

Setting the Stage

The Justice Cascade and Darfur

How do responses to mass violence in Darfur square with theses about a justice cascade in the late twentieth and early twenty-first centuries? At issue is the massive increase in individual criminal accountability in cases of grave human rights violations. We know that the UNSC and the ICC intervened, supported by social movements, INGOs and national governments. These interventions are in line with notions of a justice cascade, its nature, and its conditions. In the following review of the judicial steps taken on Darfur and the conditions supporting them, I am also concerned with the consequences. Fighters for a justice cascade invest great hopes in deterrence through the threat of punishment, but also in the cultural effects of judicial interventions: their contribution to the construction of delegitimizing narratives about mass violence. It is these cultural effects that I am particularly concerned with. Judicial representations are, after all, based on years of investigation, on a vast variety of documents, and on witness testimony. I thus take the hopes of proponents of the justice cascade seriously but confront them with cautionary notes. Even optimists will concede that judicial representations are constrained by the limiting institutional logic through which judicial proceedings filter events on the ground and that they are challenged by competing narratives.

JUSTICE CASCADE AND THE CRIMINALIZATION OF HUMAN RIGHTS VIOLATIONS

Political and military leaders responsible for mass killings and atrocities have, through much of human history and occasionally still today, been celebrated as heroes (Giesen 2004b). We do not have to go back as far as Homer's *Iliad*, but the words of one of its "heroes," the Greek prince Agamemnon of Mycenae, are especially telling. Speaking about the Trojans to his brother Menelaus, he proclaims: "We are not going to leave a single one of them alive, down to the babies in their mothers' wombs—not even they must live. The whole people must be wiped out of existence, and no one be left to think of them and shed a tear" (quoted in Rummel 1994:45). Later, and less unambiguously celebrated, those responsible for mass violence were—and still often are—subject to denial and forgetting (Cohen 2001). Genocidal leaders have believed they can count on such forgetting, as Adolf Hitler's often cited words illustrate: "It was knowingly and wholeheartedly that Genghis Khan sent thousands of women and children to their deaths. History sees in him only the founder of a state. . . . The aim of war is not to reach definite lines, but annihilate the enemy physically. It is by this means that we shall obtain the vital living space that we need. *Who today still speaks of the massacre of the Armenians?*" (quoted in Power 2002:23).

Yet the twentieth century brought remarkable change. Legal scholar Martha Minow (1998) suggests that the century's hallmark was not the horrendous atrocities committed in its course (too many past centuries can compete), but humanity's new inventiveness and efforts toward curbing human rights violations. This is in line with, albeit more broadly conceived than, Kathryn Sikkink's (2011) argument that the late twentieth and early twenty-first centuries are characterized by a "justice cascade," that is, a massive increase in individual criminal accountability for grave human rights violations. Leaders of human rights movements express similar optimism (Neier 2012). Supporting such optimism is a very different but long-standing school of thought on the criminalization of a wide range of human behaviors. Dating back to the almost classic works of scholars such as Bill Chambliss (1964), Joe Gusfield (1967), and Austin Turk (1969), this school has recently shifted its focus from status politics as a driving force toward criminalization to processes of globalization and institutionalization: "Many scholars now . . . suggest that criminalization is best viewed as a process of institutionalization that involves the diffusion of social forms and practices across polities

comprising an interstate system” (Jenness 2004:160). What, then, is the character of this institutionalization and diffusion across polities, this justice cascade, and how does Darfur fit into the picture?

Setting the Stage for Darfur: Shape and Conditions of the Justice Cascade

In 2011, political scientist Kathryn Sikkink published her remarkable, albeit much debated, book *Justice Cascade: How Human Rights Prosecutions Are Changing World Politics*. The book, published by a commercial house, was enthusiastically welcomed by some. The Robert F. Kennedy Center for Justice and Human Rights awarded it the 2012 Robert Kennedy Book Award. Sikkink documents in this book how prosecutions against individual human rights perpetrators in domestic, foreign, and international courts increased almost exponentially in recent decades. She counts by country the number of years in which prosecutions were conducted. Values, in the single digits during much of the 1980s, rose to about one hundred by the mid-1990s, to three hundred a decade later, and then approached 450 by 2009 (Sikkink 2011:21).

Domestic justice systems drive this increase, partly because a growing number of countries have adopted international human rights norms. Their willingness is enhanced by the complementarity principle of the Rome Statute: domestic courts have primary jurisdiction as long as they are able and willing to pursue cases (Article 17). As nation-states thus operate “in the shadow” of the ICC, they prosecute cases at times specifically to keep them under their own domestic jurisdiction. Conflicts between the ICC and postrevolution Libya over the extradition of members of the Gaddafi regime are but one illustration. The adoption of the Rome Statute in 1998 and the establishment of the ICC in 2002, on the heels of a series of ad hoc tribunals (for Yugoslavia, Rwanda, Sierra Leone, Cambodia, and East Timor), document the weight of the international level of the justice cascade in its own right. Indeed, international and foreign prosecutions also increased substantially. ICC charges against those responsible for the mass violence in Darfur are the essential example in our context.

What were the sources of this remarkable development? Here, too, Sikkink (2011) provides at least preliminary answers. While not discounting the Nuremberg and Tokyo trials, orchestrated by the victorious powers of World War II, she sets the stage with more challenging cases that did not result from military defeat. Her detailed studies of

Greece (1975), Portugal (1976), Spain (1975–1978), and Argentina (1985) show that regional opportunity structures had developed by the 1970s that favored transitional justice proceedings. Examples of such structures include the creation of the European Court of Human Rights in 1959 and the foundation of Amnesty International in 1961, an organization that played a central role in the Darfur crisis and the details of which I turn to in chapter 2.

Soon after its founding, Amnesty International became actively engaged in Greece. Its activism coincided with a supportive international legal environment, and this situation advanced the launching of trials. The 1975 “Torture Declaration” was prepared concurrently with the Greek torture trials and adopted by the UN General Assembly just a few months after their conclusion. Yet, at this time, trials occurred only after “ruptured” transitions from dictatorship to democracy (Greece, Portugal, Argentina) as opposed to “pacted” transitions (Spain). By the 1990s, however, conditions had changed. Ruptured transitions were no longer a prerequisite for criminal trials against human rights violators, as the cases of Guatemala, Chile, and Uruguay illustrate. The institutionalization of the human rights regime had progressed, and the fear of blowback had diminished in light of experiences from the 1970s.

