

ARTICLE

SPEAK SOFTLY AND CARRY A SEALED WARRANT: BUILDING THE INTERNATIONAL CRIMINAL COURT'S LEGITIMACY IN THE WAKE OF SUDAN

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INTRODUCTION

The Rome Statute, the constitutive treaty of the International Criminal Court (ICC), sets out the goals by which the Court's legitimacy can be measured: punishment of perpetrators, deterrence of future crimes, and positive effects on the peace, security, and well-being of the world.¹ Upholding and enhancing the legitimacy of the ICC is the duty of the Prosecutor of the International Criminal Court,² and Luis Moreno Ocampo, Prosecutor until June 2012, made it his project to make the ICC a "reality" which political actors "cannot ignore."³ During his time in office, Moreno Ocampo handed over a steady stream of accused war criminals and genocidaires from states party to the Rome Statute (State Parties) to the judges in The Hague.⁴ However, he was much less successful in bringing defendants from non-State Parties before the Court.

Under the Rome Statute, the ICC possesses a limited power of *universal* jurisdiction, whereby it may prosecute individuals from non-State Parties through referrals from the United Nations Security Council (UNSC).⁵ This power, however, is not well-

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1 *Rome Statute of the International Criminal Court*, 17 July 1998, 2187 UNTS 90 (entered into force 1 July 2002) [*Rome Statute*].

2 The International Criminal Court, in its 2006 Strategic Plan, set out three overarching strategic goals. The second is the building of legitimacy, or in the ICC's words, striving towards "a well-recognized and adequately supported institution," recognizing the fact that "the Court must obtain cooperation and support if it is to carry out its functions." International Criminal Court Assembly of States Parties, *Strategic Plan of the International Criminal Court*, 5th Sess, ICC-ASP/5/6 (2006) at 5-6.

3 Allison M. Danner, "Enhancing the Legitimacy and Accountability of Prosecutorial Discretion at the International Criminal Court" (2003) 97 AJIL 510 at 511; Luis Moreno Ocampo, "The International Criminal Court Today" (Lecture delivered at the Faculty of Law, University of Toronto, 14 November 2011), [unpublished].

4 Jacqueline Geis & Alex Mundt, "When to Indict? The Impact of Timing of International Criminal Indictments on Peace Processes and Humanitarian Action" (2009) (Paper delivered at the World Humanitarian Studies Conference, Groningen, February 2009) [unpublished].

5 Cedric Ryngeart, "The International Criminal Court and Universal Jurisdiction: A Fraught Relationship?" (2009) 12 New Criminal Law Review 498 at 500.

established. In contrast to the ICC's jurisdiction based on the principles of territoriality (*i.e.* jurisdiction over crimes that have occurred in the territory of a State Party) and nationality (*i.e.* jurisdiction over crimes committed by a national of a State Party), an assertion of universal jurisdiction by the ICC seems to run afoul of the international law principle that treaties cannot impose obligations on non-State Parties.⁶ Therefore, in situations where the ICC seeks to exercise its limited power of universal jurisdiction, the question of its legitimacy as an international institution that can act on referrals from the UNSC becomes paramount.

Because universal jurisdiction proceedings are the only means by which the ICC can take action in non-State Parties, which still constitute more than a third of the world's countries,⁷ they are important in establishing the ICC as a true world court, rather than as a mere arbiter of disputes between State Parties. Juan Méndez, president of the International Center for Transitional Justice, stated in 2007 that "[t]he next few years will tell whether the ICC is a success or a failure [...] If [Moreno Ocampo] ends up producing two or three trials and has 20 outstanding warrants, the appetite for international criminal justice will fade away completely."⁸ Nowhere is this more true than in the ICC's universal jurisdiction proceedings, by which the Court seeks to establish itself as a credible deterrent against non-cooperative regimes.

Universal jurisdiction—that is, jurisdiction based on a referral by the Security Council and without a territorial or national nexus to a State Party—has been asserted only twice by the ICC: in Sudan, the focal case of this paper, and most recently in Libya. Not coincidentally, the ICC's very first assertion of its power of universal jurisdiction over a non-State Party—the issuance of arrest warrants against Sudan's Humanitarian Affairs Minister Ahmed Mohammed Harun, Janjaweed militia commander Ali Kushayb (both in 2007 for crimes against humanity and war crimes), and President Omar al-Bashir (in 2009 for crimes against humanity and war crimes, and in 2010 for genocide)—was also the first time the ICC encountered a sitting government that categorically rejected its jurisdiction and refused to cooperate with its investigation.⁹ In response, the Prosecutor's approach to Sudan was to forgo certain well-entrenched norms of prosecutorial discretion employed by the ICC in previous cases and common in the domestic criminal context in favour of a more aggressive approach that has been described as "the ultimate high stakes

6 *Vienna Convention on the Law of Treaties*, 23 May 1969, 1155 UNTS 31 (entered into force 27 January 1980), art 34–35.

7 121 of the 193 United Nations members states are currently party to the Rome Statute, leaving 72 non-State Parties. "The State Parties to the Rome Statute", online: International Criminal Court <http://www.icc-cpi.int/en_menus/asp/states%20parties/Pages/the%20states%20parties%20to%20the%20rome%20statute.aspx>.

8 Romesh Ratnesar, "The Don Quixote of Darfur", *Time* (2 November 2007) online: Time <<http://www.time.com/time/magazine/article/0,9171,1680150,00.html>>.

In total, of the twenty-nine arrest warrants issued by the ICC during Moreno Ocampo's tenure as prosecutor (not including any as-yet undisclosed warrants that are under seal), there had only been only one conviction by the end of 2012, that of Congolese rebel Thomas Lubanga Dyilo. Nine other defendants were in custody and five had been released upon acquittal or the refusal of the Court to confirm the charges, while twelve defendants remained at large and another two died before being brought to justice. Cf. "Situations and cases," online: International Criminal Court <http://www.icc-cpi.int/en_menus/icc/situations%20and%20cases/Pages/situations%20and%20cases.aspx>.

