norms. Days before the ICC was to decide on an arrest warrant against President Bashir, a secretary of Abu Garda’s movement said on an online video broadcast:

We are not calling for justice for the others and denying it for ourselves. Justice is justice and peace is peace and a crime is a crime. We will not hide and we mean it . . . We don’t say to Bashir you go. No, we should also go when we have been called. We are going to cooperate very closely with the ICC and we are going to work hand in hand with the ICC to reveal all the truth and to implement international justice in a manner that is going to be a good example for us in Darfur, in Sudan, in Africa. It is not that [we] will hand [over our commanders if charged by the Prosecutor], they will voluntarily go.<sup>90</sup>

A representative of another movement promised that ‘if any [of] our people are indicted he will willingly . . . go . . . to tell the international community that we are innocent and then he will come back’.<sup>91</sup> This is precisely what Abu Garda did. He voluntarily appeared in Court, took part in the proceedings, and heard the judges refuse to confirm the Prosecutor’s charges against him on account of insufficient evidence linking him to the crimes.<sup>92</sup>

### C Distinguishing Friends from Enemies

In the Darfur situation, too, the ICC has played an active role in distinguishing the international community’s friends from its enemies. This could be understood again by considering the Court’s institutional interests. While the referral as such seemed a success for the Court,<sup>93</sup> it might become a Pyrrhic victory: the Darfur situation could make the Court seem entirely ineffective if Sudan, the state in which and by whose nationals crimes were allegedly committed, refused to cooperate. The Prosecutor therefore approached the Sudanese government in the first months of his investigations with velvet gloves. In his first reports to the Security Council, he highlighted the

<sup>89</sup> *Sudan Tribune*, *supra* note 83.

<sup>90</sup> ‘Darfur rebels back ICC, promise to capture “anybody”’, *Sudan Tribune*, 2 Mar. 2009.

<sup>91</sup> *Sudan Tribune*, *supra* note 83.

<sup>92</sup> *Decision on the Confirmation of Charges*, ICC-02/05-02/09-243-Red, Pre-Trial Chamber I, 8 Feb. 2010. The Prosecutor’s request for leave to appeal this decision has been declined (*Decision on the ‘Prosecution’s Application for Leave to Appeal the “Decision on the Confirmation of Charges”*’, ICC-02/05-02/09, Pre-Trial Chamber I, 23 Apr. 2010).

<sup>93</sup> The referral had been a vote of confidence in the Court since even China, an important business partner of Sudan, and the United States, a strong antagonist of the ICC, had allowed the Council’s first triggering of the ICC’s jurisdiction.

instances in which Sudan granted cooperation, while making no mention of any refusal to cooperate.<sup>94</sup> He stressed that Sudan still had a chance to end the ICC's involvement on grounds of complementarity.<sup>95</sup> In the discussion of domestic efforts to conduct proceedings, he focused on the practical obstacles instead of the Sudan's willingness, thereby avoiding giving offence to the government.<sup>96</sup> He abstained from making public cooperation requests which the Sudanese government was likely to turn down.<sup>97</sup> When bringing his first case in the Darfur situation, he requested the judges to consider issuing summonses to appear as an alternative to arrest warrants, since summonses would not corner the Sudanese government: the Sudanese government might sacrifice Ahmed Harun and Ali Kushayb to the ICC in the expectation that it would prevent the OTP going higher up the chain of command. The Prosecutor's approach was successful in that initially the Sudanese government rejected the Court in public, but continued its cooperation with the ICC in its case against the LRA<sup>98</sup> and allowed ICC officials into the country to assess questions of admissibility in the Darfur situation.