Initial steps toward human rights prosecutions eventually resulted in a decentralized, interactive system of global accountability that challenged national sovereignty. Sikkink (2011:96–125) identifies two contributors, or “streams,” to use her metaphor. The first stream is constituted by international prosecutions, from Nuremberg and Tokyo, to the International Criminal Tribunal for the former Yugoslavia (ICTY) and its Rwanda equivalent (ICTR), to the ICC with its jurisdiction over cases of aggression,¹ war crimes, crimes against humanity, and genocide. The second stream consists of domestic and foreign prosecutions such as those in Greece, Portugal, and Argentina in the mid-1970s and the Pinochet case of 1998–1999. In addition, a “hard law streambed” led from various compacts such as the Genocide Convention (1948), Geneva Convention (1949), Apartheid Convention (1980), and Torture Convention (1987), through the Inter-American Convention on Forced Disappearances (1996), to the Rome Statute (1998).

This spread of human rights initiatives, and their solidification in a system, was not simply the result of contagion. Instead, individuals, associations, transgovernmental networks penetrated by an epistemic community of criminal law experts, and NGOs such as Human Rights Watch (HRW) and Amnesty International achieved the progressive

institutionalization of individual criminal liability, that is, *criminalization* and *individualization* of international law. This focus on actors builds on earlier work in which Sikkink, in collaboration with Margaret Keck, examined advocacy in international politics. Their much cited book drew attention to transnational advocacy networks (TANs) and the engagement of TANs in information politics that tie networks together, leverage politics that shame evildoers, and accountability politics that, to hold nations accountable, “trick” them into commitments that they might enter into merely for symbolic and legitimacy reasons. The 1975 Helsinki Accord is only the most famous example (Keck and Sikkink 1998).

A tendency to privilege advocacy as a driving force of criminalization is, not surprisingly, shared by leaders of the human rights movement. Aryeh Neier, former executive director of HRW and later president of the Open Society Institute, confirms that even after the success of early truth commissions, “some in the international human rights movement continued to espouse prosecutions and criminal sanctions against those principally responsible for the most egregious offenses” (Neier 2012:264). Neier describes the role of the Italian organization No Peace Without Justice (NPWJ), but especially of Emma Bonino, an Italian politician and civil liberties campaign veteran, in the establishment of the ICC: “In the period in which the ICC was being established, Bonino was a member of the European Commission, . . . and she took advantage of her post and her contacts with heads of state to ensure the participation of high-level officials from many countries in NPWJ’s conferences. . . . The result was that by the time the conference took place in Rome—Bonino’s city—many governments were ready to support establishment of the ICC” (Neier 2012:270). Also, on the path to ratification, for which some countries had to go so far as to modify their constitutions, “[l]obbying by a number of nongovernmental organizations—including the Coalition for an International Criminal Court—played an important part” (270). Neier further highlights the role of Amnesty International (Neier 2012:55–56, 188).

Other analysts emphasize the weight of different types of actors in the establishment and spread of human rights norms. Hagan, for example, in his study of the ICTY, focuses on officials within judicial institutions, specifically successive chief prosecutors, each of whom brought a new form of “capital” to bear. All of them combined innovative strategies with established legal practices, from securing international support (Richard Goldstone), to sealed indictments and surprise arrests (Louise Arbour), to Carla del Ponte’s charges against former president Slobodan



FIGURE 2. The building housing the International Criminal Court in The Hague. Photograph © ICC-CPI.

Milošević. Innovative strategies eventually become “doxa,” Hagan argues: taken-for-granted legal standards in the emerging international criminal tribunal in The Hague.² In contrast, David Scheffer, former US ambassador and right hand of US secretary of state Madeleine Albright, highlights diplomats as crucial contributors to the establishment of international judicial institutions, from the ICTY to the ICC (Scheffer 2012).

No matter the relative weight of each of these types of actors, their interactions contributed to the passing of the Rome Statute in 1998 and the establishment of the ICC. The ICC entered into force in 2002 when sixty countries had ratified the statute. By 2013 the number of ratifying countries had more than doubled, and many—though not all—of those charged have made acquaintance with the imposing court building in The Hague (see figure 2). The continuation of this trajectory is, of course, not yet known and difficult to forecast.

Responding to Darfur in the Context of the Justice Cascade

In 2000, around the time of the formation of the ICC, disturbing events began to unfold in the Darfur region of Sudan. Activists against Sudan’s ruling elite had issued *The Black Book: Imbalance of Power and Wealth*

in Sudan. Distributed widely, especially in areas surrounding mosques after Friday prayers, the *Black Book* castigated the domination of Sudan by “only one Region (Northern Region) with just over 5% of Sudan’s population” (Seekers of Truth and Justice 2003:1). A March 22, 2004, translation, signed by “Translator,” informs us that “[a]s of last year (March 2003), some of the activists involved in the preparation of the Book took arms against the government” (Seekers of Truth and Justice 2003:1). Indeed February and March 2003 saw the formation of the Sudan Liberation Army (SLA) and the Justice and Equality Movement (JEM), two organizations that led a violent rebellion against the government of Sudan. Their armed actions were surprisingly effective. In April 2003 rebel groups attacked the Sudanese military’s el Fasher air base, destroyed numerous planes of the Sudanese air force, and killed almost one hundred soldiers. The government of Sudan and its military, supported by Janjawiid militias, responded with brute force. A first wave of mass killings unfolded between June and September 2003. Targets included not only armed rebels but primarily civilian villagers, including women, elderly men, and children. A cease-fire held only for a few months, and in December 2003 President al-Bashir vowed to “annihilate” the Darfur rebels. His vow provoked a second wave of mass killings, lasting from December 2003 through April 2004. Massive displacements of the civilian population ensued. Tens of thousands of lives were extinguished as a direct result of the violence, and many more died during the Darfuris’ flight from the violence and because of problematic conditions in displaced-person camps in Sudan and refugee camps in neighboring Chad.

