INTERNATIONAL CRIMINAL JUSTICE ON THE MOVE

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JULY 2008 produced two major developments relating to international criminal justice, highlighting again the political delicacy of this newly salient dimension of international relations. On 14 July, the prosecutor of the International Criminal Court (ICC) sought an arrest warrant against serving Sudanese President Omar al-Bashir for genocide, crimes against humanity and murder.[1] Only a week later, on 21 July, the fugitive former President of the Bosnian Serb Republic, Radovan Karadzic, was apprehended in Belgrade and soon thereafter flown to the Hague to face the international criminal tribunal for the former Yugoslavia (ICTY). While Karadzic's arrest was widely welcomed – he had forfeited over time any serious international support and had lost the active backing of most Serbs – the ICC action against al-Bashir proved highly controversial, not least within the Arab League and among a number of African governments, producing calls for the UN Security Council to "suspend" the ICC's proceedings in this case for a year — as the ICC statute's article 16 empowers the Council to do.[2]

I Introduction

This article explores key decisions creating a new framework for international criminal justice since the early 1990s and assesses whether

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1. Several excellent web-sites offer a wealth of information (and some of them also a good deal of analysis) relevant to the subject matter of this article, notably that of: the International Criminal Court (www.icc-cpi.int); the International Centre on Transitional Justice (www.ictj.org); Security Council Report, a research institution focusing on the agenda and decision-making of the Council (www.securitycouncil report.org); and the Project on International Courts and Tribunals, associated with the Centre on International Cooperation of New York University and with the University College, London, (www.pict-pcti.org).

2. See Art. 16 of the Rome Statute of the International Criminal Court, *available at* http://www.icc-cpi.int/library/about/officialjournal/Rome_Statute_120704-EN.pdf

they are proving meaningful over time. It touches on the relevance of these developments to India.

While the administration of international justice needs to be impartial, it would be naïve to ignore the political drivers behind the creation of international tribunals and courts, and the conflicting agendas of those today commenting on their performance (or lack thereof). Even decisions on whom to prosecute and for what crimes can be influenced by degrees of political caution, correctness, and opportunism. The ICC's compelling chief prosecutor Luis Moreno Ocampo, once deputy prosecutor of the trials against Argentina's former military rulers and elected to the ICC position by its assembly of states parties, has doubtless had in mind the need to make a success of early ICC prosecutions if the institution is not to flounder on disappointed expectations—this doubtless inspired considerable caution at the price of some delay. Amidst mounting complaints that the ICC was proving very expensive without yet having achieved much of note, his decision to act against al-Bashir was a bold departure. Such considerations operate largely at the level of cause, in the cause-effect cycle.

However, at the normative level, innovations with respect to international criminal law (ICL) since the mid-1990s have, for good or ill, contributed to eroding absolute conceptions of state sovereignty, altering in some ways how relationships between states, citizens, and international organizations are likely to be ordered in decades ahead.[3] This represents a non-negligible effect of recent developments in this field.

The Security Council's role—a cockpit for much geo-strategic and normative arm-wrestling among the great powers—in spurring (and occasionally seeking to brake) these developments is often underestimated and is highlighted in this policy comment.

II Whence the pressure for new departures in ICL?

The trigger for the recent revolution in ICL, holding individuals internationally responsible for crimes committed within the borders of their own countries, arises from failures of the major powers holding

3. The most useful reference book in print today on the UN Security Council is Sydney D. Bailey and Sam Daws, *The Procedure of the UN Security Council* (Third ed.) (Oxford, UK: Clarendon, 1998, with a Fourth Edition promised in years to come). See also David M. Malone (Ed.), *The UN Security Council: From Cold War to Twenty-First Century* (Boulder, CO and London, Lynne Rienner, 2004). See also the compact and authoritative Edward C. Luck, *The UN Security Council (A Primer) (*London: Routledge, 2006). For a first hand account, see Chinmaya Gharekhan's, *The Horseshoe Table: An Inside View of the Security Council* (Delhi: Longman, 2006).

permanent seats in the UN Security Council to address in a coherent way challenges to the peace (and to human life) in the former Yugoslavia in 1992-95, and in Rwanda in 1994.[4] Pusillanimous decision making that did too little to protect civilians in Bosnia and to prevent outright genocide in Rwanda resulted in a deep sense of failure and guilt among some in the Security Council, who had been recently euphoric over their capacity to help engineer Iraq's expulsion from Kuwait in 1991.