However, the ICC Prosecutor changed his policy of trying to achieve an *entente* into one of full confrontation with the Sudanese government when after the charges against Ahmed Harun and Ali Kushayb the Sudanese government broke off all cooperation.<sup>99</sup> The Prosecutor announced that his next case in the Darfur situation would concern those who 'maintained Harun in his position' as state minister.<sup>100</sup> When this case appeared to be against the Sudanese President, who had sworn 'thrice in the name of Almighty God . . . never [to] hand any Sudanese national to a foreign court',<sup>101</sup> the Sudan-ICC stand-off seemed to have taken on an additional dimension of a personal fight between the ICC Prosecutor and the Sudanese President. Sudanese officials read the Prosecutor's charges against their President as the former's revenge for the latter's refusal to hand over Harun and Kushayb. The Prosecutor confirmed this impression when he reportedly told a high-level African-Union official that '[i]f

<sup>94</sup> He mentioned only some outstanding requests. See 'Third Report of the Prosecutor of the International Criminal Court to the UN Security Council pursuant to UNSCR 1593 (2005)', 14 June 2006, at 9 and 'Fourth Report of the Prosecutor of the International Criminal Court to the UN Security Council pursuant to UNSCR 1593 (2005)', 14 Dec. 2006, at 9 and 10.

<sup>95</sup> ICC-OTP, 'Prosecutor Receives List Prepared by Commission [sic] of Inquiry on Darfur', ICC-OTP-20050405-97-En, 5 Apr. 2005.

<sup>96</sup> 'Second Report of the Prosecutor of the International Criminal Court to the Security Council pursuant to UNSC 1593 (2005)', 13 Dec. 2005, at 6.

<sup>97</sup> For instance, he never publicly requested Sudan to allow ICC investigators to work in Darfur, arguing that the ICC's presence would be too dangerous for witnesses who cooperated with the Court: *ibid.*, at 4, Third Darfur Report, *supra* note 94, at 1 and Fourth Darfur Report, *supra* note 94, at 3 and 4.

<sup>98</sup> Officials of the OTP's JCCD were flown from Khartoum to Juba in a presidential jet by Bashir's favourite pilot.

<sup>99</sup> The Sudanese Embassy in The Hague literally refused to open the door to accept the warrants. No more ICC delegations were welcome in Sudan. (*Decision on the Prosecution's Application for a Warrant of Arrest against Omar Hassan Ahmad Al Bashir*, ICC-02/05-01/09-3, Pre-Trial Chamber I, 4 Mar. 2009, at para. 229).

<sup>100</sup> 'Statement of the Prosecutor of the International Criminal Court to the United Nations Security Council pursuant to UNSCR 1593 (2005)', 5 Dec. 2007, at 10.

<sup>101</sup> Hoge, 'UN Gives Suspect List to Prosecutor', *Int'l Herald Tribune*, 7 Apr. 2005.

Sudan had handed over these two guys, it would not have had the problem of the President'.<sup>102</sup>

Once the *détente* had ended the Prosecutor missed no occasion to emphasize that the international community, in particular the Security Council, should consider the suspects its enemies. He has identified them as obstacles to peace in Darfur, and beyond. With respect to Ahmed Harun, the Prosecutor for instance unjustifiably insinuated that Harun was responsible for violence in Abyei, an area outside Darfur and thus outside the Court's jurisdiction, when he told the Security Council:

Impunity is not an abstract notion. . . . As a member of the NCP-SPLM Committee, [Harun] was sent to Abyei to manage the conflict. And Abyei was burned down, 50,000 citizens displaced.<sup>103</sup>

As part of his argument as to why the Security Council must send a 'strong message' to the Sudanese government, he compared the latter with the archetypical example of evil in contemporary Western political thinking,<sup>104</sup> stating:

Sudanese officials protect the criminals and not the victims. Denial of crimes, cover up and attempts to shift responsibility have been another characteristic of the criminal plan in Darfur. We have seen it before. The Nazi regime invoked its national sovereignty to attack its own population, and then crossed borders to attack people in other countries.<sup>105</sup>

The Prosecutor advised the Security Council to 'make publicly clear that the two fugitive indictees and those who protect them will not benefit from any lenience, any support from the international community'.<sup>106</sup> He concluded by warning the Council that by remaining inactive it could become complicit in crime when he stated, 'Silence has never helped or protected victims. It only helps the criminals.'<sup>107</sup>

By contrast, the Prosecutor has presented the Darfuri rebel movements as friends of the ICC, his accusations against three of their members notwithstanding. In his reports to the Security Council the Prosecutor contrasted the Sudanese government's uncooperativeness with the rebel leaders' willingness to cooperate.<sup>108</sup> He suggested that the judges issue summonses to appear instead of arrest warrants because he had

<sup>102</sup> Discussion with people present at the meeting, Dec. 2008.