9 The events giving rise to the UNSC's referral of Sudan to the ICC began in 2003, when rebels in the Darfur region of Sudan rose up against President Bashir's government. The government, in response, launched a military campaign against the rebels while arming local "Janjaweed" militias, which attacked the tribes suspected of supporting the rebels. Approximately 300,000 people were killed and two million displaced in the ensuing violence, and the UNSC referred the situation to the ICC on April 1, 2005. Pablo Castillo, "Rethinking Deterrence: The International Criminal Court in Sudan" (2007) 13 UNISCI Discussion Papers 167 at 168.

gamble” in terms of building the Court’s legitimacy.¹⁰ Prosecutor Moreno Ocampo’s opinionated communications with the public, his use of open, rather than sealed, arrest warrants, and his decision to directly prosecute Omar al-Bashir, Sudan’s head of state, harmed the efforts of the ICC to legitimize its universal jurisdiction. A stronger adherence to commonly accepted prosecutorial norms of practice in future exercises of universal jurisdiction would better extend the legitimacy of the ICC into this new area of law.

I. PUBLIC COMMENTS

As Prosecutor of the ICC, Moreno Ocampo frequently gave press conferences and interviews in which he discussed the cases against Bashir, Harun, and Kushayb. These public pronouncements and media communications regarding Sudan often departed from the traditional practice of the Prosecutor’s office and stood in sharp contrast to domestic norms of conduct found in State Parties such as Canada. Most notably, Moreno Ocampo loudly, consistently, and publicly made it clear that he believed the defendants to be guilty. After the Sudanese regime defied the ICC’s arrest warrants against Harun and Kushayb, for example, Moreno Ocampo stated that all of Darfur was a “crime scene” and compared the Sudanese regime to Nazi Germany.¹¹ Six months later, petitioning the Court for the issuance of the Bashir warrant, he publicly opined on the *mens rea* of Sudan’s president, stating that “[h]is alibi was a counterinsurgency. His intent was genocide.”¹² These are not the only examples of conclusory and apparently biased statements by the Prosecutor. Throughout the Sudan proceedings, Moreno Ocampo was criticized for being “confrontational” and “torn between the roles of prosecutor and public advocate seeking to create political leverage,”¹³ as well as being publicity-seeking and partial to the Darfuri rebel groups.¹⁴ While not likely sufficient to disqualify Moreno Ocampo as Prosecutor, such remarks were contrary to ICC and domestic prosecutorial guidelines and harmful to the ICC’s legitimacy.

The ICC Prosecutor’s discretion to make public statements is constrained by treaty and ICC regulations. The Rome Statute provides that “[t]he Prosecutor is expected at all times to act impartially.”¹⁵ Furthermore, Article 42(7) of the Rome Statute and rule 34(1) of the Rules of Procedure and Evidence provide a non-exhaustive list of grounds which require the disqualification of the Prosecutor, including the “[e]xpression of opinions, through the communications media, in writing or in public actions, that, objectively, could adversely affect the required impartiality of the person concerned.”¹⁶ The ICC has held that these provisions require the Prosecutor to respect the presumption of innocence beyond and independently of any pending court proceedings.¹⁷

10 Geis & Mundt, *supra* note 4 at 17.

11 James Traub, “Unwilling and Unable: The Failed Response to the Atrocities in Darfur” (2010) Global Centre for the Responsibility to Protect Occasional Paper Series at 21.

12 “Sudan Head Accused of War Crimes”, *BBC News* (14 July 2008) online: BBC News <<http://news.bbc.co.uk/2/hi/africa/7504640.stm>>.

13 “Sudan: Justice, Peace and the ICC” (2009) International Crisis Group (ICG) Africa Report No. 152 at 26-27.

14 Sarah M.H. Nouwen & Wouter G. Werner, “Doing Justice to the Political: The International Criminal Court in Uganda and Sudan” (2011) 21 *EJIL* 941 at 960-61.

15 *Prosecutor v Saif Al-Islam Gaddafi and Abdullah Al-Senussi*, ICC-01/11-01/11 OA 3, Decision on the Request for Disqualification of the Prosecutor (12 June 2012) at para 18 (International Criminal Court Appeals Chamber noting that “Article 42(7) of the Statute provides specifically that “[n] either the Prosecutor nor a Deputy Prosecutor shall participate in any matter in which their impartiality might reasonably be doubted on any ground”).

16 *Rome Statute*, *supra* note 1, art 42(7); *Rules of Procedure and Evidence of the International Criminal Court*, UN Doc PCNICC/2000/1/Add.1 (2000), rule 34(1).

17 *Prosecutor v Saif Al-Islam Gaddafi and Abdullah Al-Senussi*, *supra* note 15 at para 26.

Domestic prosecutorial norms may provide further guidance for such situations. In Canada, a State Party with an independent and effective criminal justice system,¹⁸ prosecutorial standards dictate that prosecutors should not argue their cases through the media or make any comment that could prejudice an ongoing investigation; this includes all statements of personal opinion, particularly those regarding the guilt or innocence of the accused or the strength or weakness of their legal case.¹⁹ The purpose is to allow the dissemination of factual information to the public to bolster its confidence in the system, while preserving the “overriding duty” to ensure that trials are fair.²⁰ While the ICC differs in many ways from the domestic criminal justice system of a State Party such as Canada, it seeks to uphold the same basic purposes—punishment, deterrence, and positive effects on the peace, security, and well-being of society—and ought therefore to espouse similar principles of prosecutorial behaviour. Ocampo’s conclusory statements as to the intention and ultimate guilt of the defendants clearly do not accord with the respect for the presumption of innocence demanded by ICC and domestic Canadian prosecutorial guidelines.