Being unable to revive the lives lost, minds turned to how the guilty could be punished. In particular, Madeline Albright, then US permanent representative at the United Nation—and who harboured a personal interest in Yugoslavia, where she spent some years of her childhood—believed that remedial action was required on moral grounds but also to salvage UN and US credibility. The notion of the Security Council creating international criminal tribunals to address these crimes would have been implausible if not unthinkable only 10 years earlier in the concluding years of the cold war. But much had changed in international relations as of the mid-1980s.

One important signal of the thaw in the cold war was a noticeable improvement in the climate among the permanent five (P-5) members of the United Nations Security Council (UNSC). The first serious evidence of the relaxation in east-west tensions within the council was their ability, at the 1987 invitation of UN Secretary General Javier Perez de Cuellar, to tackle resolution of the murderous Iran-Iraq war.[5] The war came to an end in mid-1988 on the terms laid down in the Security Council resolution (SCR) 598.[6] The post-cold war era at the UN had begun.

The post-cold war period has been marked by the council's disposition to tackle many more conflicts than it had been able to earlier, when it was stymied by east-west animosities and the plethora of vetoes (cast and threatened) by the permanent members. Since 1990, there has been a sharp drop in the use of the veto, accompanying the introduction of a culture of accommodation among the permanent five, and substantive shifts in the council's approach to conflict and its resolution. Factors held by the council as constituting a threat to international peace expanded to include a coup against a democratically elected regime (in Haiti), a range of humanitarian catastrophes—particularly those generating large exoduses of displaced persons and refugees, internally and internationally—and acts of terrorism.

4. Drivers of UN Security Council decision-making since the end of the cold war are discussed in greater detail in David M. Malone, "An Evolving UN Security Council" 47 *Indian Journal of International Law* 594-615 (2007).

5. See Cameron R. Hume, *The United Nations, Iran and Iraq: How Peacemaking Changed* (Bloomington, IN: Indiana University Press, 1994).

6. SCR 598 of 20.7.1987.

This, in turn, allowed the council to address a range of conflicts, mostly internal in nature, that it most likely would have avoided in the past when the cold war antagonists often played out their hostility through regional proxies and were prepared to frustrate council involvement. Thus, the council's willy-nilly decisions in the 1990s proved highly innovative in shaping the normative framework for international relations.[7] However, P-5 concord had its limits, highlighted by a Russian veto threat in the Security Council against NATO action to protect Kosovars in early 1999 and deep divisions pitting China, France and Russia against the UK and the US on military action to overthrow Saddam Hussein in Iraq in early 2003, both of which strained the fabric of international relations and have continued to bedevil council dynamics to a degree (not least as Kosovo's declaration of independence in early 2008 again brought the Balkan cauldron close to the boil). Similarly, sharp disagreements within the council over internal governance in Burma in 2007, and, to a lesser degree, Zimbabwe in 2008, resulted in vetoes. Whether the tremendous expansion of international institutions addressing criminal justice would have occurred without a brief "era of euphoria" among the P-5 and within the Security Council more broadly that might tentatively be dated from late 1990 to mid-1994, resulting from the rapid implosion of the Soviet Union, is highly debatable.

With respect to the council's own failures, and those of other international actors such as the European Union, to take credible, effective steps to stop the killing in Bosnia and in Rwanda, it was possible in these new circumstances, thanks to the strong advocacy of several champions (not least Albright and Klaus Kinkel, then foreign minister of Germany), to secure council agreement to the creation of an International Criminal Tribunal to address "serious violations of international humanitarian law" (essentially war crimes and crimes against humanity) in the former Yugoslavia as of 1993; and in Rwanda as of 1994 to address genocide, crimes against humanity and war crimes. While these tribunals have been much criticized for rendering slow justice (so slow that former Serbian President Milosevic expired while on trial), complaints would have been much shriller had the tribunals been perceived as providing expedient decisions. The Rwanda tribunal is working towards closing down its docket, having addressed a number of important cases. The ICTY, until recently slated to shut down in 2010, is not in so fortunate a position, with former Bosnian Serb military commander Ratko Mladic still at large – although

7. See David M. Malone, "The UN Security Council in the 1990s: Boom and Bust?" in *From Territorial Sovereignty to Human Security* 35-52 (2000). Keynote Address in the Proceedings of the 28th Annual Conference of the Canadian Council on International Law (The Hague: Kluwer Law International 1999).

the arrest of Karadzic gives rise to some optimism that General Mladic may soon also be apprehended. The cost-benefit ratio of the tribunals has been much discussed, not least in Rwanda, where it was often argued that the very large sums involved would have been better spent on post-conflict reconstruction and development efforts. As well, the decision to reject at the outset the possibility of death sentences, required in order to maintain the largest possible degree of international consensus on the tribunals' creation, was controversial in Rwanda.

