
Review Conference of the Rome StatuteDistr.: General
30 May 2010Original: English

Kampala
31 May – 11 June 2010**The Importance of Justice in Securing Peace¹****A. Introduction**

1. The Rome Statute recognizes the intrinsic link between justice and peace. States Parties to the Statute, “recognizing that [such] grave crimes threaten the peace, security and well-being of the world” and “determined to put an end to impunity for the perpetrators of these crimes and thus to contribute to the prevention of such crimes”, agreed “that it is the duty of every State to exercise its criminal jurisdiction over those responsible for international crimes” and created an International Criminal Court (ICC) that would step in when States do not exercise that responsibility.

2. The Statute embodies the idea that the rule of law can protect individuals and nations from massive atrocities. It proposes a new framework to enforce this idea and to manage conflicts, a framework based upon individual accountability for perpetrators of massive crimes. In Rome, Lloyd Axworthy, Minister of Foreign Affairs of Canada, described this essential link: “by isolating and stigmatizing those who commit war crimes or genocide, and removing them from the community, [the Court] will help to end cycles of impunity and retribution. Without justice, there is no reconciliation, and without reconciliation, no peace.”²

3. Yet, President Omar Al Bashir will promote the idea that the ICC stands in the way of peace in the Sudan. And some people will follow suit in good faith. But it is wrong. In countries where the Court operates, the international community pursues comprehensive solutions with a political track, a security track, a humanitarian track and now a justice track. The search for such solutions has always been elusive. Less than 85 per cent of negotiations end in an agreement and far less are implemented. In Sudan, there was no peace process before the ICC. All attempts at agreement failed. All attempts at appeasing President Al Bashir failed. The idea that the ICC stopped an “emerging” peace process is pure invention. Rather the opposite, as we will show below. ICC intervention triggered new efforts to end the conflict and stop the crimes.

4. States made a conscious decision in Rome to create a justice system that could stop or prevent violence rather than an *ad hoc* creation acting *a posteriori*. They also connected peace and justice, providing for interaction of the Court with the UN Security Council; a design that was put in practice as early as March 2005 with UNSC Resolution 1593 on Darfur.

¹ By Juan E. Méndez, Visiting Professor, Washington College of Law, American University; Special Adviser to the Prosecutor of the ICC on Crime Prevention. The author acknowledges the research assistance of Ms. Kavita Kapur, JD candidate, Washington College of Law.

²Statement by Lloyd Axworthy, 15 June 1998, <http://www.un.org/icc/speeches/615can.htm>

5. The Statute created new rules that actors involved in conflict management must adjust to. The new framework and specific provisions -- such as article 27 which negates claims for immunity based on a suspect's official capacity -- are already factored in peace efforts. As shown below, the Rome Statute system is in motion and has become part of the international landscape.

B. Acceptance of the new framework

1. Growing number of States Parties

6. Ratification has been steadfast. Since 2002, when the Statute entered into force with the ratification of 60 States, 51 States joined the ranks of the ICC. Its jurisdiction covers all Western Europe, all South America and 60% of African States.

2. Support from non-States Parties

7. Evolution of States not Party to the Statute in the last six years is also significant. The Chinese authorities describe themselves as a "non-State Party partner of the Court."³ Russia has sent more than 3,000 communications to the Office of the Prosecutor (OTP) on alleged crimes committed in Georgia. The OTP regularly interacts with Qatar, Egypt, Rwanda, and regional organizations such as the League of Arab States. Since 2005, the United States has followed a similar policy of constructive engagement with the ICC. The present administration is supportive, including of the opening of an investigation in Kenya. The US role is noteworthy in efforts to arrest individuals protected by militias such as Joseph Kony or to isolate others such as President Al Bashir.⁴

3. Centrality of the ICC in the UN

8. Mentions of ICC-related matters in the UN General Assembly debate are one among many indicators of ICC impact. As recommended by the Assembly of States Parties,⁵ members of the Security Council which are States Parties are also keeping ICC issues on UNSC agenda. The ICC is changing the dynamics of the UN. Secretary-General Ban Ki-Moon stated in 2007: "*The rule of law is a fundamental principle on which the United Nations was established. [...] International criminal justice, a concept based on the premise that the achievement of justice provides a firmer foundation for lasting peace, has become a defining aspect of the work of the Organization.*" His 2009 report on mediation confirms that "*ignoring the administration of justice...leads to a culture of impunity that will undermine sustainable peace. Now that the ICC has been established, mediators should make the international legal position clear to the parties. They should understand that if the jurisdiction of the ICC is established in a particular situation, then, as an independent judicial body, the Court will proceed to deal with it in accordance with the relevant provisions of the Rome Statute and the process of justice will take its course.*"⁶

³ 'United Nations Report of the Secretary-General on the work of the Organization General Assembly Official Records Sixty-second Session Supplement No. 1 (A/62/1) United Nations • New York, 2007', p.19, para 81.