Indeed, similar statements by Moreno Ocampo in a separate universal jurisdiction proceeding during his tenure as Prosecutor—*Prosecutor v. Saif Al-Islam Gaddafi and Abdullah Al-Senussi*—earned him the admonition of the Appeals Chamber of the International Criminal Court, although the Court stopped short of disqualifying Moreno Ocampo as Prosecutor in that case.²¹ In 2012, the defendants in the Libya case, Saif Qaddafi and Abdullah Senussi, filed a request to disqualify Moreno Ocampo based on public, out-of-court statements he had made regarding their prosecution.²² Most of the objectionable statements came in an interview for *Vanity Fair* magazine in which Moreno Ocampo stated, among other things, that “Senussi was in charge of the killing and the shooting”; that Gaddafi “was deliberately and with knowledge organizing the system”; and that “[t]here was no battle. It was people going to a funeral. That’s a crime against humanity.”²³ The Appeals Chamber held:

[T]he Prosecutor’s behaviour was clearly inappropriate in light of the presumption of innocence. Such behaviour not only reflects poorly on the Prosecutor but also, given that the Prosecutor is an elected official of the Court and that his statements are often imputed to the Court as a whole, *may lead observers to question the integrity of the Court as a whole* [emphasis added].²⁴

The Appeals Chamber did not disqualify Moreno Ocampo, holding that “[a] reasonable observer [...] would have understood that the Prosecutor’s statements were based on the evidence available to him and that the judges would ultimately take the relevant

18 Canada ranks higher than average among Western European and North American countries, and among high income countries worldwide, under the categories “Criminal investigation system is effective” and “Criminal system is free of improper government influence” in the World Justice Project’s Rule of Law Index. Mark D. Agrast et al., “Rule of Law Index 2012-2013” (2012) The World Justice Project at 75. While not the only example of a State Party with an independent and effective criminal justice system, Canada is useful as a standard of comparison because its domestic prosecutorial guidelines are published in English and the author is familiar with the Canadian legal system.

19 “The Federal Prosecution Service Deskbook”, online: Public Prosecution Service of Canada <<http://www.ppsc-sppc.gc.ca/eng/fps-sfp/fpd/>>, ss 10.3.3, 10.4.1, 10.4.2.3 [Deskbook].

20 *Ibid*, s 10.2.

21 *Prosecutor v Saif Al-Islam Gaddafi and Abdullah Al-Senussi*, *supra* note 15.

22 *Ibid*.

23 *Ibid* at para 9.

24 *Ibid* at para 33.

decisions on the evidence.”²⁵ However, the decision represents an unequivocal concern of the judges of the ICC that Moreno Ocampo’s opinionated public statements, while not flatly prohibited, threaten the legitimacy of the Court—or in the words of the Court, its “integrity” in the eyes of “observers”.²⁶

Dr. Sarah Nouwen of the University of Cambridge and Wouter Werner of the University of Amsterdam argue that Moreno Ocampo’s statements may have helped boost the legitimacy of the ICC by creating the perception that the Court has its priorities straight—it is targeting modern-day Nazis, individuals whose guilt is beyond a doubt, and through this approach is more likely to garner the support of other states and political actors that benefit from positioning themselves on the “good” side of a stark moral dichotomy.²⁷ This argument, however, may conflate cause and effect; the atrocities in Sudan were already well-known and broadly condemned worldwide due to media, government, and NGO reports by the time the ICC took up the issue in 2005.²⁸ It therefore seems unnecessary for the Prosecutor to have added his voice to the chorus. His statements could only raise questions about procedural fairness in the ICC in regards to specific defendants.

Moreno Ocampo’s public comments also raise broader concerns about the ICC’s legitimacy given the political context in which it must operate. Every exercise of universal jurisdiction by the Court, arising as it must from a UNSC referral, is inherently political, at least to the extent that the veto-wielding non-State Parties—China, Russia, and the United States—have power over the Court’s actions while remaining beyond its jurisdiction.²⁹ This institutional reality gives rise to inevitable accusations of neocolonialism and imperialism from non-State Party targets of the ICC, including the Sudanese.³⁰ Taken at face value, these accusations undermine the Court’s legitimacy as an institution capable of impartial punishment and deterrence. This is because China, Russia, and the United States, along with the Security Council veto-wielding State Parties, France and the United Kingdom, must all agree to any exercise of universal jurisdiction by the ICC against a non-State Party, but any one of these countries may veto such a referral for any reason whatsoever. The ICC’s relationship to the great powers is actually much more complex than such accusations imply. For example, despite action in Darfur being a United States foreign policy priority,³¹ the United States had to be persuaded not to veto the Sudan referral in the UNSC.³² However, charges of neocolonialism gain credibility, and may undermine the legitimacy of the Court across the globe, if the Prosecutor’s comments appear to reinforce them.

In the case of Sudan, an argument can be made that the Prosecutor’s comments have undermined the legitimacy of the ICC, as the Sudanese regime was able to claim that such opinionated outspokenness was evidence of a neocolonial agenda, and thereby mobilize domestic and international political support against the ICC. Moreno Ocampo’s condemnatory rhetoric and pronouncements in the Sudan prosecutions enabled Bashir to draw parallels between his prosecution and the rationale of humanitarian intervention being put forward by the United States in justification of its invasion of Iraq in 2003,

25 *Ibid* at para 34.

26 *Ibid* at para 33.

27 Nouwen & Werner, *supra* note 14 at 963.

28 “A Dilemma Over Darfur”, *The Economist* (15 July 2008) online: *Economist* <<http://www.economist.com/node/11737170>>.

29 Moreno Ocampo, “The International Criminal Court Today”, *supra* note 3.

30 Geis & Mundt, *supra* note 4 at 10; see also “Warrant Issued For Sudan’s Leader”, *BBC News* (4 March 2009) online: *BBC News* <<http://news.bbc.co.uk/2/hi/7923102.stm>> [BBC 2009/3/4].