III Internal conflicts

The council's willingness to involve itself in a broad range of internal conflicts, encompassing inter-communal strife, crises of democracy, fighting marked by a fierce struggle for control of national resources and wealth, and several other precipitating causes of conflict or incentives for continuation of war, forced it to confront hostilities of a much more complex nature than the inter-state disputes with which it had greater experience. Widespread violations of human rights, including many imputable to those serving in government, often in the highest positions, marked many of these conflicts.

IV Resort to chapter VII

Resorting to the provisions of chapter VII of the UN charter and to enforcement of council decisions was not new: they were enforced in Korea and to a much lesser extent in the Congo during the UN's early years, while a naval blockade against Rhodesia proved largely unconvincing.[8] But the extent to which the council has adopted decisions under chapter VII since 1990, made possible by better relations between the P-5 and a fall-off in use of the veto, is wholly unprecedented. And it has proved addictive. By 2004, a third of its resolutions were adopted under chapter VII provisions. In order to give them force, and to command compliance from all member states, the resolutions creating the two international criminal tribunals were both adopted explicitly under the terms of chapter VII of the charter, thus making their implementation universally mandatory.

V The humanitarian imperative

An innovative feature of the council's decisions on a number of crises

8. UN Department of Political Affairs, "A Brief Overview of Security Council Applied Sanctions" *Interlaken 2*, 1998.

after the end of the cold war has been its concern over the humanitarian plight of civilian victims of conflicts, particularly refugees. Refugees were hardly a new topic of concern for the council.[9] The fate of Palestinian refugees proved a continuing spur to the Arab-Israeli dispute following Israel's war of independence in 1947-48, leading also to the creation of a UN agency, UNRWA, exclusively dedicated to their welfare. Those displaced by war, particularly where mass exoduses of the population occurred, had long been seen as deserving of care from the international community and were among the prime "clients" of both the Red Cross system (ICRC and the Federation of World Red Cross and Red Crescent Societies) and the UN High Commissioner for Refugees. Nevertheless, the Security Council invoked the plight of refugees and their implied destabilizing effect on neighbouring states as grounds for its own involvement in conflict in the 1990s as never before. Early council resolutions on the former Yugoslavia[10] and on Somalia[11] illustrate this development. Any threat that the Haitian crisis of democracy (1990-94) may actually have posed to international peace and security only arose from the outflow of Haitian boat-people threatening to engulf a number of Caribbean countries and the shores of Florida.[12] The newly widespread acceptance that refugee flows could actually be a major catalyst to conflict—rather than merely an outcome of it—was striking.

Furthermore, the intensive, if highly selective, television media scrutiny (the so-called "CNN effect") of horrendous conditions endured by victims of war impelled worldwide populations to press their governments to alleviate suffering arising from a variety of conflicts.[13] Several factors conspired to focus attention on the UN to act on behalf of the international community, not least the existence of several UN specialized agencies with the skills and "critical mass" required and the possibility for the UN

9. See Francis Kofi Abiew, *The Evolution of the Doctrine and Practice of Humanitarian Intervention* (The Hague; Boston: Kluwer Law International, 1999); Stephen A. Garrett, *Doing Good and Doing Well: An Examination of Humanitarian Intervention* (Westport, Conn: Praeger, 1999).

10. See SCR 713 of 25.9.1991 and SCR 733 of 23.1.1992.

11. See the Secretary-General's report requesting the Security Council to take up the case of Somalia (UN Document S/23445, 1991).

12. See Diego Arria, "Diplomacy and the Four Friends of Haiti" and Andrew S. Faiola, "Refugee Policy: The 1994 Crisis" in Georges Fauriol (Ed.), *Haitian Frustration, Dilemmas for US Foreign Policy* 90-98 and 83-89 (Washington D.C: Center for Strategic and International Studies, 1995).

13. See SCR 688 of 5.4.1991 on humanitarian protection in Iraq; and James Cockayne and David M. Malone, "Creeping Unilateralism: How Operation Provide Comfort and the No-Fly Zones in 1991 and 1992 Paved the Way for the Iraq Crisis of 2003" 37 *Security Dialogue* 123-141 (Mar 2006).

to deploy peace missions of various types and sizes with mandates focused on humanitarian objectives or at least including them. In the early 1990s, at the peak of media and public fervour for humanitarian initiative, a lively debate unfolded over not only the international right to intervene in the internal affairs of countries to save civilian lives but also a purported duty to do so.[14] UN Secretary General Kofi Annan proved a lively promoter of this debate, staking out new ground in championing human rights and concern for civilians in war as key themes.[15] His advocacy of humanitarian intervention was articulated most unambiguously in a speech to the UN General Assembly on 20.9.1999 that many understood to be an indirect endorsement of NATO action (without council approval) to launch military action to protect Kosovar civilians.