Much of the Western world began to take note only after the first peak of killings (summer 2003) had subsided and when the second wave (winter 2003–2004) was under way. The first public pronouncement, a “genocide alert,” issued by the United States Holocaust Memorial Museum (USHMM) in January 2004, was followed by a series of op-ed pieces in prominent American print media; a speech before the UN General Assembly by UN Secretary-General Kofi Annan on April 7, 2004, on the occasion of the tenth anniversary of the Rwandan genocide; passage on September 18, 2004 of UNSC Resolution 1564, instituting an International Commission of Inquiry on Darfur; and the UNSC’s referral of the case of Darfur to the ICC on March 31, 2005. Parallel to UN interventions, a massive civil society movement evolved. In the United States, the Save Darfur movement gathered almost two hundred liberal and conservative organizations under its umbrella. The US Congress resolved that the violence in Darfur amounted to genocide. Secretary of

State Colin Powell initiated the famous “Atrocities Documentation Survey,” a survey of more than one thousand Darfuri refugees in the camps of Eastern Chad. Based on findings from this survey, he declared, at a hearing before the Senate Foreign Relations Committee on September 9, 2004, that genocide was being committed. President George W. Bush followed suit a few weeks later.

Importantly in our context, soon after the UNSC referred the case of Darfur to the ICC on March 31, 2005, the court took action. After almost two years of investigation, on February 27, 2007, the ICC’s chief prosecutor, Luis Moreno-Ocampo, applied for an arrest warrant against Ahmad Harun, then Sudan’s deputy minister for the interior, responsible for the “Darfur Security Desk,” and against Ali Kushayb, a Janjawid leader. Both were charged with crimes against humanity and war crimes. On April 27, 2007, the court issued a warrant for the arrest of both actors for war crimes and crimes against humanity. It took another year until the prosecutor also applied for an arrest warrant against Sudanese president Omar al-Bashir, charging him with crimes against humanity, war crimes, and genocide (July 14, 2008). The judges did not initially follow this application in its entirety, but on March 4, 2009, they issued a warrant against al-Bashir for crimes against humanity and war crimes (see figure 3). With more than a year’s delay and five years after the UNSC referral to the ICC, on July 12, 2010, the court followed up with a warrant against the president of Sudan for the crime of genocide.

The ICC thus places itself at the center of the judicial field and its engagement with the mass violence in Darfur. Its interventions clearly seek to discredit potential denial of atrocities and, certainly, glorification of those responsible for their perpetration. Consider the following statement from the initial charging document against President al-Bashir of March 4, 2009. After spelling out several conditions, the first warrant concludes as follows:

CONSIDERING that, for the above reasons, there are reasonable grounds to believe, that Omar al Bashir is criminally responsible as an indirect perpetrator, or as an indirect co-perpetrator [footnote], under article 25(3)(a) of the Statute, for (i) intentionally directing attacks at a civilian population as such or against individual civilians not taking direct part in hostilities as a war crime . . . ; (ii) pillage as a war crime . . . ; (iii) murder as a crime against humanity; (iv) extermination as a crime against humanity . . . ; (v) forcible transfer as a crime against humanity . . . ; (vi) torture as a crime against humanity . . . ; rape as a crime against humanity. . . .

CONSIDERING that, under article 58(1) of the Statute, the arrest of Omar Al Bashir appears necessary at this stage to ensure (i) that he will appear

**Cour
Pénale
Internationale**
**International
Criminal
Court**



Original: English

No.: ICC-02/05-01/09
Date: 4 March 2009

PRE-TRIAL CHAMBER I

Before: Judge Akua Kuenyehia, Presiding Judge
Judge Anita Ušacka
Judge Sylvia Steiner

SITUATION IN DAFUR, SUDAN

**IN THE CASE OF
THE PROSECUTOR v. OMAR HASSAN AHMAD AL BASHIR ("OMAR AL
BASHIR")**

Public Document

Warrant of Arrest for Omar Hassan Ahmad Al Bashir

FIGURE 3. Title page of indictment of President Omar al-Bashir.

before the Court; (ii) that he will not obstruct or endanger the ongoing investigation into the crimes for which he is allegedly responsible under the Statute; and (iii) that he will not continue with the commission of the above-mentioned crimes;

FOR THESE REASONS [THE COURT],

HEREBY ISSUES:

A WARRANT OF ARREST FOR OMAR AL BASHIR, a male, who is a national of the State of Sudan, born on 1 January 1944 in Hoshe Bannaga, Shendi

Governorate, in the Sudan, member of the Jaáli tribe of Northern Sudan, President of the Republic of the Sudan since his appointment by the RCC-NS on 16 October 1993 and elected as such successively since 1 April 1996 and whose name is also spelt Omar al-Bashir, Omer Hassan Ahmed El Bashire, Omar al-Bashir, Omar al-Beshir, Omar el-Bashir, Omer Albasheer, Omar Elbashir and Omar Hassan Ahmad el-Béshir.

Done in English, Arabic and French, the English version being authoritative.³

Not only did the court issue this warrant, but through its press offices, it also sought to disseminate it to a broad public.⁴ My analysis shows that media from across the globe, at least in the sample of countries included in our analysis, responded to the indictment and communicated its message to a world audience: the depiction of President al-Bashir as a criminal perpetrator. The chances that media would present crime frames to display violence increased with several of the court's interventions (see chapter 9; Savelsberg and Nyseth Brehm 2015).

In short, civil society, INGOs, TANs, national governments, the UN, and the ICC acted to criminalize the violence of Darfur and to initiate a legal case. Darfur thus took its rightful place in the context of the justice cascade. The driving forces were the same as those the literature has identified in other cases. But what were the consequences? What expectations were invested in the justice cascade, and how did they materialize in the case of Darfur?