31 Kenneth A. Rodman, “Darfur and the Limits of Legal Deterrence” (2008) 30 *Hum Rts Q* 529 at 544-45.

32 International Crisis Group, *supra* note 13 at 5, fn 17.

which was derided as neocolonialist by many Arab and African countries.³³ By portraying himself as a victim of American neocolonialism, Bashir boosted his domestic support following the announcement, not only from party faithful,³⁴ but also from his traditional political opponents.³⁵ He also parlayed the warrants into international support; African and Arab countries and organizations including Egypt, Tanzania, the Arab League, the African Union, the Organization of the Islamic Conference, and the Non-Aligned Movement rallied around Bashir both before and after the issuance of the first warrant against him,³⁶ defiantly joining him in telling the ICC to “eat it.”³⁷ Far from isolating Bashir from the rest of the international community, the ICC’s proceedings against Bashir provided a common cause with which he was able to rally support from other states and organizations. Moreno Ocampo’s rhetoric may have reinforced this unintended effect, as it gave the impression that the ICC had pre-judged the guilt of Bashir and his regime before any legal proceedings had taken place.

The Prosecutor’s public comments may also have had negative effects on peace and security in Darfur by exacerbating the standoff between the regime and Darfuri rebel forces. As an influential international institution, the ICC can create a moral hazard by taking sides in a conflict whereby the favoured side’s righteousness and sense of inevitable triumph are enhanced, and its willingness to compromise is correspondingly reduced.³⁸ This not only limits the chances for long-term peace, but worse, can cause rebel groups to allow or even provoke further atrocities in order to draw further condemnation of the regime from the West.³⁹ This phenomenon has been observed in Darfur, both generally⁴⁰ and with regard to specific key actors like Abdul Wahid Mohamed al-Nur, leader of a faction of the Sudan Liberation Army, who proclaimed that “the international community wants success, not peace” when he abandoned peace talks in May 2006.⁴¹ Abdul Wahid’s continuing refusal to return to the negotiating table remains a major obstacle to peace. Moreno Ocampo’s comments with respect to the Sudan case were similar, if not stronger, than his remarks on the Libya situation that the Appeals Chamber denounced as a threat to the Court’s legitimacy in 2012. His public comments may therefore have been damaging to peace and security in Darfur, in addition to potentially undermining the legitimacy of the ICC on punishment and deterrence.

II. SEALED WARRANTS

Moreno Ocampo’s use of open arrest warrants instead of sealed ones against Bashir, Harun, and Kushayb in the Sudan case also represented a significant departure from domestic and international prosecutorial norms. The purpose of an open arrest warrant is to provide information to the public, thereby strengthening the appearance of an

33 Rodman, *supra* note 31 at 543.

34 BBC 2009/3/4, *supra* note 30.

35 Geis & Mundt, *supra* note 4 at 13.

36 BBC 2009/3/4, *supra* note 30; Traub, *supra* note 11 at 22; International Crisis Group, *supra* note 13 at 27, 30.

37 Xan Rice, “Sudanese President Tells International Criminal Court to ‘Eat’ Arrest Warrant”, *The Guardian* (4 March 2009) online: The Guardian <<http://www.guardian.co.uk/world/2009/mar/04/sudan-al-bashir-war-crimes>>.

38 Mayank Bubna, Issue Brief, “The ICC’s Role in Sudan: Peace versus Justice” (2010) Institute for Defense Studies and Analyses at 8; Traub, *supra* note 11 at 26.

39 Traub, *supra* note 11 at 26.

40 Nouwen & Werner, *supra* note 14 at 957.

41 Julie Flint, *Rhetoric and Reality: The Failure to Resolve the Darfur Conflict* (Geneva: Small Arms Survey, Graduate Institute of International and Development Studies, 2010) at 17; “Sudan Liberation Army – Abdul Wahid (SLA-AW)”, online: Small Arms Group <<http://www.smallarmssurveysudan.org/facts-figures-armed-groups-darfur.php>>.

open and just judicial system.⁴² However, under ICC and Canadian domestic practice, countervailing considerations can lead a judge to seal a warrant on application by the prosecutor, preventing its disclosure to the public or the intended subject of arrest. Under Canadian guidelines, this can include situations in which an open warrant would “compromise the nature and extent of an ongoing investigation” or “prejudice the interests of an innocent person”.⁴³ Sealed warrants are also available to the ICC prosecutor; they are withheld from the public and only made available to select persons, usually whichever national law enforcement officers are expected to have an opportunity to implement the arrest.⁴⁴ Such warrants have been used successfully against at-large defendants on a number of occasions, including three militia leaders arrested in the Democratic Republic of Congo and two Congolese militia leaders arrested in Belgium and Germany, resulting in the defendants being brought to The Hague to stand trial.⁴⁵ As Prosecutor, Moreno Ocampo even used sealed warrants successfully in the Sudan case, but only against the three Darfuri rebel leaders, Abu Garda, Banda, and Jerbo, in 2009.⁴⁶ The question here is whether the use of open warrants against Bashir, Harun, and Kushayb—the “name and shame” approach—was of overall benefit to the Court’s legitimacy.

The most obvious consequence of the use of open warrants against defendants in non-State Parties is that it virtually guarantees that the arrest and eventual punishment of the defendant will not be achieved. As one columnist wrote after the first warrant was issued against Bashir, “the president of Sudan is going to think twice before boarding any airliner now.”⁴⁷ Of course, it is inherent that a sovereign state will not enforce an arrest warrant against its own head of state or cooperate with any investigation,⁴⁸ so the warrants against Bashir are almost by definition unenforceable as long as he remains in power. However, Moreno Ocampo prioritized publicity over punishment in Harun’s case as well. In June 2008, the Prosecutor revealed in an interview that he planned to divert a plane carrying Harun in order to arrest him, causing the then-Humanitarian Affairs Minister, quite foreseeably, to skip his flight.⁴⁹ The use of open warrants in exercises of universal jurisdiction clearly undermines the Court’s ability to punish; the question becomes whether open warrants are nonetheless justified on other grounds.

Despite the fact that “name and shame” takes punishment off the table, advocates of the approach argue that it still achieves deterrence in other ways. Human Rights Watch, for example, applauded the Bashir warrant, as it enabled them to denounce Bashir in legal as well as political and humanitarian terms; he became not only a brutal dictator, but also “a wanted man.”⁵⁰ This deterrence, then, is general rather than specific—it deters other would-be perpetrators from committing crimes by alerting them that they too could be branded international criminals, harming their reputation, prestige, and potentially their

42 Deskbook, *supra* note 19, ch 39.

43 *Criminal Code*, RSC 1985, c C-46, s 487.3.