This debate culminated in 2002 in a report of the International Commission on Intervention and State Sovereignty, sponsored by the Government of Canada, "The responsibility to protect,"[16] a concept somewhat improbably endorsed with unanimity by the 2005 UN Summit. Since then, the Council has been slow to come to grips with the operational implications of the concept, most notably in its cautious and agonizingly slow approach to the political and humanitarian crisis affecting Darfur, where only in 2007 did it adopt a more forward role, taking over the lead from an ambivalent African Union that had earlier (with UN support and the support of individual UN member states) fielded a monitoring mission of its own—AMIS. Meanwhile, *faute de mieux*, a council containing many ICC doubters (not least China and the USA) had referred to the International Criminal Court its expert report (including a confidential list of suspects) suggesting serious human rights violations in Darfur.

VI A more legal and regulatory approach

As pointed out by law scholar James Cockayne, legal frameworks help build perceptions of legitimacy, and the Security Council is increasingly turning to legal techniques and expertise to underpin its fact-finding activities.[17] Often, these frameworks are drawn from or build on the

14. See Jonathan Moore (Ed.), *Hard Choices: Moral Dilemmas in Humanitarian Intervention* (Lanham MD: Rowman and Littlefield Publishers, 1998).

15. See James Traub's, *The Best Intentions: Kofi Annan and the UN in the Era of American World Power* 91 -109 (New York: Farrar, Straus and Giroux, 2006).

16. See the complete report at www.iciss.ca. See also Gareth Evans and Mohamed Sahnoun, "Responsibility to Protect" 81 *Foreign Affairs* 1-8(Nov/Dec 2002).

17. James Cockayne, *Evolving Challenges to Human and International Security: Global Organized Crime*, Coping with Crisis Working Paper Series, International Peace Academy, New York, 2007.

foundations of international criminal law. The council has been creative in the ways it has done this: by referring matters to the International Criminal Court for further investigation (e.g., on Darfur); by developing ad hoc commissions of inquiry to assess the evidence of crimes; and by calling on member states to provide policing expertise to assess the adequacy of national investigation efforts and complement them where necessary (e.g., for the investigation into the assassination of former Prime Minister Rafiq Hariri in Lebanon in 2005-06).[18]

Indeed, the Hariri investigation and the tribunal mooted to ensue from it are significant in a number of ways: they represent an expansion of the council's willingness to use judicial techniques to influence the behaviour of member states, and may prove that international courts can help elucidate state involvement in terrorism.[19]

Additionally, the council is steadily entrenching its supervisory role by creating subsidiary committees that oversee member state compliance not only with specific sanction regimes, but also with more general standards it sets (for example, on child soldiers), the mandatory guidelines it issues (notably in the fight against terrorism), and in the struggle to prevent nuclear proliferation to non-state actors.

The results of this approach, as on Iraq, have sometimes been decidedly mixed—especially when the council's attention span wanders or when the P-5 fall out over implementation of council decisions. Indeed, the Iraq case is cautionary on the council's, and the UN's, ability to pull off complex legal and regulatory regimes over extended periods of time - as suggested by the International Inquiry Committee (a.k.a., the Volcker Committee) report on the "oil for food" scandal of 2005-06.[20]

The council's resort to tribunals and to the availability of the ICC in its contribution to the fight against impunity can also be seen as part of this trend.

VII Fight against terrorism: Some growing concerns

The council has been more active in addressing terrorism for some

18. Following the Hariri assassination in Beirut on 14.2. 2005, the Security Council, in SCR 1595 of 7.4. 2005 established an Independent Investigation Commission (UNIIC), initially for a period of three months. See also SCR 1664 of 29.3. 2006.

19. The notion sometimes entertained that such tribunals could prosecute "state terrorism" would likely prove contentious, not least as the term itself has been applied to date in highly politicized fashion mainly to Israeli practices by its opponents.