CONSEQUENCES OF THE JUSTICE CASCADE: BETWEEN HOPE AND CAUTIONARY NOTES

Scholars as well as movement actors and practitioners anticipate consequences of the justice cascade with substantial optimism. Darfur provides one case with which to examine the foundation of this optimism. Sikkink (2011) herself draws hope from her Transitional Trial Data Set, an impressive collection of data on a large number of transitional justice situations. Her statistical analyses suggest, cautiously worded, that prosecutions of human rights perpetrators, including high-level actors, while achieving retribution, do not systematically produce counterproductive consequences as some critics have suggested. They may in fact advance later human rights and democracy records, especially in situations where trials are accompanied by truth commissions (Kim and Sikkink 2010).⁵ Observations by practitioners support such findings. Neier (2012), for example, notes, "The fact that international humanitarian law has now been enforced through criminal sanctions that the various

tribunals have imposed on hundreds of high-ranking military officials, guerilla leaders, civilian officials, and heads of government has contributed immensely to awareness of the rules for the conduct of warfare and for the seriousness with which they must be regarded” (132).

Others challenge such optimism (Goldsmith and Krasner 2003; Snyder and Vinjamuri 2003–2004; Pensky 2008). Most recently, Osiel (2014), while expressing sympathy with the idea of international criminal justice, declares that “international criminal law is unlikely to endure as anything more than an intermittent occasion for staging splashy, eye-catching degradation rituals, feel-good spectacles of good will toward men.” He points to the absence of the world’s largest powers from among the countries supporting the Rome Statute, power politics in the UNSC (consider Syria in the early 2010s), the risks of coups d’état when nations prosecute past ruling juntas or dictators, partisan case selections in posttransitional justice proceedings, and the risk of “victors’ justice.”⁶ Others highlight the risk that one-sided memories of victimization and a competition for victim status—both potential outcomes of flawed transitional justice—may in fact propel cycles of violence (Barkan 2013).

It is easy to sympathize with both sides of the dispute. Both the criminalization of human rights offenses and the internationalization of criminal human rights law are in their infancy, and it is hard to forecast their future. But we can put theory and empirical work to use and apply to our scholarship Max Weber’s advice to those involved in politics: engage in the drilling of hard boards with passion and sound judgment. It is in this spirit that I examine the effect of criminal justice intervention, specifically its cultural effects: the representations of mass violence in the case of Darfur.

From Broad Expectations to the Role of Collective Representations and Memories

The construction of delegitimizing representations of mass violence is one of two potential mechanisms through which criminal proceedings may contribute to improved human rights records. The other mechanism, deterrence, combines a notion of political and military figures as rational actors with an understanding that an increase in the risk of prosecution and punishment from zero to at least modest levels may reduce the inclination to commit future crimes. Support with regard less to the severity than to the likelihood of punishment comes from criminological research (e.g., McCarthy 2002; Matsueda, Kreager, and Huizinga 2006).

But even for deterrence to work, memories of past sanctions must be ingrained in the minds of future cohorts of political and military actors. Past sanctions must become part of the collective memory they share.

The cultural argument may thus be more powerful: a socialization mechanism, not just as a precondition of deterrence but as a force in its own right. Building on a recent line of scholarship, this argument posits that collective memories created by criminal proceedings against human rights offenders potentially delegitimize grave violations, thus reducing the likelihood of their recurrence. Potential violations may no longer even appear on the decision tree of rational actors.

Expectations of criminal law's delegitimizing functions are grounded in classic writings (Mead 1918) and supported by a new line of neo-Durkheimian work in cultural sociology. Here criminal punishment is interpreted as a didactic exercise, a "speech act in which society talks to itself about its moral identity" (P. Smith 2008:16). The potential weight of this mechanism for our theme becomes clear if indeed the IMT in Nuremberg and the Universal Declaration of Human Rights initiated the extension of the Holocaust and psychological identification with its victims, as Jeffrey Alexander (2004a) argues for the memory of the Holocaust. Judicial events such as Nuremberg, the Eichmann trial in Jerusalem, or the Frankfurt Auschwitz Trial produced cultural trauma: members of a world audience were affected by an experience to which they themselves had not been exposed.

Empirical research by historians and sociologists shows that criminal trials have the capacity to color not just narratives of recent events but also the collective memory of a more distant past in the minds of subsequent generations (Savelsberg and King 2011). Once generated, delegitimizing memories—in a positive feedback loop—further promote human rights standards. This notion is consistent with Daniel Levy and Natan Sznaider insight that "[t]he global proliferation of human rights norms is driven by the public and frequently ritualistic attention to memories of their persistent violations" (Levy and Sznaider 2010:4).

Scholarly expectations are in line with hopes of those practitioners who, long before the take-off of the justice cascade, expected much from criminal tribunals against perpetrators of grave human rights crimes. Consider Justice Robert Jackson, the American chief prosecutor at the IMT in Nuremberg, who famously argued: "Unless we write the record of this movement with clarity and precision, we cannot blame the future if in days of peace it finds incredible the accusatory generalities uttered during the war. *We must establish incredible events*

by credible evidence” (quoted in Landsman 2005:6–7; my emphasis). President Franklin Delano Roosevelt thought along similar lines. As his confidant Judge Samuel Rosenman noted: “[Roosevelt] was determined that the question of Hitler’s guilt—and the guilt of his gangsters—must not be left open to future debate. The whole nauseating matter should be spread out on a permanent record under oath by witnesses and with all the written documents” (in Landsman 2005:6). Here Justice Jackson and President Roosevelt add a history-writing or collective memory function to the common functions of criminal trials, a truly innovative step. While some of the authors cited above might support these practitioners’ hopes, others raise doubts.

A Cautionary Note: Institutional Logic, Knowledge Construction, and Representations

Reasons to caution the optimists abound. Critics are right when they argue that power relations often matter more in the international community than legal norms. Suspected perpetrators continue to hold on to power. In the Darfur case, Sudan’s President Omar al-Bashir is still in power in 2015, after having been indicted for genocide years ago. They even find signs of appeasement from the international community for a number of reasons. Al-Bashir, for example, initially appeared to hold the key for an agreement that was to end the long and bloody war between the North and the South of Sudan. One of my interviewees, responsible for the Sudan desk in the foreign ministry of a large European country, stated: “The essential key to peace in the region is the inclusion of the regime in Khartoum in the peace process, its liberation from international isolation, combined with respective incentives, which then will have to be kept by the international community” (author’s translation). In addition, Western powers saw in al-Bashir an ally in the fight against terrorism (Hagan and Rymond-Richmond 2008:85–93).