⁴ US Assistant Secretary of State for African Affairs Johnnie Carson said: "*We think that President Bashir should present himself to the court to face charges*", Reuters 03/02/10.

⁵ Report on cooperation, 2007, recommendation 54 «*States Parties that are members of the Security Council should ensure that the Court's interests, needs for assistance and mandate are taken into account*».

⁶ *Enhancing Mediation and its Support Activities*, Report of the Secretary General, S/2009/189, para. 37, 8 April 2009.

4. Links with regional Organizations

9. The OTP worked with African Union (AU) mediators in Kenya, Darfur and Guinea; with the Organization of American States regarding *inter alia* Colombia. The League of Arab States was the first organization to send a mission to Darfur in 2004 and is active in efforts to solve the crisis. The League also supports the Palestinian National Authority in efforts to investigate crimes committed in the region. All EU States are States Parties, and to date they have consistently insisted on implementation of the Court's decisions.

C. Implementing the new legal framework

1. Referrals and other decisions

10. In mid-2003, the Prosecutor reported that crimes in Ituri appeared to fall within the jurisdiction of the Court. Almost 5,000 persons were killed after 1 July 2002, and the Democratic Republic of the Congo (DRC) Government recognized its inability to control the area. There were no judicial proceedings. The Prosecutor selected the DRC situation as the first to investigate, expressing his intention to use his *proprio motu* powers if necessary, but at the same time inviting the DRC to proceed with a referral, which it eventually did on March 3, 2004. Following an invitation from the Prosecutor, President Museveni of Uganda decided similarly in December 2003 to refer the situation concerning the Lord's Resistance Army. In Kenya, in November 2009, the President and the Prime Minister stressed the need to prevent the recurrence of violence during the next election cycle and expressed full commitment to cooperate with the Court, should the Prosecutor use his *proprio motu* powers.⁷ Such decisions are indicators that countries suffering from armed violence consider justice an element to achieve stability. And so did the UN Security Council on 31 March 2005, when it referred the Darfur situation to the Court "*determining that the situation in Sudan continues to constitute a threat to international peace and security.*"

2. Exclusion of impunity in peace processes

11. In 2007, in the DRC, there was talk of possible amnesties for senior commanders to encourage demobilization of armed groups. Following contacts between the OTP and the mediators, an "ICC clause" excluding amnesties for Rome Statute crimes was incorporated in the Goma Agreement of January 2008.⁸ Mathieu Ngudjolo, former leader of a militia group was arrested and transferred to the Court by the DRC authorities on 7 February 2008. Ngudjolo had agreed to be integrated into the Congolese Armed Forces and was in Kinshasa for training at the time of his arrest. Certain voices claimed that his surrender could jeopardize the ongoing demobilization. It did not. In February 2008, in the Central African Republic, a political dialogue developed under the auspices of the Geneva Centre for Humanitarian Dialogue and the UN. The amnesty issue was raised. The Prosecutor was invited to brief participants in the dialogue. In the end, the Global Peace Agreement of June 2008 excluded amnesty for war crimes, crimes against humanity and genocide.⁹

12. In Colombia, the prospect of the ICC attaining jurisdiction was explicitly mentioned by prosecutors, courts, legislators and members of the Executive Branch as an important reason to make policy choices in implementing the Justice and Peace Law, thus ensuring that

⁷ ICC/OTP, "Kenyan authorities committed to cooperate, as ICC Prosecutor informs them that in December he will request ICC Judges to open an investigation into post-election violence", 6 November 2009, <http://www.icc-cpi.int/Menu/Go?id=05573ae3-6a23-4109-ad10-89f7365dd031&lan=en-GB>

⁸ IRIN, "DR Congo: Cautious welcome for Kivu peace deal", <http://www.irinnews.org/Report.aspx?ReportId=76468>.