<sup>103</sup> 'Statement of the Prosecutor of the International Criminal Court to the United Nations Security Council pursuant to UNSCR 1593 (2005)', 5 June 2008, at 3.

<sup>104</sup> See S. Nieman, *Evil in Modern Thought: An Alternative History of Philosophy* (2002).

<sup>105</sup> Prosecutor's Statement June 2008, *supra* note 103, at 5. See also the Prosecutor's reference to the Sudanese elections in 2010, in which Omar al-Bashir ran for President, as a 'Hitler election': Kurczy, 'Sudan Vote is "a Hitler Election," says ICC Prosecutor Ocampo', *Christian Science Monitor*, 23 Mar. 2010.

<sup>106</sup> Prosecutor's Statement June 2008, *supra* note 103, at 3.

<sup>107</sup> *Ibid.*, at 9.

<sup>108</sup> Contrast paras 22 and 23 of the 'Ninth Report of the Prosecutor of the International Criminal Court to the UN Security Council Pursuant to UNSCR 1593 (2005)', June 2009: '22. The Prosecution reports, as described below, that the GoS has refused to cooperate with the Court and the Prosecutor, in contradiction with UNSCR 1593 and Presidential Statement 21. 23. Other parties to the conflict, as described below, have offered a degree of voluntary cooperation.' The Prosecutor explained this in paras 39 and 43: 39: 'The Sudanese authorities have not cooperated with the Court'; . . . 43: ' . . . the five rebel groups, parties to the conflict . . . publicly affirmed . . . their intention to cooperate with the ICC even if individuals in their ranks were sought by the Court'.

guarantees that the suspects would voluntarily appear in Court. When the decision on the arrest warrant against President Bashir was imminent, the Prosecutor urged the judges to make the decision on the summonses for the rebel suspects their priority.<sup>109</sup> The Sudanese government's rejection of the arrest warrant against the President would contrast starkly with the complying rebel leaders in Court. In his report to the Council the Prosecutor highlighted rebel commander Abu Garda's commitment to justice:

Abu Garda returned to The Hague voluntarily for the confirmation of charges hearing. At the start of the hearing, he stated 'I came here because I believe in justice . . . If my presence here . . . helps in any means to improve the situation in my country, Sudan, particularly the situation of my suffering people in Darfur, and encourage others to come and cooperate with the ICC, or let others, those who have committed real crimes for our nation, our people of Darfur in Sudan, come to this Court, I will be satisfied.'<sup>110</sup>

Similarly, when the other two suspects from rebel movements voluntarily appeared before the Court 'Moreno-Ocampo commended the Darfur rebels for cooperating with the court, in contrast to the Sudan government which has refused to execute three arrest warrants against officials, including President Bashir.'<sup>111</sup>

In Sudan, the impression of the ICC's friend-enemy distinction became even more glaring when in February 2010 the Court first ordered the Pre-Trial Chamber to reconsider its decision not to charge Bashir with genocide,<sup>112</sup> and less than a week later declined to confirm the charges against Abu Garda.<sup>113</sup>

## 4 Conclusion

As the citations in the introduction illustrate, ICC officials have frequently denied that the Court is in any sense political; indeed they have advertised the Court as entirely apolitical. Promoting referrals to the Court, the OTP has suggested that '[g]roups bitterly divided by conflict may oppose prosecutions at each others' hands and yet agree to a prosecution by a Court perceived as neutral and impartial'.<sup>114</sup> A Ugandan official in the Ministry of Justice agrees: 'domestic jurisdictions can be a victim of politics, international justice cannot'.<sup>115</sup> Both the OTP and the Ugandan official suggest that with the move from the domestic to the international plane the political disappears. At a conference hosted by the League of Arab States the Prosecutor guaranteed the participants that '[t]here are no friends in the Court. There are no enemies in the Court.