Al-Bashir’s NCP ally Ahmed Harun, himself indicted by the ICC for war crimes and crimes against humanity, was nominated and elected governor of South Kordofan, a conflicted state along the border of South Sudan. Building on his track record in Darfur, he there appears to be repeating some of the bloody practices against potential allies of South Sudan, no matter the death toll among civilians. While actors such as al-Bashir and Harun may no longer travel freely abroad, and while resulting restrictions may weaken their base in Sudan—despite well-orchestrated demonstrations in support of al-Bashir, in response to

his indictment—they have been holding on to power. The ICC prosecutor can only hope to see them as defendants in court on some future day (see the postscript on the most recent developments).

But even if the constraints of power could be broken, the construction of a damning narrative in the global collective conscience faces restraints in its own right. They include divisions within the field of criminal law and justice, conflicts across fields, and tensions arising from the involvement of global versus national or local actors. All of these difficulties are discussed for the case of Darfur in following chapters, but here I first turn to one crucial constraint: limitations imposed on historical narratives by the specific institutional logic of criminal law. I consider the arguments and illustrate them with documents from the pre-legal and legal process on Darfur.

History told by criminal proceedings, and the collective memories they shape, differs from those produced by actors in fields such as scholarship or journalism or by executive commissions.⁷ Criminal law, after all, is subject to a particular set of institutional rules. These rules become part of the habitus of practitioners in the field. They function as filters through which legal actors interpret the world: in order to function successfully, actors have to incorporate into their habitus their field's dominant institutional logic. What, then, are the constraints of criminal law?

First, criminal law focuses on individuals. Social scientists, by contrast, would also consider social structure and broad cultural patterns as precursors of mass violence. Second, criminal law—the most violent and intrusive among all types of law—is rightly constrained by specific evidentiary rules, at least under rule-of-law conditions. Evidence that historians or journalists might use would often be inadmissible in a criminal court. Third, criminal law is constrained by particular classifications of actors, offenses, and victimization. It may be blind, for example, to the role played by bystanders whom guardians of moral order would want to implicate. Fourth, criminal law applies a binary logic. Defendants are found guilty or not guilty. Social psychologists would apply more differentiated categories, and philosophers, historians, and even some victims see “gray zones” among perpetrators and victims (Levi 1988; Barkan 2013).

Wise jurists are aware of the limits of criminal law as a place for the reconstruction of history. Such wisdom is reflected in the words of the judges of the Jerusalem court in its 1961 proceedings against Adolf Eichmann, key organizer of the Nazi annihilation machine:

The Court does not possess the facilities required for investigating general questions. . . . For example, to describe the historical background of the

catastrophe, a great mass of documents and evidence has been submitted to us, collected most painstakingly and certainly out of a genuine desire to delineate as complete a picture as possible. Even so, all the material is but a tiny fraction of the existent sources on the subject. . . . As for questions of principle which are outside the realm of law, no one has made us judges of them and therefore our opinion on them carries no greater weight than that of any other person who has devoted study and thought to these questions. (quoted in Osiel 1997:80–81)⁸

Social theorists and empirical researchers confirm these concerns. In discussing cultural trauma, the collective memory of horrendous events, Alexander (2004b) spells out several preconditions for such trauma to emerge: claims-making by agents; carrier groups of the trauma process; speech acts, in which carrier groups address an audience in a specific situation, seeking to project the trauma claim to the audience; and cultural classifications regarding the nature of the pain, the nature of the victim, the relation of the trauma victim to the wider audience, and the attribution of responsibility. Alexander observes that linguistic action, through which the master narrative of social suffering is created, is mediated by the nature of institutional arenas that contribute to it. Clearly, some claims can be better expressed in legal proceedings than others, which will forever remain, adapting Franz Kafka's famous words, before the law. Some carrier groups have easier access to law (on the privileged position of "repeat players," see Galanter 1974). Further, some classifications of perpetrators, victims, and suffering are more compatible with those of the law than others. In its construction of the past, the kind of truth it speaks, the knowledge it produces, and the collective memory to which it contributes the law is thus always selective.

Empirical research confirms such selectivities of criminal law. *The Limits of the Law* is the subtitle of historian Devin Pendas's famous book *The Frankfurt Auschwitz Trial, 1963–65* (2006). Without losing sight of the political context and extrajudicial forces at work in this trial against twenty-two former functionaries of the most murderous annihilation camp, Pendas takes "law on the books" seriously even while studying "law in action." He is right as the former may, directly or indirectly, affect the "social structure of the case" (Black 1993), providing the strategic frame within which actors apply tactics to advance their goals.

The Frankfurt trial, for example, faced several legal constraints. First, the German government had annulled the occupation (Control Council) law in 1956 with its criminal categories such as "crimes against humanity" and its sentencing guidelines (including the death penalty).

Second, the German Basic Law, while acknowledging the supremacy of international law, prohibited *ex post facto* prosecutions. “Genocide” could be prosecuted only for future cases. Third, the Frankfurt court thus relied on standard German criminal law, created with crimes in mind that differed radically from those committed in the context of the organized annihilation machinery of Nazi Germany. This law was limited by its strict Kantian focus on subjective intent and its distinction between perpetrator and accomplice (the latter considered a tool rather than an autonomous actor in the execution of the crime). This type of law, Pendas shows, was ill suited for confronting the complex nature and organizational context of the crimes committed at Auschwitz, especially the systematic annihilation of millions. Instead, prosecution was successful in particular cases of especially atrocious actions, such as brutal acts of torture during interrogations, in which malicious intent could be documented and in which defendants could not present themselves as tools of the will of others. We might thus suggest that Pendas had referred, in his subtitle, to the limits of *German* criminal law, were it not for research by scholars such as Michael Marrus (2008), who documents similar limitations for the Nuremberg “Doctors’ Trial,” conducted by American authorities under occupation law. Here, too, particularly atrocious practices came more to light than did institution-alized ideas of the medical profession or routine practices of physicians that provided the foundation for human “experiments.”