20. For the IIC's reports, see www.iic-offp.org.

time than is widely believed[21]—as underscored in the conclusions of the first Security Council summit meeting on 31.1.1992. Soon thereafter, the council adopted sanctions against Libya over its non-cooperation with investigation of two airline-bombing incidents, a course of action that ultimately brought about a trial of the Libyan suspects by a Scottish tribunal in the Netherlands.[22] However, the council imposed sanctions against the Taliban regime, in the wake of devastating bombings at US embassies in Kenya and Tanzania in 1998, proved ineffective against a regime almost completely isolated from the international community, even after the sanctions measures were strengthened in 2000.[23]

The events of 11.9.2001 proved to the council how serious terrorist threats could be. The council's shift to actively combating both the financial networks supporting terrorism and safe havens for terrorists through the decisions of its resolution 1373 was unusual—indeed unprecedented. In imposing the mandatory provisions of the draft convention on the suppression of terrorism financing on member states, council members initiated a potentially habit-forming process of "legislating" for all member states—a very controversial move.[24] However, Columbia University scholar Edward C. Luck commented in late 2006: "The core goal of pulling together a coherent and integrated UN approach to counter-terrorism remains as elusive as ever."[25]

The issue of how to promote international humanitarian law while also pursuing the fight against terrorism has been the subject of growing concern and research.[26] Fears that the fight against terrorism might overwhelm respect for humanitarian law (such as the measures enshrined in the Geneva Conventions) were exacerbated by practices in Afghanistan, Iraq, Guantanamo Bay, and elsewhere following the events of 9/11. The debate

21. See Chantal de Jonge Oudraat, "The UN and Terrorism: The Role of the UN Security Council" in Jane Boulden and Thomas G. Weiss (Eds.), *Terrorism and the UN: Before and After September 11th* (Bloomington, IN: Indiana University Press, 2004).

22. In Jan 2001, the court found one suspect guilty and acquitted the other. For some of the Council's decisions, see SCR 758 of 31.3.1992, SCR 883 of 11.11.1993 and SCR 1192 of 27.8.1998, suspending sanctions upon the arrival of the two suspects in the Netherlands.

23. Sanctions were originally imposed in SCR 1267 of 15.10.1999. They were strengthened in SCR 1333 of 7.12.2000.

24. See Axel Marschik, "The Security Council as World Legislator? Theory, Practice and Consequences of an Expanding World Power". IILJ Working Paper No. 2005-18 *available at* http://ssrn.com/abstract=871758

25. Correspondence with the author, 30.10.2006.

26. See Hans-Peter Gasser, "Acts of terror, 'terrorism' and International Humanitarian Law" 84 *International Review of the Red Cross* 547-570 (2002).

remains a lively one, not least in the domestic politics of the US. Suffice it here to note that the Security Council needs to seek a balanced approach to these two objectives and that it has not always succeeded in this delicate task in the eyes of all observers.

VIII A warning siren: The imperial Security Council

Several recent developments have been no less controversial. Resolution 1540 of 28.4.2004 again legislated for member states, this time on the prevention of nuclear proliferation to non state actors that might use nuclear technology and products for terrorist purposes. Member states, on the whole, disliked this intensely. Resolution 1566 of 8.10.2004 appeared to be attempting to impose a definition of terrorism on the membership as a whole, a move that was roundly denounced by a number of delegations in the UN General Assembly's sixth committee. Discussing the shift to an "imperial Security Council," Simon Chesterman writes:[27]

> The scope of the Council's expanding powers…is likely to be determined by the tension between end-driven demands of responding to perceived threats to peace and security, and the means-focused requirements of legitimacy. The temptations of legislation by Council fiat must be balanced…by recognition that implementation depends on compliance by member states.

Security Council and the development of ICL

This activist phase of the Security Council will be remembered in part for its contribution to radical innovation in international criminal law, notably through its creation of *ad hoc* international criminal tribunals for the former Yugoslavia (ICTY) and Rwanda (ICTR). Nothing in the UN charter foresaw nor authorized the council's creation of such judicial bodies, but nothing in the charter precluded it. In an era of unprecedented council activism, the establishment of these tribunals signalled just how expansive the council's interpretation of its own powers had become. And because all five of the permanent members supported or acquiesced in the creation of the tribunals, council decisions have a consensual precedent. Since then, the council has encouraged the creation of a variety of special courts involving international participation to address serious crimes in Sierra Leone, Cambodia, and

27. Simon Chesterman, "The Security Council as World Legislator? Theoretical and practical aspects of law-making by the Security Council" 26.5. 2006, Institute for International Law and Justice Discussion Paper *available at* http://www.iilj.org/research/UNSecurityCouncil.html.

elsewhere.[28] Nevertheless, assessments of the track record of the special tribunal for Sierra Leone are mixed, particularly with respect to "value for money" and to local perceptions of the quality of justice rendered.[29]

The creation of the criminal tribunals greatly intensified pressures for a permanent ICC with universal jurisdiction, a notion that had been promoted for some time but with little previous success. After 1994, progress on negotiating a statute for such a court accelerated dramatically.[30] However, when the ICC statute was adopted in Rome in 1998, a number of states, including the USA, voted against the text, citing a variety of concerns.[31] China, like India, has kept the court at arm's length. Russia signed the statute, but, after much public soul-searching, has still not ratified. In the US, the ICC became a domestic political football in the dying days of the Clinton administration. The administration's Republican opponents portrayed the court as a major potential threat to US troops deployed globally, and in 2001 President Bush repudiated the statute President Clinton had signed in his final hours in power.