<sup>109</sup> 'Request for Expedited Decision on the Prosecution's Application Pursuant to Article 58', ICC-02/05-207, OTP, 12 Mar. 2009, but submitted on 25 Feb. 2009.

<sup>110</sup> 'Tenth Report of the Prosecutor of the International Criminal Court to the Security Council pursuant to UNSC 1593 (2005)', Dec. 2009, at 5.

<sup>111</sup> '2 Sudanese War Crimes Suspects Surrender to Court', *Associated Press*, 16 June 2010.

<sup>112</sup> *Judgment on the appeal of the Prosecutor against the 'Decision on the Prosecution's Application for a Warrant of Arrest against Omar Hassan Ahmad Al Bashir'*, ICC-02/05-01/09-73, Appeals Chamber, 3 Feb. 2010.

<sup>113</sup> Decision on the Confirmation of Charges, *supra* note 92.

<sup>114</sup> ICC-OTP, 'Paper on Some Policy Issues before the Office of the Prosecutor', Sept. 2003, at 5.

<sup>115</sup> Interview with Ugandan government official, Kampala, Sept. 2008.

There is one law, applying to all.<sup>116</sup> In this statement, the ICC Prosecutor explicitly rejects the idea that the ICC is ‘political’ in the sense studied in this article. Similarly, when asked ‘you’re a trained lawyer, are you becoming a politician at the ICC?’, the Prosecutor answered:

On the contrary. I am putting a legal limit to the politicians. That’s my job. I police the border-line and say, if you cross this you’re no longer on the political side, you are on the criminal side. I am the border control.<sup>117</sup>

However, determining who is ‘on the political side’ or not is inherently political, especially when it involves the labelling of groups and individuals as international criminals. As the Prosecutor himself has argued, ‘[t]he law makes the difference between a soldier or a terrorist, a policeman or a criminal’.<sup>118</sup> On account of this power to distinguish between a soldier or a terrorist, a policeman or a criminal, the ICC is a powerful weapon in political struggles. Seeking to protect the ‘common bonds’ that ‘unite all peoples’<sup>119</sup> by prosecuting the most serious international crimes that ‘deeply shock the conscience of humanity’,<sup>120</sup> the ICC provides a vocabulary with which opponents can label the enemy as a violator of universal norms, and thereby as the enemy of humanity itself. Adjudicating on genocide, war crimes, and, most notably, crimes ‘against humanity’, the Court brands some as enemies of mankind, *hostes humani generis*. At the same time, those who assist or cooperate with the Court are elevated on the stage of virtue, as the soldier or policeman enforcing universally valid norms and fighting humanity’s enemies for humanity’s sake.

It is in this vein that the Ugandan government used the ICC to transform the LRA from its own enemy into an enemy of mankind. Meanwhile, the government could present its fight against the LRA as a fight for humanity and itself as the upholder of community values. Its cooperation with the ICC led to an impression of friendship with the Court, which boosted its international legitimacy. In the case of Sudan the reverse occurred, in that the government felt branded as a criminal, while rebel leaders embraced the ICC’s intervention because the Court weakened their opponent. The rebels could present themselves as friends of the Court, a position which was reinforced by the Prosecutor’s policy of distinguishing the uncooperative government from the cooperative rebel groups. In both cases the ICC confirmed and deepened friend–enemy distinctions and proved to be unable to escape the logic of the political. It was used to ‘eliminate a political foe . . . according to some prearranged rules’,<sup>121</sup> Kirchheimer’s definition of a political trial.