Legal constraints thus limited not only the Frankfurt trial’s representational but also its juridical functions. They frustrated the pedagogical intent with which Fritz Bauer, prosecutor general of the state of Hessen, had advanced these collective proceedings. Inspired by the 1961 Eichmann trial in Jerusalem, he sought a large, historical trial that would stir the collective conscience, increase awareness, and instill in Germans’ collective memory the horrific nature of the Nazi crimes. He partly succeeded, but only within the limits of the law, which directed attention to those lone actors who had engaged in particularly excessive cruelty beyond the directives under which they worked in Auschwitz. While Nazi crimes were thereby put on public and terrifying display, the trial did little harm to the “accomplices” who ran the machinery of mass killing. And it paradoxically helped Germans to distance themselves from the crimes of the Holocaust. Perpetration appeared, in the logic of the Auschwitz trial, either as the outgrowth of sick minds or as executed in the context of the machinery set up by the Nazi leadership, in which ordinary Germans acted without or even against their own

will. The German case thus illustrates with particular clarity what Bernhard Giesen (2004b) elsewhere has called the “decoupling” function of criminal law.

In short, criminal law faces limits to its history writing and collective memory-forming missions. These limits result in part from its institutional logic: its focus on the behavior of individuals, consideration of only a limited set of behaviors, the constraints imposed by rules of evidence, and its binary logic and exclusionary intent. Each of these features has consequences for narratives that result from legal procedures, and, through them, for the formation of collective memory. These constraints are visible in pre-legal and legal documents on Darfur. Later chapters examine how this logic of criminal law corresponds with that of news media, with which it shares a focus on individuals, dramatic events, and a tendency to distinguish starkly between good and evil. Consequences for the collective representation of mass violence are substantial.

Constructing the Darfur Narrative through the Lens of Criminal Law and Justice

Initial warnings regarding horrific events unfolding in Darfur were included in a December 2003 confidential memo by Tom Eric Vraalsen, the UN special envoy for humanitarian affairs in Darfur, to Jan Egeland, the UN emergency relief coordinator. Vraalsen reported that “‘delivery of humanitarian assistance to populations in need is hampered mostly by *systematically denied access*. While [Khartoum’s] authorities claim unimpeded access, they greatly restrict access to the areas under their control, while imposing blanket denial to all rebel-held areas’—that is, areas overwhelmingly populated by the African Fur, Zaghawa, and Massalit peoples” (cited in Reeves 2013; emphasis in original).

Official pronouncements by the United Nations followed initial journalistic efforts in early 2004 by college professor Eric Reeves and *New York Times* op-ed writer Nicholas Kristof. They began with Secretary-General Kofi Annan’s April 7, 2004, speech before the UN General Assembly, held on the occasion of the tenth anniversary of the Rwandan genocide. The “action plan” Annan called for demanded:

swift and decisive action when, despite all our efforts, we learn that genocide is happening, or about to happen. . . . In this connection, let me say here and now that I share the grave concern expressed last week by eight independent experts . . . at the scale of reported human rights abuses and at

the humanitarian crisis unfolding in Darfur, Sudan. Last Friday, the United Nations Emergency Relief Coordinator reported to the Security Council that “a sequence of deliberate actions has been observed that seem aimed at achieving a specific objective: the forcible and long-term displacement of the targeted communities, which may also be termed ‘ethnic cleansing.’” His assessment was based on reports from our international staff on the ground in Darfur, who have witnessed first-hand what is happening there, and from my own Special Envoy for Humanitarian Affairs in Sudan, Ambassador Vraalsen, who has visited Darfur. (Annan 2004)

Annan’s speech, coinciding with the peak of the second wave of mass violence in Darfur, was followed by now well known UN actions. On September 18, 2004, the UNSC adopted Resolution 1564. This resolution threatened to sanction the Sudanese government should it fail to live up to its obligations on Darfur. It also established the International Commission of Inquiry on Darfur (ICID) to investigate violations of human rights in Darfur and invoked, for the first time in history toward such purpose, the Convention for the Prevention and Punishment of the Crime of Genocide (Genocide Convention). The resolution, sponsored by Germany, Romania, the United Kingdom, and the United States, was adopted by eleven votes in favor, no objections to the resolution, and four abstentions (Algeria, China, Pakistan, and Russia). As nation-states and their governments are the constituent members and thus the crucial actors of the organization, their economic and strategic interests and cultural sensitivities are important determinants of the path the UN follows. I discuss some of the countries cited here in greater detail throughout this book.

Soon after Resolution 1564 passed, in October 2004, Secretary-General Annan appointed commissioners to the ICID, which began its work on October 25, 2004. In line with the resolution, the commission was charged “‘to investigate reports of violations of international humanitarian law and human rights law in Darfur by all parties’; ‘to determine also whether or not acts of genocide have occurred’; and ‘to identify the perpetrators of such violations’ ‘with a view to ensuring that those responsible are held accountable’” (ICID 2005:9). Clearly, the mandate was framed in the terms of criminal law, specifically international humanitarian and human rights law. The selection of commission members, in terms of their educational backgrounds, careers, and positions, further solidified the placement of the Darfur issue in the field of criminal law and justice. The ICID consisted of five members whose short bios, describing their positions at the time of appointment, appear in its report (ICID 2005:165–166). The commission chair was

the late Antonio Cassese from Italy. A renowned law professor, Cassese had published prominently on issues of international human rights law and international criminal law. Previously, he had served as the first president of the ICTY. Mohamed Fayek, from Egypt, is a former minister in his country's government and secretary-general of the Arab Organization for Human Rights, an NGO. Hina Jilani, from Pakistan, had served as a special representative of the UN secretary-general on human rights defenders and as secretary-general of the Human Rights Commission of Pakistan. She was then a member of the District Court and Supreme Court Bar Association in Egypt. Dumisa Ntsebeza, from South Africa, served as a commissioner on the Truth and Reconciliation Commission of his country. He led that commission's Investigatory Unit and was head of its witness protection program. Ntsebeza was an Advocate of the High Court of South Africa and a member of the Cape Bar. Finally, Therese Striggnier-Scott from Ghana was a barrister and principal partner with a legal consulting firm in Accra. She served on her country's High Court, as an ambassador to France and Italy, and as a member of the "Goldstone Commission," which had investigated public violence and intimidation in South Africa. In short, the ICID was dominated by members from the Global South with a background in law, especially international human rights law and international criminal law. Three of its five members were from the African continent.