44 Alison Cole, “Gaddafi Might Have Been Arrested By Now If the ICC’s Warrant Had Been Sealed”, *The Guardian* (31 August 2011) online: The Guardian <<http://www.guardian.co.uk/law/2011/aug/31/gaddafi-arrest-warrant-under-seal>>.

45 *Ibid.*

46 “Situation in Darfur, Sudan”, online: International Criminal Court <http://www.icc-cpi.int/EN_Menus/ICC/Situations%20and%20Cases/Situations/Situation%20ICC%200205/Pages/situation%20icc-0205.aspx>.

47 Julie Flint, “Ocampo’s Great Gamble”, *The Guardian* (15 July 2008) online: The Guardian <<http://www.guardian.co.uk/commentisfree/2008/jul/15/sudan.humanrights>> [Flint, Guardian].

48 Bubna, *supra* note 38 at 7-8; Traub, *supra* note 11 at 26.

49 Flint, *Guardian*, *supra* note 47.

50 BBC 2009/3/4, *supra* note 30.

freedom if they ever fall from power.⁵¹ Moreno Ocampo seemed to subscribe to the logic that open warrants are preferable because of their purported political impact; obtaining a warrant against a defendant, according to Moreno Ocampo, constituted ninety percent of his job as Prosecutor, while the enforcement of the warrant was “fallout” that was not part of his mandate.⁵² If the ICC’s open warrants were actually effective in achieving general deterrence, the Court’s legitimacy could be enhanced despite the reduced chances of punishment under this approach.

This logic, however, rests upon the assumption that the mere denunciatory power of the Court has an inherent deterrence value. In the domestic criminal context, this assumption may be true; national criminal justice systems in countries like Canada have long histories of relatively effective and fair enforcement, giving the threat of an individualized criminal denunciation in those countries significant deterrent power.⁵³ ICC exercises of universal jurisdiction, on the other hand, are a novel and untested form of legal authority with virtually non-existent enforcement capabilities.⁵⁴ Given this reality, it is easy, at least at this early stage in the ICC’s existence, for prospective perpetrators in non-State Parties to dismiss the ICC as an impotent Western stooge⁵⁵ rather than allow the Court’s actions to fill them with apprehension and, as Moreno Ocampo has proposed, allow mediators to arrange for their safe passage into exile in non-State Parties.⁵⁶

Indeed, Bashir has taken every opportunity to flaunt his impunity from the Court’s justice, and many prominent world leaders have joined him in doing so. Within weeks of the issuance of the first warrant against him in 2009, Bashir traveled to Egypt, Libya, and Eritrea.⁵⁷ He then flew to Qatar for the Arab League summit, where he was welcomed with a red carpet and a kiss from the Qatari Emir.⁵⁸ On the way home he stopped in Mecca, Saudi Arabia, then traveled to Ethiopia for bilateral talks in late April.⁵⁹ Later that year, he attended an African Union Peace and Security Council Meeting in Nigeria.⁶⁰ On July 22, 2010, nine days after the second arrest warrant was issued against him, this time for genocide, Bashir traveled on a state visit to Chad⁶¹ and soon after to Kenya to celebrate the country’s new constitution.⁶² In June 2011, he embarked on a state

51 Bubna, *supra* note 38 at 4; Geis & Mundt, *supra* note 4 at 1.

52 Moreno Ocampo, “The International Criminal Court Today”, *supra* note 3.

53 Leila Nadya Sadat, “Universal Jurisdiction, National Amnesties, and Truth Commissions: Reconciling the Irreconcilable” in Stephen Macedo, ed, *Universal Jurisdiction: National Courts and the Prosecution of Serious Crimes Under International Law* (Philadelphia: University of Pennsylvania Press, 2004) 193 at 195.

54 Rodman, *supra* note 31 at 531.

55 “The International Criminal Court Bares Its Teeth”, *The Economist* (12 May 2011) online: *The Economist* <<http://www.economist.com/node/18682044>>.

56 Moreno Ocampo, “The International Criminal Court Today”, *supra* note 3.

57 International Crisis Group, *supra* note 13 at 20.

58 Michael Slackman & Robert F. Worth, “Often Split, Arab Leaders Unite for Sudan’s Chief”, *New York Times* (30 March 2009) online: *New York Times* <<http://www.nytimes.com/2009/03/31/world/africa/31arab.html>>.

59 International Crisis Group, *supra* note 13 at 20.

60 Amnesty International, Press Release, “Nigeria: Government Must Arrest Sudanese President During Visit” (22 October 2009) online: Amnesty <<http://www.amnesty.org/en/for-media/press-releases/nigeria-government-must-arrest-sudanese-president-during-visit-20091022>>.

61 “Bashir Defies Warrant on Chad Trip”, *Al Jazeera* (22 July 2010) online: *Al Jazeera* <<http://english.aljazeera.net/news/africa/2010/07/201072183438656172.html>>.

62 Jaclyn Belczyk, “ICC Reports Kenya to UN Over al-Bashir Visit”, *Jurist* (28 August 2010) online: *Jurist* <<http://www.jurist.org/paperchase/2010/08/icc-reports-kenya-to-un-over-al-bashir-visit.php>>.

visit to China,⁶³ and in October 2011 he attended a trade summit in Malawi.⁶⁴ Even Libya's National Transitional Council (NTC) hosted Bashir in January 2012,⁶⁵ despite having just overthrown Muammar Qaddafi's regime, the second attempted subject of ICC universal jurisdiction after Sudan. The latter event was particularly humiliating for the ICC, since the NTC had, shortly prior to the visit, made clear its refusal to hand over Saif Qaddafi and Abdullah Senussi, the other Libyan ICC defendants, to the ICC.⁶⁶ While Bashir has turned down high-profile invitations from Turkey⁶⁷ and Uganda⁶⁸ after ICC-related protests from the European Union and NGOs, respectively, neither country indicated that it was prepared to arrest Bashir if he did attend.