⁹ See UN Peacebuilding Commission, "Central African Republic Thematic meeting. Background Paper on Inclusive Political Dialogue", para. 13. <http://www.un.org/peace/peacebuilding/Country-Specific%20Configurations/Inclusive%20Political%20Dialogue.pdf>.

the main perpetrators of crimes would be prosecuted. In Kenya, former Secretary-General Kofi Annan on behalf of the AU maintained at all times that post election violence had to be prosecuted in order to avoid recurring violence during the next elections in 2012, either through mechanisms established by the Kenyans or by the ICC.¹⁰ In Guinea, after the September 2009 events of Conakry, the international community unanimously called for accountability. In a communiqué of October 12, the International Contact Group on Guinea¹¹ requested “*the establishment of an International Commission of Inquiry to investigate the 28 September 2009 gross human rights violations including the massacre of unarmed civilians and rapes, identify the culprits and prosecute them in the competent courts in Guinea or at the International Criminal Court.*” Blaise Compaoré, President of Burkina Faso and the Contact Group’s Envoy for Guinea met with an OTP delegation on 12 January 2010, hours before Dadis Camara arrived in Ouagadougou. He confirmed both the need to ensure accountability, and the fact that African states and the ICC would work together.

D. Facing the short-term tensions and integrating a “justice track” to mediation efforts

13. While each of the specific cases currently before the ICC has its particular tensions, the reality is that Rome Statute requirements of accountability form part of any lasting solutions.

14. In Northern Uganda, the international community was keen to appease Joseph Kony both before and after the ICC warrant. In contrast, Kony was only interested in impunity and repeatedly took advantage of peace talks to re-group and re-arm his forces. The impact of international justice was undermined because States and other stakeholders did not actually support accountability. Justice for mass atrocities demands universality, consistency and reliability.

15. The case against Ahmed Harun in Darfur also shows the need to integrate judicial and other efforts. For three years, the arrest warrant against Harun was ignored by mediators and political leaders as they pursued a three-track approach that included political negotiation, peacekeeping and humanitarian aid but not justice. They ignored the facts on the ground, especially Harun’s role in hindering humanitarian assistance, or his role as a member of the UNAMID oversight committee, hindering the deployment of peacekeepers. In June 2007, one month after the issuance of the warrant, the UN Security Council visited Khartoum and failed to raise the issue with the Government. In 2008, Harun intervened in Abeyi on the border between North and South Sudan and 60.000 people were displaced. For three years, the Security Council failed to remind Sudan that the referral, a decision under Chapter VII, was binding on all member States. It was not an oversight. It was a deliberate decision to sequence peace and justice, peace first, then justice. As a result, there was neither. It took an initiative by Costa Rica in June 2008 to secure a UNSC Presidential statement supporting the Court.

16. As to President Al Bashir, it is worth recalling that in 2008, before the Prosecutor’s application for an arrest warrant, there was no peace process. UN and AU envoys Jan Eliasson and Salim Salem had resigned. ICC gave new life to the negotiations. The AU and Arab League increased efforts to achieve peace, creating a committee headed by Qatar. A new UN-AU mediator was appointed. The United States, a non-State Party to the Rome Statute, took a leading role. President Al Bashir was cornered and needed to sound reasonable. His

¹⁰ See for instance Reuters, “Kenya needs reforms to avoid 2012 violence - Annan”, 31 March 2009, <http://www.reuters.com/article/latestCrisis/idUSLV509691>.

¹¹ The Group consists of ECOWAS, the African Union, the Community of Sahel-Saharan States the European Union, the Mano Union, the Organization of the Islamic Conference, La Francophonie, the UN, the Chairman of the Peace and Security Council of the AU, and the African states and permanent members of the UNSC.

government then engaged with the UN's Department of Peace-Keeping Operations more actively than at any time before and 65% of UNAMID was deployed in the following six months. His efforts to sound constructive led to renewed negotiations with the rebels and the AU-UN mediator Djibril Bassole brought the parties to the negotiating table without ever challenging ICC's independent work. Whether or not those talks eventually succeed, efforts to bring President Al Bashir to justice did not hamper peace; they may well have had a decisive role in fostering it.