The commission was supported by an investigative team that included forensics experts, military analysts, and investigators with expertise in gender violence. It traveled to Sudan and the three Darfur states, met with the government of Sudan and with government officials at the state and local levels (for a mixed assessment of government cooperativeness, see ICID 2005:15–16), met with military and police, rebel forces and tribal leaders, displaced persons, victims and witnesses, and NGO and UN representatives, and it examined reports issued by governments, intergovernmental organizations, UN bodies, and NGOs (2–3). Many of these actors are identified above as the driving forces behind the justice cascade. Here they provide evidence in the examination of criminal wrongdoing in a specific case.

On January 25, 2005, three months after its constitution, the commission delivered a 176-page single-spaced report to the UN secretary-general (ICID 2005). Ten pages of the text are devoted to "the historical and social background" of the conflict (17–26). There we learn about those social forces we encounter elsewhere in much of the historical and social science literature on Darfur: demographics of Sudan and Darfur;

colonial rule, including the incorporation of the Sultanate of Darfur into Sudan during British rule; fluctuations between military regimes and democratic rule after independence; the 1989 coup by Omar al-Bashir; internal power struggles; the North-South war and the Comprehensive Peace Agreement (CPA); the land tenure system and conflict over land; a history of intermarriage and socioeconomic interconnectedness between tribes, but an intensification of tribal identifications under conditions of conflict; desertification and growing struggles for resources, especially between agriculturalists and nomadic groups; devaluation of traditional law, once a potent tool for settling land disputes; an influx of weapons from neighboring countries; the emergence of the Arab Gathering, an alliance of Arabic tribes, and of the African Belt, composed of members of the Fur in the 1980s; the emergence of the Sudan Liberation Movement/Army (SLM/A) and the Justice and Equality Movement (JEM), the former inspired by the *new Sudan* policy of the South Sudanese SLM/A, the latter by trends in political Islam; militant activities by these groups; the government's shortage of military resources due to the civil war in the South, its resort to exploiting tensions between different tribal groups, and its equipping of mostly Arabic nomadic groups with ideological and material support, thus laying the foundation for the "Janjaweed" militias (named by "a traditional Darfurian term denoting an armed bandit or outlaw on horse or on camel" [ICID 2005:24]); and previous unsuccessful efforts at finding a peaceful solution.

Obviously, ten pages of text allow very little space to discuss each of these many factors. Correspondingly, all of these factors are irrelevant in light of the ICID's mission, cast in terms of criminal law and justice and constituting part of the justice cascade. Indeed, throughout the report, the commission strictly follows the legal logic. It categorizes actors ("1. Government Armed Forces"; "2. Government supported and/or controlled militias—The Janjaweed"; "3. Rebel movement groups" [ICID 2005:27–39]), spells out the legal rules binding on the government of Sudan and on the rebel groups, identifies categories of international crimes, and associates available and legally relevant evidence with those legal concepts (ICID 2005:40–107). In summarizing its findings, the ICID first speaks to the *actus reus* with regard to "[v]iolations of international human rights law and international humanitarian law:"

The Commission took as the starting point for its work two irrefutable facts regarding the situation in Darfur. Firstly, according to United Nations estimates there are 1[.]65 million internally displaced persons in Darfur, and more than 200,000 refugees from Darfur in neighbouring Chad.

Secondly, there has been large-scale destruction of villages throughout the three states of Darfur. The Commission conducted independent investigations to establish additional facts and gathered extensive information on multiple incidents of violations affecting villages, towns and other locations across North, South and West Darfur. The conclusions of the Commission are based on the evaluation of the facts gathered or verified through its investigations. (3)

Having thus summarized the facts on the ground—as established by multiple actors, including the UN, its suborganizations, and NGOs, and supplemented by the commission’s own investigation—the report proceeds to link this evidence to the legal categories of the Rome Statute, and concludes:

Based on a thorough analysis of the information gathered in the course of its investigations, the Commission established that the Government of the Sudan and the Janjaweed are responsible for serious violations of international human rights and humanitarian law amounting to crimes under international law. In particular, the Commission found that Government forces and militias conducted indiscriminate attacks, including killing of civilians, torture, enforced disappearances, destruction of villages, rape and other forms of sexual violence, pillaging and forced displacement, throughout Darfur. These acts were conducted on a widespread and systematic basis, and therefore may amount to crimes against humanity. The extensive destruction and displacement have resulted in a loss of livelihood and means of survival for countless women, men and children. In addition to the large scale attacks, many people have been arrested and detained, and many have been held incommunicado for prolonged periods and tortured. The vast majority of the victims of all of these violations have been from the Fur, Zaghawa, Massalit, Jebel, Aranga and other so-called “African” tribes. (3)

By identifying the acts of violence as “widespread and systematic,” the ICID determines that they amount to crimes against humanity, as defined in the Rome Statute, and thus fall under the jurisdiction of the ICC. The ICID thereby lays the ground for its recommendation to the UNSC that the case be referred to that court.

Simultaneously, mindful that the violence in Darfur may be interpreted differently, the commission seeks to preempt potential challenges:

In their discussions with the Commission, Government of the Sudan officials stated that any attacks carried out by Government armed forces in Darfur were for counter-insurgency purposes and were conducted on the basis of military imperatives. However, it is clear from the Commission’s findings that most attacks were deliberately and indiscriminately directed against civilians. Moreover, even if rebels, or persons supporting rebels, were present in some of the villages—which the Commission considers likely in only a

very small number of instances—the attackers did not take precautions to enable civilians to leave the villages or otherwise be shielded from attack. Even where rebels may have been present in villages, the impact of the attacks on civilians shows that the use of military force was manifestly disproportionate to any threat posed by the rebels. (3)

The Commission obviously seeks to challenge a counternarrative based on an insurgency and counterinsurgency frame and proposed by the government of Sudan. By not referencing early attacks by the SLA and the JEM against institutions of the Sudanese state, the commission plays down the insurgency part of the history of the unfolding violence. Yet the evidence to challenge the (counter)insurgency frame seems readily at hand: a counterinsurgency would have been directed against militants, whereas, according to the commission's evidence, civilians were the targets. Further, should militants or members of rebel groups have hidden among the civilian population, the military would have been obliged to protect civilians in the ensuing fighting.