As Schmitt predicted, instead of creating a neutral and impartial arena beyond politics, universal norms, presented as so fundamental that no-one can reasonably

<sup>116</sup> Mr. Luis Moreno-Ocampo, ‘Remarks’, Conference on ‘Justice in Post Armed Conflicts, and the ICC: Reduction of Impunity and a Support to International Justice’, hosted by Professor Cherif Bassiouni and the League of Arab States, Cairo, 15 Jan. 2009.

<sup>117</sup> Smith, “‘Beshir is Destined to Face Justice’”, *Africa Report*, 28 Oct. 2009.

<sup>118</sup> Moreno-Ocampo, *supra* note 33, at 3.

<sup>119</sup> Preamble to the Rome Statute, *supra* note 2.

<sup>120</sup> *Ibid.*

<sup>121</sup> Kirchheimer, *supra* note 26, at 6.

disagree with them,<sup>122</sup> may intensify political struggles.<sup>123</sup> Unlike the *justus hostis*, the lawful and just enemy which is entitled to recognition and respect irrespective of the justness of its cause,<sup>124</sup> the *hostis humani generis* is a criminal who violates universal norms and operates beyond the bonds that hold the international society together. Far from being politically neutral, universalism thus provides a vocabulary to label opponents as enemies of mankind. Consequently, any 'allegedly and apparently antipolitical system serves existing or newly emerging friend-and-enemy groupings and cannot escape the logic of the political'.<sup>125</sup> For the ICC this results in a paradoxical situation. The more successfully it portrays itself as neutral, universal, and above politics, the more attractive it will become as an instrument for the labelling and neutralization of enemies of a particular political group. Similarly, precisely because the ICC serves universal values and presents itself as non-political it becomes an attractive venue for political trials.

Two features of the Court make it even more subject to the logic of the political. First, in contrast to its World War II predecessors, the ICC, with jurisdiction over ongoing armed conflicts, can be operating in the fog of war itself, where collectivities constantly define and redefine their friends and enemies. Consequently, where the Nuremberg and Tokyo Tribunals only dealt with defeated enemies, the ICC can be used as an instrument to defeat enemies.<sup>126</sup> When the ICC intervenes in ongoing armed conflicts, it should thus not be surprised to find itself ending up in political struggles and being enmeshed in friend-enemy distinctions.

Secondly, because of the Court's dependence on state cooperation, it has its own institutional interest in intensifying these dichotomies. Whether its case is against rebels or against state officials, the more its suspects are generally recognized as enemies of mankind, the greater the likelihood that other actors will assist the Court by executing its arrest warrants. In this light it is not surprising that the ICC's Prosecutor chose to make an analogy between the Sudanese government and the Nazis. The Prosecutor has gone further by suggesting that those who protect the Court's enemies are also criminals, for instance when linking the charges against President Bashir to his protection of Harun. The OTP has hinted that even the Security Council, if it does not prioritize states' cooperation with the ICC, could be criminal. On the other hand, the

<sup>122</sup> In the context of so-called 'constitutional values' Klabbers made the same observation: '[O]ne of the main attractions of constitutionalism is to suggest that there is a sphere beyond everyday politics, comprising values that cannot (or only with great difficulty) be affected or changed': Klabbers, 'Constitutionalism Lite', 1 *Int'l Orgs L Rev* (2004) 31, at 54.

<sup>123</sup> See C. Schmitt, 'The Age of Neutralisations and Depoliticizations' (trans. M. Knzetz and J. McCormick), 96 *Telos* (Summer 1993) 130; *ibid.*, *Die Wendung zum diskriminierenden Kriegsbegriff*, (2007, reprint from 1938 edn); *ibid.*, *supra* note 20.

<sup>124</sup> The strongest articulation can be found in C. Schmitt, *Der Nomos der Erde im Völkerrecht des Jus Publicum Europaeum* (1960). For a critique of Schmitt's reading of classical international law see *inter alia* Koskenniemi, 'International Law as Political Theology: How to Read *Nomos der Erde*?', 11 *Constellations* (2004) 492 and J.W. Müller, *A Dangerous Mind: Schmitt in Post-War European Thought* (2003).

<sup>125</sup> Schmitt, 'The Age of Neutralisations', *supra* note 123, at 72.