E. Measuring the true impact of justice on peace and stability

17. In Annexes to this paper we offer charts with data on quantitative analysis of the deterrent effect of justice initiatives on ongoing conflicts. The following provides a qualitative analysis.

1. Preventing violence

18. In its Prosecutorial Strategy 2009-2012, the OTP commits to provide early information on its activities, to alert States and organizations of the commission of Rome Statute crimes. This policy is based on lessons learned. In November 2004, the conflict in Côte d'Ivoire moved to the brink of mass atrocities on the basis of the ethnicity or national origin of groups considered "non-Ivoirien" by the Gbagbo government. There were armed militias in the countryside, and mobs of "Jeune Patriotes" in Abidjan threatening to attack those considered non-citizens even if they had been born in the country. The air waves were filled with hate speeches. Then I, at that time Special Adviser to the Secretary-General, urged action by Kofi Annan and the Security Council, and stated publicly that, since Côte d'Ivoire had accepted the jurisdiction of the ICC in 2002, and the Statute included instigation to commit genocide as a crime under its jurisdiction, those responsible for incitement to violence could face prosecution in The Hague. My press release was widely publicized in Abidjan. After 48 hours, expressions of racial hatred in radio and TV ceased. Calm returned. It was established later that the prospect of ICC prosecution was carefully analyzed by persons in authority and their legal advisers. The conflict receded and the incident is evidence that threat of prosecution can stay the hand of perpetrators.

19. Regarding Georgia, the OTP made public statements affirming that it had jurisdiction over alleged crimes as soon as violence started in August 2008. Both parties pledged cooperation with the Court. The Office visited Georgia in November 2008 and Moscow in February 2010, following the Governments' invitations. The fact that these two countries chose law to settle the remaining issues of the 2008 conflict is an important step. In Guinea, the OTP announced on October 14, 2009 that it was monitoring allegations. Six days later, Guinea's Foreign Affairs Minister met with the OTP to offer cooperation and the Office visited Conakry in February 2010. In Kenya, the OTP stated as early as January 2008 that it had jurisdiction over alleged crimes. All actors then committed to address post-election violence and prevent recurring violence through prosecution by the ICC of those most responsible; national accountability proceedings for other perpetrators; and mechanisms of truth and reconciliation to shed light on past events.

20. Radhika Coomaraswamy, Special Representative to the Secretary General for Children in Armed Conflict, testified in early 2010 that prosecution of child recruitment had led armed groups worldwide to seek to negotiate the release of child soldiers. She said "[t]he Lubanga trial represents a crucial precedent in the fight against impunity and will have a decisive deterrent effect against perpetrators of such crimes," citing the release of 3,000 child soldiers in Nepal.

2. Marginalizing alleged criminals

21. At the time of the Dayton agreement for ex-Yugoslavia, there were pressures on ICTY to revoke the arrest warrants against Karadzic and Mladic so that they could sit at the bargaining table. There were fears that criminal prosecution would be an obstacle to a negotiated end to the conflict. In fact, the exclusion of both suspects from the talks was key to a successful outcome. Based on such experience, the ICC OTP has called on States to “*eliminate non-essential contacts with individuals subject to an arrest warrant issued by the Court, [...] contribute to the marginalization of fugitives and take steps to prevent that aid and funds meant for humanitarian purposes or peace talks are diverted for the benefit of persons subject to a warrant.*”¹²

22. In the context of Northern Uganda, the Office developed strategies to support arrest efforts and deter external supply and support to the LRA. The Office signed an agreement with the Sudanese Government to execute the LRA arrest warrants. As a consequence of this and other efforts, the LRA lost its safe haven and moved its headquarters from the Sudan to the DRC.¹³

23. President Al Bashir of the Sudan has become isolated. He cannot travel to States Parties to the Statute. South Africa informed him that, although he was invited to the inauguration of President Zuma, he would be arrested upon entry into the country. Uganda, Nigeria and Venezuela did the same. Presidents Lula of Brazil and Fernández de Kirchner of Argentina refused to approach him in an Arab-South America summit in March 2009. President Sarkozy has taken the unprecedented decision to postpone and relocate a French-African summit rather than run the risk of meeting him in a corridor. Turkey had him cancel an appearance at an Organization of the Islamic Conference meeting in Ankara.