David Wippman recently wrote with acuity on the challenges the court faces and the opportunities it presents, arguing that the claims of both critics and supporters of the ICC have been exaggerated.[32] He notes that the staggering expense of *ad hoc* tribunals argue both for an integrated approach but also suggest that the ICC will be on a tight financial leash, precluding expansive interpretations of its remit.[33] (Without having yet proceeded with a single prosecution, the ICC will already, by late 2008, have cost in excess of $500 million). Wippman concludes that, at best, the ICC will be able to try only a few ringleaders in the man-made humanitarian or political disasters on its docket, resulting in many perpetrators going

28. The Council continues to gnaw at the issue of impunity, most recently at Denmark's request, producing in Jun 2006 a Presidential Statement on the topic. See UN Document S/PRST/2006/28 of 22.6.2006.

29. See John L. Hirsch, "Peace and Justice : Mozambique and Sierra Leone Compared"in Chandra Sriram and Suren Pillay (Eds.), *Peace versus Justice? Truth Commissions and War Crimes Tribunals in Africa* (Scottsville, South Africa: University of KwaZulu-Natal Press, 2008 forthcoming)

30. See Mauro Politi and Giuseppe Nesi (Eds.), *The Rome Statute of the International Criminal Court: A Challenge to Impunity* (Aldershot, UK: Ashgate, 2001) The essay therein of Elizabeth Wilmshurst "The International Criminal Court: The Role of the Security Council", is particularly instructive.

31. See Marc Weller, "Undoing the Global Constitution: UN Security Council Action on the International Criminal Court" 78 *International Affairs* 693-712 (London, Oct 2002).

32. David Wippman, "Exaggerating the ICC" in Joanna Harrington, Michael Milde, and Richard Vernon (Eds.), *Bringing Power to Justice? The Prospects of the International Criminal Court* 99-140 (McGill-Queens University Press, 2006).

33. The ICTR and the ICTY together cost approximately $ 400 million in 2004.

free. But this was also the logic of the Tokyo and Nuremberg trials. Seeing leaders dragged before courts can produce useful demonstration effects (deterrent effects are probably more dubious).

There has been much debate over whether ICC prosecutions are compatible with the objective of national reconciliation. Darryl Robinson reminds that the court has the discretion not to proceed with prosecutions where it views them as likely to be counterproductive to broader justice; that in the worst cases it almost always will be appropriate to prosecute a few of the worst perpetrators; that such proceedings are complementary with other forms of justice, mostly at the national level; and finally that national or international truth commissions aimed at promoting reconciliation need not be incompatible with a small number of well-targeted criminal prosecutions.[34]

The court is now up and running (with 106 states parties) and has four situations and related cases on its docket (unfortunately all of them relating to Africa, giving rise to complaints that the continent is being excessively targeted and enhancing the political sensitivity of the court's activities). The most high-profile of these focuses on Darfur, with the ICC prosecutor's decision to move against Sudanese President al-Bashir much in the news.

A case referred by Uganda to the ICC—relating to a particularly violent and vicious rebel force—may be no less relevant to the council in the future. Arrest warrants for crimes against humanity and war crimes were made public by the ICC prosecutor against five senior commanders of the Lord's Resistance Army rebel movement (including its leader Joseph Kony) on 13.10. 2005. Execution of the arrest warrants remains outstanding. This case has been criticized by a number of Ugandans and NGOs who believe that national reconciliation should trump criminal prosecution of Kony (and some of his confederates).[35] And it may come back to haunt both the ICC and Ugandan President Museveni if the latter settles his differences with the LRA politically, as continues to seem quite possible.[36] Then, issues

34. Darryl Robinson, "Serving the Interests of Justice: Amnesties, Truth Commissions and the International Criminal Court" Bringing *Power to Justice* at 210-243.

35. For a relevant informed blog commentary see http://lawofnations.blogspot.com/2005/04/icc-watch-prosecutor-northern-ugandan.html. For a fuller analysis, see http://.www.globalsecurity.org/military/ library/news/2005/10/mil-051010-irin02.htm.