Bashir's recent travel itinerary indicates that, absent actual enforcement, naming does not necessarily lead to shaming. Due to Bashir's successful use of the narrative of Western imperialism, the warrants may have even won the Sudanese President more friends, with leaders of other African and Middle Eastern countries using Bashir's visits to bolster their own anti-neocolonial credentials. In light of this failure of general deterrence, Moreno Ocampo would have better served the ICC's legitimacy by following prosecutorial standards more in line with those practiced in earlier ICC cases involving State Parties and in the domestic context of State Parties like Canada, including the use of sealed warrants. This would have given the Court a better opportunity to capture and punish defendants, bringing the Court one step closer to acquiring the effective general deterrence power of a national criminal justice system.

III. THE DECISION TO PROSECUTE

Underlying the two elements of prosecutorial discretion discussed above—public comments and sealed warrants—is the decision of whom to prosecute in the first place. The Rome Statute states that the Prosecutor may issue an arrest warrant against a person if, *inter alia*, “[t]here are reasonable grounds to believe that the person has committed a crime within the jurisdiction of the Court”.⁶⁹ In deciding whether to investigate a person in anticipation of issuing an arrest warrant, the Prosecutor must also consider, *inter alia*, whether “[t]aking into account the gravity of the crime and the interests of victims, there are nonetheless substantial reasons to believe that an investigation would not serve the interests of justice.”⁷⁰ Similarly, Canadian guidelines call for a prosecutor to ask two questions before instituting criminal proceedings against an individual: first, whether there is enough evidence to support a “reasonable prospect of conviction,”⁷¹ and second, whether the public interest requires a prosecution to be pursued.⁷² With respect to the public interest issue, the Canadian guidelines lay out specific factors that

63 Michael Wines, “Sudan Leader is Welcomed in Visit to China”, *New York Times* (29 June 2011) online: *New York Times* <<http://www.nytimes.com/2011/06/30/world/asia/30china.html?r>>.

64 “Hague Court Questions Bashir’s Visit to Malawi”, *Reuters* (19 October 2011) online: *Reuters* <<http://af.reuters.com/article/topNews/idAFJOE79I0K520111019>>.

65 “Sudan’s Bashir Offers Help to Libya During Criticized Visit”, *BBC News* (7 January 2012) online: *BBC News* <<http://www.bbc.co.uk/news/world-africa-16454493>>.

66 Marlise Simons, “Hague Prosecutor Opens Door to Libya Trial of Son and Aide”, *New York Times* (22 November 2011) online: *New York Times* <<http://www.nytimes.com/2011/11/23/world/africa/hague-official-backs-trials-in-libya-for-two-men.html?ref=internationalcriminalcourt>>.

67 “Bashir Cancels Visit to Istanbul”, *BBC News* (8 November 2009) online: *BBC News* <<http://news.bbc.co.uk/2/hi/8349678.stm>>.

68 “Wanted Bashir ‘Drops Uganda Trip’”, *BBC News* (16 July 2009) online: *BBC News* <<http://news.bbc.co.uk/2/hi/africa/8154730.stm>>.

69 *Rome Statute*, *supra* note 1, art 58(1)(a).

70 *Ibid*, art 53(1)(c).

71 Deskbook, *supra* note 19, s 15.3.1.

72 *Ibid*, s 15.2.

should determine whether a prosecution is in the public interest. Two are of particular relevance here because they align with the ICC's fundamental goals: "the need for general and specific deterrence" and "whether the prosecution would be perceived as counter-productive,"⁷³ which could include adverse effects on the peace, security, and well-being of the victims. Since the evidentiary issue ultimately relates to punishment, domestic prosecutorial standards correspond very closely with the three main goals of the ICC: punishment, deterrence, and peace.⁷⁴

Like domestic prosecutors, Moreno Ocampo as Prosecutor had discretion to pick his targets. While he states that his decisions were made on the basis of available evidence,⁷⁵ his decision to target Bashir is considered to have been, at least in part, retaliation for the President's non-cooperation with the Harun and Kushayb warrants.⁷⁶ Moreno Ocampo also avoided at least one easy target for probable political reasons: Salah Abdallah Ghosh, a former intelligence chief and valuable counter-terrorism intelligence source for British and American governments. Ghosh was heavily involved in the Darfur atrocities and could have easily been arrested while visiting the UK in 2006 for medical treatment.⁷⁷ Moreno Ocampo evidently exercised prosecutorial discretion in selecting his targets, and the decision to prosecute Bashir, a sitting head of state, rather than Ghosh or other high-ranking members of the Sudanese regime, may have ultimately harmed the legitimacy of the Court.

The proceedings against Bashir pose unique evidentiary problems given his position as the head of a sovereign state.⁷⁸ Unlike the targeting of lower-level officials, where the cooperation of the regime is at least theoretically possible, issuing a warrant against the head of state means that cooperation with the Court can occur only by means of a regime change.⁷⁹ Moreno Ocampo knew, therefore, that his investigators would be denied access to Sudan, dramatically restricting the likelihood of collecting sufficient evidence against Bashir.⁸⁰ Some sources of evidence remained available to the Court, such as furtive interviews with Sudanese dissidents and activists in Sudan, as well as information from Sudanese expatriates and refugees in Chadian camps.⁸¹ However, while such sources may have had good knowledge of on-the-ground atrocities, they would likely not have been able to provide sufficient evidence of a chain of command in the Sudanese regime leading back to, and implicating, Bashir. Moreno Ocampo never requested investigatory access to Darfur, even when only the Harun and Kushayb warrants had been issued, out of concern for the safety of witnesses and victims.⁸² However, it is at least possible that Bashir could have eventually been convinced or coerced into allowing investigators into Sudan as long as he himself was not on the chopping block. Therefore, the effect of Moreno Ocampo's decision to target Bashir, rather than other members of his regime beyond Harun, was to make a grand rhetorical statement at the expense of almost any chance of achieving justice.

73 *Ibid*, s 15.3.2.

74 *Rome Statute*, *supra* note 1.