<sup>126</sup> See also G.J. Simpson, *Law, War & Crime: War Crimes Trials and the Re-invention of International Law* (2007), at 116.

Prosecutor has identified the enemies of its enemies as its friends, as suggested by the Prosecutor's friendly approach to the Ugandan government and Darfur rebel movements. Finally, the OTP has portrayed those who question the Court's friends as the friends of its enemies, as the Prosecutor's above-cited response to questions on the absence of proceedings against the UPDF illustrates.

The Court's dependence on state cooperation also leads to a situation in which parties, particularly governments, are in a position to limit the risk identified by Kirchheimer that they may lose control over their political trial. Officially, the Court is independent and can prosecute all sides in a conflict. However, 'endowed with no more powers than any tourist in a foreign State',<sup>127</sup> the OTP depends heavily on cooperation by the government on issues ranging from issuing visas for its investigators to the execution of its arrest warrants. As long as it defines its success by pointing to completed cases before the Court, the OTP thus needs cooperative relations with the government of the state on the territory or by the nationals of which crimes were committed. Prosecuting government officials will usually not be beneficial to such relations.

The fact that the ICC has become a battleground for political contestation is not a consequence of the Court acting extra-statutorily; its potential to be used as a weapon in political struggles is inherent in its core business, adjudicating on international crimes. Moreover, the fact that the Court may fuel friend–enemy distinctions does not necessarily mean it betrays justice or the rule of law. Nor does it mean that the ICC becomes the only site of political contestation.<sup>128</sup> But the findings do require a frank recognition that the Court is not a non-political oasis in a political world.<sup>129</sup> Indeed, attempts to find in the Court a neutral terrain beyond politics may give rise to even more intensified political struggles.

This recognition should help international lawyers to do justice to the political. Rather than defining the political as something which needs to be limited and civilized by law, international lawyers should take up the question what sort of politics is enacted in concrete cases. After all, even if trials before the ICC could be described as somehow 'political', this in and of itself does not diminish their value, as it is 'the quality of the politics pursued in them that distinguishes one political trial from another'.<sup>130</sup>

In this context, we conclude on a note of optimism. The article started with the episode of the petitions of the Sudanese trade organizations which the Registry of the ICC

<sup>127</sup> Swart and Sluiter, 'The International Criminal Court and International Criminal Co-operation', in H.A.M. von Hebel, J.G. Lammers, and J. Schukking (eds), *Reflections on the International Criminal Court* (1999) 91, at 115, commenting on RS, Art. 99(4). But see also Art. 57(3)(d).

<sup>128</sup> See De Waal, 'Who Are the Darfurians? Arab and African Identities, Violence and External Engagement', SSRN, 10 Dec. 2004, available at: <http://conconflicts.ssrc.org/hornofafrica/dewaal/>, on how political opponents in Darfur have banked on international responses in taking their positions. Particularly on rebel movements' strategic use of the emerging notion of the responsibility to protect see Kuperman, 'Darfur: Strategic Victimhood Strikes Again?', 4 *Genocide Studies and Prevention* (2009) 281.

<sup>129</sup> For this call see also K. Clarke, *Fictions of Justice: The ICC and the Challenge of Legal Pluralism in Sub-Saharan Africa* (2009), at 237.

<sup>130</sup> Shklar, *supra* note 23, at 145.



returned to sender, in part because of their political nature. The single judge, however, ordered the Registry to receive the boxes, political or not.<sup>131</sup> The judge did not touch upon the debate about law and politics, yet implicitly his decision supported the view that law and politics should not be regarded as categories which oppose and mutually exclude each other. The negative counterpart of the political is not 'law', but the 'non-political'.<sup>132</sup> There is no reason to assume that the law always belongs to the latter category.

<sup>131</sup> *Decision on the Filing of Annex 4 to the Application under Rule 103*, ICC-02/05-224, 18 May 2009, Pre-Trial Chamber I.

<sup>132</sup> See Morgenthau, *supra* note 15.