36. Situation in Northern Uganda, see a Sep 2006 report from the International Crisis Group at http://www.crisisgroup.org/home/index.cfm?id=4374&l=1

Museveni and the LRA leadership met in Southern Sudan in Oct 2006, and although that meeting did not resolve outstanding differences, it may have helped create a dynamic that could. For an update on the situation in Northern Uganda, see a Sep 2006 report from the International Crisis Group at http://www.crisisgroup.org/home/index.cfm?id=4374&l=1

of amnesty and asylum for the LRA leadership may arise, and the council might be tempted to request the ICC to suspend prosecutions.[37] At the same time, there is little doubt that the ICC's indictments were a significant factor in creating pressure on the LRA to cease its campaign of mayhem and terror in northern Uganda.[38] The political dynamics that could result from the indictment of al Bashir are, as yet, unknowable, but the ICC's action has introduced an element of volatility in the already fraught affairs of Sudan pregnant with potential consequence.

On prospects for the ICC, its (Canadian) presiding judge Philippe Kirsch comments: [39]

> The court springs from a major gap in the international legal system. The great scale of genocide and many crimes against humanity and war crimes tends to overwhelm the capacity (and sometimes the will) of domestic legal systems, particularly in countries recovering from war. The international criminal tribunals were important initiatives, but they are limited in time and space (in terms of the territory they cover). Any decision to create such tribunals is subject to the vagaries of geo-politics (as reflected in the Security Council).

With the preceding information, it will be clear that the Security Council's venture into the realm of international criminal law has been ground-breaking and, for good or ill, more decisive than have been to date its decisions on terrorism or transnational crime.

IX Implications for India?

India last sat as an elected member of the UN Security Council in 1991-92.[40] It ran again in 1996 for a term 1997-98, but was defeated by

37. For further speculation along these lines, see an Oct 2006 brief by Security Council Watch at http://www.securitycouncilreport.org/site/c.glKWLeMTIsG/b.2087351/k.E8B6/October_2006BRUganda.htm

38. See Nick Grono, "What Comes First, Peace or Justice? Uganda's Dilemma" *International Herald Tribune*, 27.10. 2006.

39. Conversation and subsequent correspondence with Philippe Kirsch, 4-5 Jun 2006.

40. India's term on the Council in 1991-92, at an exceptionally busy time for the United Nations which was experiencing an era of euphoria produced by the end of the Cold War and Iraq's expulsion from Kuwait in early 1991 (under a Council mandate), was a distinguished one under the leadership of Chinmaya Gharekhan. He details aspects of this tenure in his book, *The Horseshoe Tab*le*: An Inside View of the UN Security Council* (Longman, 2006), widely recognized as a major contribution to the literature on the Council. He went on to serve as UN Secretary-General Boutros Boutros-Ghali's representative in the Council.

Japan.[41] Subsequently, its efforts focused on securing a permanent seat, notably in a joint campaign in 2004-2005 with Brazil, Germany and Japan (widely described as the G4).[42] More recently it announced, in 2007, that it would seek election to a non-permanent seat in 2009 for a term in 2010-2011.[43]

In the future, whether as a permanent or as an elected member, India, which has remained studiedly aloof from the international criminal tribunals and from the ICC, will need to develop a view, on a case-by-case basis of the political dimension of the ICC's existing, proposed and potential docket as and when cases are discussed in the Council (for example, with respect to the council's authority to suspend ICC prosecutions).[44] It may also need to develop a position on proposals for *ad hoc* criminal tribunals. Having to address the merits of criminal justice in individual cases, as a practical political matter rather than merely as a question of principle, will doubtless require judgment calls that could undermine the consistency of India's opposition towards the ICC and other such courts and tribunals(as it has for the United States).

Thus, while a shift in India's view on international criminal justice may not be in the cards as a matter of design, necessity could produce a more qualified view of this field once India is again seated

41. Indian commentators have tended to attribute this defeat the Japanese "checkbook diplomacy" leveraged by Japan's official development assistance program. However, it may also be that India's stance against the Comprehensive Test Ban Treaty (under discussions in months preceding the Security Council election) contributed to the scale of India's defeat: Japan breezed to a first ballot victory with 142 votes, leaving India with a mere 40. The CTBT was ultimately approved by 158 votes in favor and 3 against (India, Bhutan, Libya) with 5 abstentions (Cuba, Lebanon, Syria, Mauritius, and Tanzania) on 10.9.1996.