24. In the Guinea case, Morocco, a non-State Party, refused to allow injured Guinean president Dadis Camara to remain on its territory. Morocco did not want to harbor a possible ICC suspect.

F. Conclusion

25. As Lloyd Axworthy stressed, “[...] *had there been a mechanism enabling the Security Council to block the [ICTY] prosecutor's action against Milosevic, some would have pushed for it. The argument for intervention would have been the same then as is being used now with Sudan: that justice will get in the way of peace. [...] I, and others, believe that rather than hinder negotiations, the indictment was a catalyst propelling negotiations forward. In Uganda as well, the possibility of criminal prosecution affected the dynamics of peace negotiations in an unexpected way [...] Assumptions about the effect of justice on a conflict were proven wrong again.*”¹⁴

26. The Rome system has become a reality; the full support of all of those who contributed to its birth is now more than ever essential to its growth. Firmness from State Parties and international organizations and from the Court itself will determine its long-term success. For justice to have an impact, the most important condition is that justice follows its own rules, without interference and without being subject to political considerations. Justice contributes to peace and prevention when it is not conceived as an instrument of either and on condition that it is pursued for its own sake. If the ICC is contemplated simply as a lever, it

¹² Prosecutorial Strategy 2009 – 2012, para. 48; <http://www.icc-cpi.int/Menu/Go?id=66a8dcdc-3650-4514-aa62-d229d1128f65&lan=en-GB>.

¹³ Report on the activities performed during the first three years (June 2003 - June 2006), para. 36, <http://www.icc-cpi.int/Menu/Go?id=d76a5d89-fb64-47a9-9821-725747378ab2&lan=en-GB>.

¹⁴ Lloyd Axworthy, « Good News For Sudan, » Huffington Post, 4th March 2009.

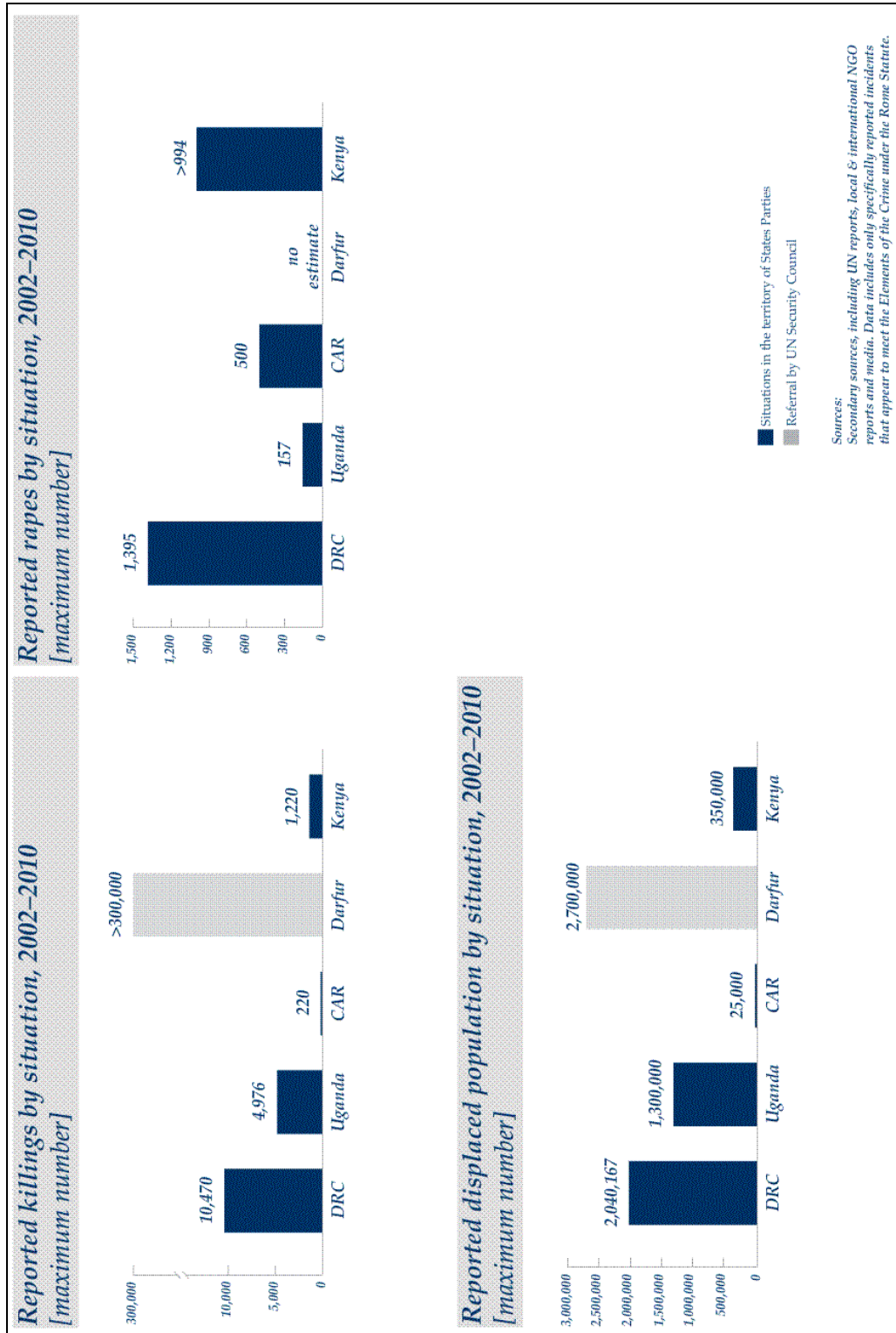
will be undermined as some will expect it to be turned on and off as political circumstances dictate. It will be too early to issue a warrant before a negotiation and too late at the end of the negotiation. Adjusting, in particular through "sequencing," would be fatal. The ICC would lose the legitimacy which is its strength, and be of little value to peace as perpetrators can also play the game of carrots and sticks. Justice contributes to peace precisely by concentrating in its own specific role, for the benefit of the victims, and for the contribution that it makes to the rule of law.