75 Moreno Ocampo, "The International Criminal Court Today", *supra* note 3.

76 Geis & Mundt, *supra* note 4 at 11.

77 Francis Elliott, "Sudan Intelligence Chief was in London for Treatment – Report", *Sudan Tribune* (26 November 2006) online: Sudan Tribune <<http://www.sudantribune.com/Sudanese-intelligence-chief-was-in,18908>>.

78 The Bashir indictments are based on command, rather than direct, responsibility. They allege that Bashir is responsible in three separate capacities for the alleged crimes: as President of Sudan, as head of the National Congress Party, and as commander-in-chief of the Sudanese armed forces. See International Crisis Group, *supra* note 13 at 6.

79 Geis & Mundt, *supra* note 4 at 1; Castillo, *supra* note 9 at 169.

80 Ryngaert, *supra* note 5 at 502.

81 Castillo, *supra* note 9 at 171.

82 Rodman, *supra* note 31 at 554.

A stricter adherence to prosecutorial guidelines may have produced a different course of action. As discussed above, the Rome Statute requires that the Prosecutor have “reasonable grounds to believe that the person has committed a crime within the jurisdiction of the Court” in order to seek the issuance of an arrest warrant,⁸³ a standard that, facially, has nothing to do with the admissibility of the evidence upon which the Prosecutor’s belief is based. However, the Canadian prosecutorial standard, that there be a “reasonable prospect of conviction” in order to proceed with a case, may shed light on the underlying purpose of the analogous Rome Statute provision. By focusing on the standard of “conviction,” rather than mere knowledge of guilt, the Canadian standard requires the prosecutor to take into consideration his ability to assemble admissible evidence before initiating a case. Therefore, using Canadian prosecutorial guidelines to interpret the language of the Rome Statute, evidentiary considerations weigh against seeking charges against Bashir, at least as long as he remains firmly entrenched as the political and military leader of Sudan, for the inherent difficulties of obtaining evidence against a sitting head of state make successful prosecution much less likely.

Secondly, the decision to prosecute the head of state, rather than a lower-level official like Harun or non-governmental militant like Kushayb, impairs the goal of deterrence. The problem arises not with respect to general deterrence, which was discussed earlier, but specific deterrence; that is, the objective of deterring future criminal conduct in Sudan itself. Specific deterrence is meant to “divide and conquer,” causing the target to be marginalized or turned over to the Court by other regime members desperate to avoid punishment themselves.⁸⁴ The target of the proceedings, of course, will have nothing to lose from continuing to behave badly, so the gamble in such situations is that the Court proceedings will take advantage of existing power struggles in the regime.⁸⁵ This is least likely to succeed against powerful dictators who control every branch of the state apparatus, like Bashir, and in his case the gamble has, indeed, been a failure. Despite having had a somewhat tenuous hold on the leadership of the National Congress Party (NCP) when the first arrest warrant was issued,⁸⁶ and despite the fact that some Sudanese officials privately lament Bashir’s guiding of Sudan into “pariah nation” status and appear genuinely afraid of being sent to The Hague themselves,⁸⁷ Bashir was ultimately powerful and politically astute enough to consolidate his grip on power over NCP after each of the ICC’s warrants were issued.⁸⁸ Unable to unseat Bashir, NCP officials have closed ranks around their leader, knowing that if he falls, they will fall too.⁸⁹ Rather than sewing the seeds of discord and thereby deterring continuing atrocities, the warrants against Bashir, given his position as head of state, had the opposite effect: they drove him and his cohorts to close ranks, dig in their heels, and continue committing atrocities.

The decision to prosecute Bashir has arguably undermined the legitimacy of the Court in a third way: by harming the peace, security and well being of the people of Sudan. The failure of specific deterrence has caused Bashir to tighten his grip over the state apparatus and thereby acquire freer reign to carry out further atrocities. Bashir has also apparently lashed out at his subjects out of sheer retaliatory spite. On the day the first warrant against Bashir was issued, Sudan expelled thirteen international humanitarian organizations and three local ones in retaliation, depriving 4.7 million aid-reliant Darfuris of half of the support they had been receiving.⁹⁰ Bashir also ordered all international NGOs

83 *Rome Statute*, *supra* note 1, art 58(1)(a).

84 *Ibid*, at 533.

85 Moreno Ocampo, “The International Criminal Court Today”, *supra* note 3.

86 Geis & Mundt, *supra* note 4 at 12.

87 Rodman, *supra* note 31 at 546; Bubna, *supra* note 38 at 6.

88 International Crisis Group, *supra* note 13 at 9, 21.

89 Castillo, *supra* note 9 at 180.

90 Traub, *supra* note 11 at 22.

to leave the country by the following year, threatening hundreds of thousands more in other parts of Sudan.⁹¹ This humanitarian catastrophe was ultimately mitigated through diplomacy; United States Senator John Kerry visited Sudan in April 2009 to mediate the redeployment of three international NGOs,⁹² and the United States was eventually able to persuade Bashir to allow a broader return of aid organizations by pursuing an “engagement” policy towards Sudan that avoided any mention of the ICC.⁹³ The international NGO Doctors Without Borders, which hailed the ICC’s formation in 1999 and urged it to take sweeping action,⁹⁴ stated ten years later that “at the time, few organizations fully grasped how international judicial processes could come in direct conflict with providing humanitarian aid.”⁹⁵ This reversal of opinion by one of the strongest original backers of an aggressive ICC indicates that even if ICC action against a sitting head of state has the potential to produce effective specific deterrence, the discipline required of the international community in isolating and condemning the defendant as a criminal is extremely difficult to maintain in the face of the ongoing messy complexities of international diplomacy and humanitarian assistance.