42. On this, see David M. Malone "The High Level Panel and Security Council Reform" 36 *Security Dialogue* 370-372 (2005). Under varying scenarios, the G4 plan also allowed for additional representation from Africa on the Council, in both permanent and non-permanent categories. The G4 did not always seem of one mind on whether the new permanent members needed to be granted veto powers, although India always seemed to incline in this direction, at least for bargaining purposes.

43. India has made clear that it is not giving up on its claim to a permanent seat in the Council by running for an elected one. Rather, its decision may recognize a sense of disarray within the G4 since its failure in 2005 to clinch agreement on Security Council expansion and also a geo-political dispensation in recent years that does not favour major international institutional adjustments.

44. India's explanation of vote, at the time of the adoption of the ICC's statute in Rome in 1998, providing largely a political rather than legal rationale for its inability to sign on, is *available at* http://www.indianembassy.org/policy/ICC/ICC_Adoption_July_17_1998.html.

on the Council.[45]

X Conclusions: International criminal law, Security Council and conceptions of sovereignty

Arguably the most important—although one of the least noticed—of the consequences of council decisions in the post-cold war era, taken as a whole, shaped and driven in part by the factors discussed above, has been to erode and shift at the international level the understanding and interpretation of national sovereignty. This shift is accounted for by the new drivers of council decision-making (including terrorism) and by the P-5's ability to work together more often than not, although the dynamics of their interaction are complex and infinitely variable. With a fairly sophisticated institutional framework now established, practice in the area of international criminal justice is, beyond the conduct and outcome of individual cases by courts and tribunals, more likely to be shaped by relations between the great powers, political expediency and short-term tactical calculations, some of them relating to peace processes, than by any master plan. The systemic outcome over time is thus hard to predict.

But it is now widely (although not universally) accepted that tyrants can no longer seek refuge behind the walls of sovereignty to shield themselves from international concern and even action over massive human rights violations and humanitarian catastrophes. Cumulatively, council decisions, and those of the parties to the ICC statute, have carried forward meaningfully—and in my view very helpfully—the fight against impunity. Canada has played a major role in producing this shift in international relations.

More broadly, the council, by intervening repeatedly to address the humanitarian consequences of mostly civil wars, often authorizing coercive

45. An interesting dialogue among prominent Indian legal scholars, practioners and judges, reflecting a wide range of views including, in several instances, considerable openness towards international criminal justice can be found in Dipankar Banerjee, Abhaya Kashyap, Pravin H. Parekh (Eds.), *The International Criminal Court: Proceedings of a Dialogue in India* (New Delhi: Konrad-Adenauer-Stiftung, 2006). From a completely different perspective, calls are heard occasionally from within India for New Delhi to join the ICC, in order to extend new protections to Indian citizens. This was recently the case in Chennai by Rajya Sabha member E.M. Sudarsana Natchiappan. (See IANS report of 9.8. 2008 *available at* http://www.thaindian.com/newsportal/uncategorized/india-must-join-international-criminal-court-expert_10082007.html).

measures,[46] and by designing increasingly complex and intrusive mandates for international actors within member countries, sometimes without their consent, has not so much over-ridden article 2(7) of the charter (that does exempt chapter VII decisions from its non-intervention provisions), but rather sharply redefined in practice conceptions of what can constitute a proper trigger for international intervention—with intervention taking many forms, not just that of military action.

However, for those inclined to believe in a steady progression towards the achievement of international justice, politics are likely to continue to intrude. Wrangling over the form and mandate of the tribunal (agreed early on in principle) to address the murder of former Lebanese Prime Minister Hariri is instructive. The success of the Cambodian government in stalling for many years the launch of a mixed tribunal to try the few remaining Khmer Rouge leaders also gives pause. As well, complaints about double standards as between powerful nations and their citizens, and less powerful ones, are hardly irrational. And finally, concerns over international criminal justice as a blunt tool insufficiently sensitive to political nuance and judicious diplomatic timing may prove prescient in some instances.

In sum, although not necessarily perceived as such at the time, the council's decisions in 1993 and 1994 to create two *ad hoc* international criminal tribunals proved among its most far-reaching initiatives, unleashing pressures that led to the creation of the ICC. Karadzic now has the leisure to reflect on the ensuing new equations for international relations in his jail cell in the Hague, and President al-Bashir will doubtless be wondering how these international institutional innovations may affect him very concretely in the future.

46. See Thomas M. Franck, *Recourse to Force: State Action Against Threats and Armed Attacks*, (Cambridge, UK: Cambridge University Press, 2002) particularly 5-9. Franck, Simon Chesterman and the author revisit this view in *The Law and Practice of the United Nations* (Oxford University Press, 2007).