27. The impact of the ICC in deterring violence will emanate from the certainty of application of law. As commentators have observed, "*trials deter future human rights violations by increasing the perception of the possibility of costs of repression for individual state officials.*"¹⁵ Certainty regarding the investigation and prosecution of massive crimes will compromise the calculus of any leader thinking to use violence to gain or retain power. Certainty that law will be applied is the ultimate tool to ensure lasting peace.

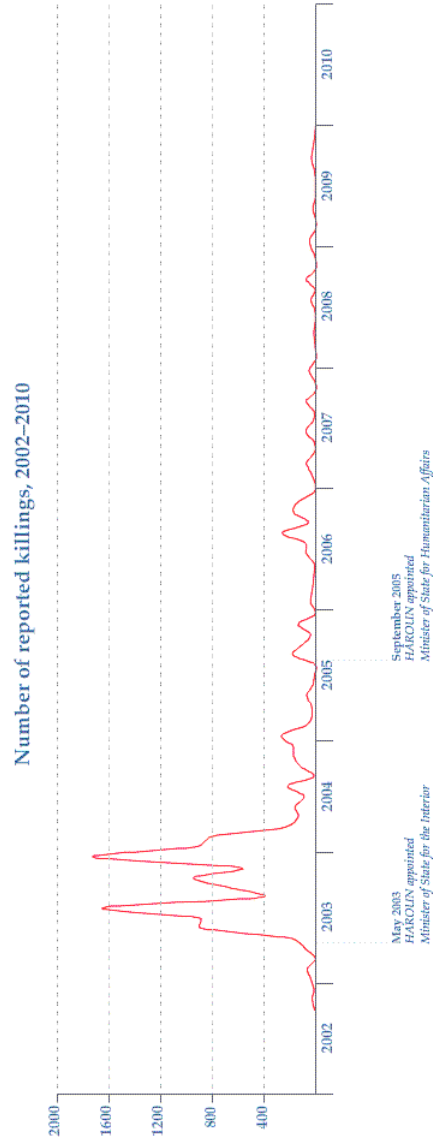
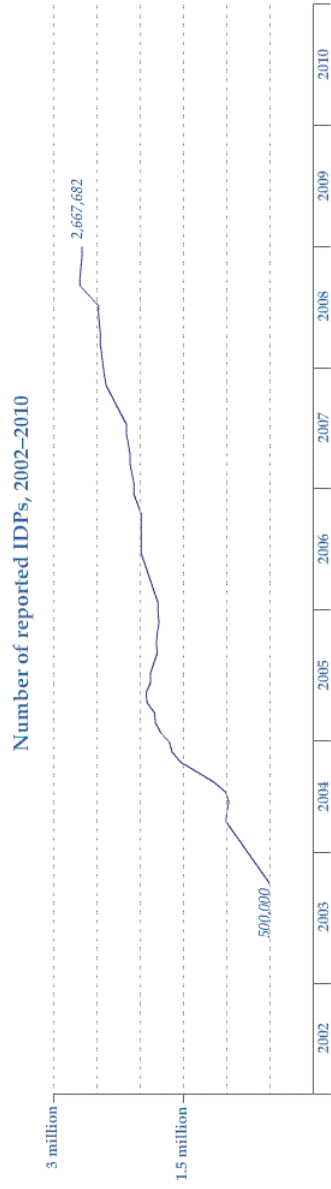
¹⁵ Hunjoon Kim and Kathryn Sikkink, *Do Human Rights Trials Make a Difference?*, American Political Science Association Annual Meeting, p. 37 (Aug. 2007).