Humanitarian realities on the ground continued to undermine Moreno Ocampo’s tough stance against Bashir throughout the final years of his tenure as Prosecutor. In 2010, the international community quietly allowed Bashir to fraudulently win re-election,⁹⁶ in part out of fear that, in the wake of the ICC’s actions, an election controversy would jeopardize the impending peaceful secession of South Sudan.⁹⁷ Bashir’s sense of impunity, meanwhile, did not seem to decrease after the issuance of the first warrant against him in 2009; his forces embarked on fresh rampages in Southern Kordofan and Blue Nile states in 2011,⁹⁸ detaining United Nations Peacekeepers and subjecting them to a mock firing squad.⁹⁹ Moreno Ocampo argues that, to bolster its legitimacy, the ICC must take principled actions and force other actors to adjust to its behaviour,¹⁰⁰ but the adjustments described above were damage control—attempts by international actors to mitigate the disruptive effects of the ICC’s actions on peace and security in Sudan. By ignoring the reality on the ground, the Bashir proceedings during Moreno Ocampo’s tenure were largely counter-productive.

CONCLUSION

There is a pattern in Luis Moreno Ocampo’s departures from traditional prosecutorial practice in the Sudan case: his actions were more public and more aggressive than long-

91 International Crisis Group, *supra* note 13 at 18.

92 *Ibid.*, at 22.

93 Traub, *supra* note 11 at 23.

94 James Orbinski, “The Nobel Peace Prize Speech” (Speech delivered at the Nobel Peace Prize Ceremony, Oslo, 10 December 1999), online: Doctors Without Borders <<http://www.msf.org/msf/articles/2000/11/the-nobel-peace-prize-speech.cfm>>.

95 Christophe Fournier, “Darfur Expulsion: Response By the MSF International President”, *Doctors Without Borders* (5 March 2009) online: <<http://www.msf.org/msf/articles/2009/03/darfur-expulsion-response-by-the-msf-international-president.cfm>>.

96 Jeffrey Gettleman, “Bashir Wins Election as Sudan Edges Toward Split”, *New York Times* (26 April 2010) online: *New York Times* <<http://www.nytimes.com/2010/04/27/world/africa/27sudan.html>>.

97 International Crisis Group, *supra* note 13 at 14; Geis & Mundt, *supra* note 4 at 11; Bubna, *supra* note 38 at 6.

98 Jeffrey Gettleman, “Sudan Attacks Disputed Border State”, *New York Times* (2 September 2011) online: *New York Times* <<http://www.nytimes.com/2011/09/03/world/africa/03sudan.html>>; Jeffrey Gettleman, “As Secession Nears, Sudan Steps Up Drive to Stop Rebels”, *New York Times* (20 June 2011) online: *New York Times* <<http://www.nytimes.com/2011/06/21/world/africa/21sudan.html>>.

99 *Ibid.*

100 Moreno Ocampo, “The International Criminal Court Today”, *supra* note 3.

standing prosecutorial norms of discretion would have dictated. Moreno Ocampo desired that the Court, in its full statutory glory, be accepted as a reality by world actors, and believed it was necessary to stir the pot as much as possible to get political actors to accept that the ICC's powers of universal jurisdiction are a reality.¹⁰¹ The problem with this approach is that it ignores the potential for failure; the possibility that the universal jurisdiction powers in Article 13(b) of the Rome Statute, a contentious element of the treaty at its drafting,¹⁰² could fall into disuse as a few initial prosecutions fail to establish the legitimacy of the Court in exercising universal jurisdiction. Moreno Ocampo rightly rebutted critics who urged him to take a more political approach to prosecution,¹⁰³ but his actions as Prosecutor were already overly politicized. He would have better served the legitimacy of the ICC by taking a less adversarial approach and adhering to the standards of prosecutorial behaviour established in State Parties like Canada, as well as by the ICC treaty and regulations themselves.

By keeping his public comments calm and impartial, the Prosecutor could have enhanced the Court's credibility in Africa and the Middle East instead of providing the Sudanese defendants, who naturally and self-servedly were ready to accuse the Court of neocolonialism, with more ammunition. A neutral approach could have also avoided exacerbating the military standoff on the ground. By using sealed rather than open warrants, the Prosecutor could have had a better chance of capturing and punishing the perpetrators, helping to establish a track record of successful enforcement. Should several successful exercises of universal jurisdiction one day be accomplished, "naming and shaming" defendants with open warrants may be an effective policy option. However, in asserting its universal jurisdiction over a non-State Party for the first time, the ICC did not yet have sufficient legitimacy to employ such a strategy. The Court's legitimacy would also have been better served had Moreno Ocampo followed ICC and domestic prosecutorial guidelines in choosing his targets. The proceedings against Bashir, irrespective of his likely culpability, have not led to his conviction and punishment and have been counter-productive with respect to deterrence as well as to peace, security, and well-being in the region.

With Libya's new regime refusing to hand over Saif Qaddafi and Abdullah Senussi to the Court, the death of Muammar Qaddafi while in rebel custody,¹⁰⁴ and the outstanding Sudanese warrants against Bashir, Harun, and Kushayb, along with a 2012 arrest warrant against Abdel Rahim Hussein, Sudan's Minister of National Defence, languishing on the books without any prospect of enforcement, the ICC has not yet effectively exercised its universal jurisdiction as of the end of 2012. Fatou Bensouda, who replaced Moreno Ocampo as Prosecutor in 2012,¹⁰⁵ should more strictly follow ICC and domestic prosecutorial standards—speaking softly, carrying a sealed warrant, and picking her targets prudently—as such a change in direction would give the ICC the greatest chance to expand its legitimacy into the realm of universal jurisdiction.

101 *Ibid.*

102 Diane F. Orentlicher, "The Future of Universal Jurisdiction in the New Architecture of Transnational Justice", in Stephen Macedo, ed, *Universal Jurisdiction: National Courts and the Prosecution of Serious Crimes Under International Law* (Philadelphia: University of Pennsylvania Press, 2004) 214 at 218.

103 Moreno Ocampo, "The International Criminal Court Today", *supra* note 3.

104 Marlise Simons, "Hague Prosecutor Opens Door to Libya Trial of Son and Aide", *supra* note 66.

105 Marlise Simons, "The Hague: New Prosecutor Picked for International Criminal Court", *New York Times* (1 December 2011) online: *New York Times* <<http://www.nytimes.com/2011/12/02/world/europe/the-hague-new-prosecutor-picked-for-international-criminal-court.html?ref=internationalcriminalcourt>>.