Annex

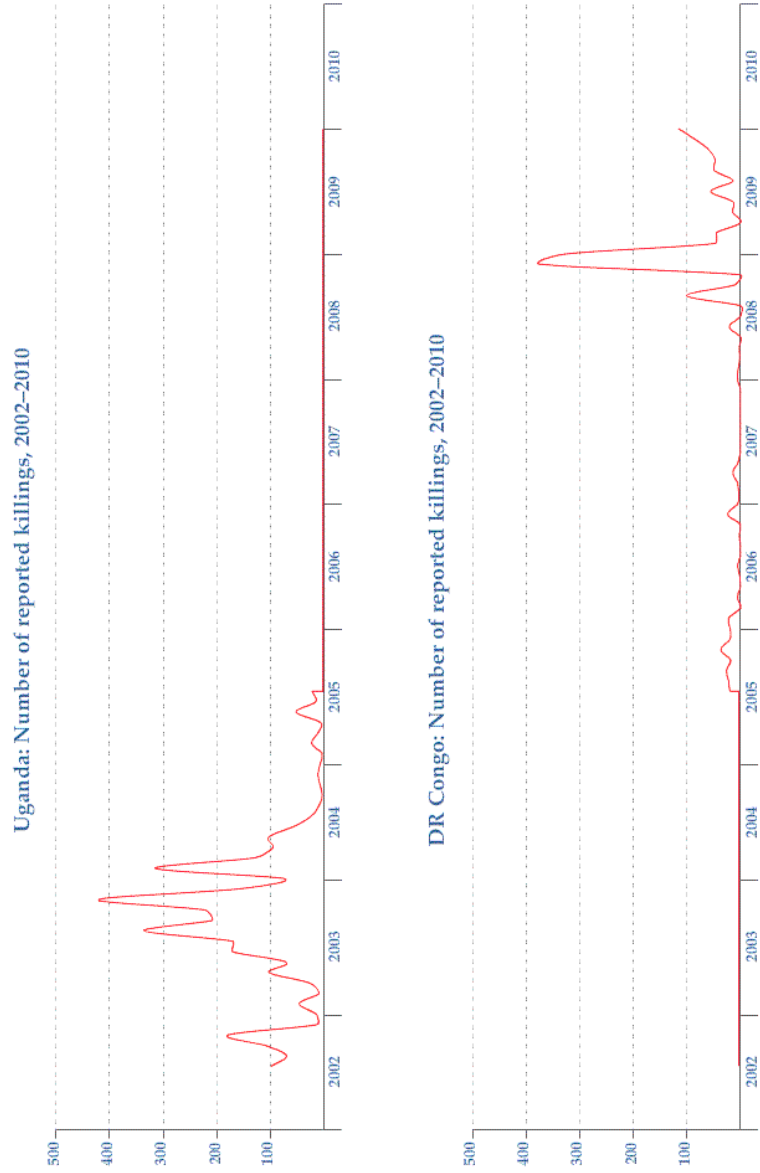
Quantitative analysis of the deterrence impact



Darfur: Total Number of Reported Killings and IDPs, 2002-2009



LRA: Total Number of Reported Killings in Northern Uganda and DR Congo, 2002-2010



DR Congo: Total Number of Reported Killings in Ituri and the Kivus, 2002-2010