The commission nevertheless follows its mandate to also assess the involvement of rebel groups: “While the Commission did not find a systematic or a widespread pattern to these violations, it found credible evidence that rebel forces, namely members of the SLA and JEM, also are responsible for serious violations of international human rights and humanitarian law which may amount to war crimes. In particular, these violations include cases of murder of civilians and pillage” (4).

The quotations offered here summarize the commission's work. They reflect a report that spells out a series of behaviors by the Sudanese government and its associates and by rebels that constitute crimes based on norms of international criminal law and on the available, legally relevant evidence.

Finally, while major parts of the report refer to organizational actors such as the government of Sudan, militias, or rebel groups, the ICID eventually follows the logic of criminal law also by attributing responsibility to individuals. It does so in a later section of the report, “Identification of Perpetrators”:

Those identified as possibly responsible for the above-mentioned violations consist of individual perpetrators, including officials of the Government of Sudan, members of militia forces, members of rebel groups, and certain foreign army officers acting in their personal capacity. Some Government officials, as well as members of militia forces, have also been named as possibly responsible for joint criminal enterprise to commit international crimes. . . . The Commission also has identified a number of senior

Government officials and military commanders who may be responsible, under the notion of superior (or command) responsibility, for knowingly failing to prevent or repress the perpetration of crimes. Members of rebel groups are named as suspected of participating in a joint criminal enterprise to commit international crimes. (4–5)

Not only does this segment of the report follow the individualizing logic of criminal law, but the commission also employs legal concepts, developed and refined in the history of international criminal law, in order to establish the criminal responsibility of individuals who acted in complex organizational contexts. “Command responsibility” seeks to prevent those from washing their hands of guilt who delegate the dirty work to others, lower in the organizational hierarchy. Further, in an effort to identify individuals as potential criminal perpetrators who acted in the context of complex organizations, the report applies the notion of joint criminal enterprise. This term, which appears twice in the report, developed out of the concept of conspiracy in American criminal law.⁹ First developed in the United States in the fight against organized crime, the concept mutated into “criminal organization” in the London Charter of 1943, on which the Nuremberg tribunal was based, and into “joint criminal enterprise” in the ICTY’s proceedings (Meierhenrich 2006). In addition to illustrating the application of concepts from international criminal law, this excursus into legal history illustrates how the global is constituted from below, in this case from the law of the United States (see Fourcade and Savelsberg 2006).

One more section from the ICID report merits lengthy quotation as it speaks to legal rules of evidence and as it became the center of some of the fiercest debates in the narratives on Darfur. Consider the following passage on the question “Have acts of genocide occurred?”

The Commission concluded that the Government of the Sudan has not pursued a policy of genocide. Arguably, two elements of genocide might be deduced from the gross violations of human rights perpetrated by Government forces and the militias under their control. These two elements are, first, the *actus reus* consisting of killing, or causing serious bodily or mental harm, or deliberately inflicting conditions of life likely to bring about physical destruction; and, second, on the basis of a subjective standard, the existence of a protected group being targeted by the authors of criminal conduct. However, the crucial element of genocidal intent appears to be missing, at least as far as the central Government authorities are concerned. Generally speaking, the policy of attacking, killing and forcibly displacing members of some tribes does not evince a specific intent to annihilate, in whole or in part, a group distinguished on racial, ethnic, national or religious grounds.

Rather, it would seem that those who planned and organized attacks on villages pursued the intent to drive the victims from their homes, primarily for purposes of counter-insurgency warfare. (4)

It is noteworthy that the commission here applies the notion of counterinsurgency that it rejects elsewhere in the report (see above). More important, the authors are torn when they apply, in this context, the criteria of the Convention for the Prevention and Punishment of the Crime of Genocide (Genocide Convention): “The Commission does recognise that in some instances individuals, including Government officials, may commit acts with genocidal intent. Whether this was the case in Darfur, however, is a determination that only a competent court can make on a case by case basis” (p. 4).

It is at least conceivable that, in the deliberation on the applicability of “genocide,” political concerns intruded upon the ICID’s strict application of legal logic. Such intrusion is not uncommon when crimes of a highly political nature are concerned. But why does the commission show such caution regarding the symbolically highly loaded notion of genocide when its reference to “a competent court” that alone can make a final (legal) determination applies to statements about war crimes and crimes against humanity as well? The reason likely lies in the kinds of voices I cite above, and to which I return in detail below: statements by foreign policy makers that urged against potential provocations of the government of Sudan and its leadership at a time when diplomats hoped for their cooperation in the North-South peace process and in the referendum over the independence of South Sudan.

The same tension observed here for the ICID later plagued the ICC when the case of Darfur was added to its docket. Based on the ICID report, the UNSC referred the case of Darfur to the ICC on March 31, 2005. And the ICC acted, adding the case of Darfur to Sikkink’s “first stream” of the justice cascade—namely, international prosecutions—while simultaneously mobilizing what Sikkink calls the “streambed” of new judicial institutions, here specifically the Rome Statute. The court’s first chief prosecutor, Luis Moreno-Ocampo, investigated the case and began his series of prosecutorial decisions against Ahmad Harun, Ali Kushayb, and President Omar al-Bashir, as described above.

In short, the ICC is now placed at the center of the judicial field in response to the mass violence in Darfur. In this case, and generally, the court is exposed to tensions well known from domestic criminal law, conflicts to which I turn next.

Conflicts within International Criminal Law and Justice

As institutions of international criminal law involve different professional groups, and as they are exposed to a highly political environment that they often cannot disregard, internal conflict is unavoidable. Within the ICC conflicting reasoning has been detected between lawyers and technocrats (Meierhenrich 2014; for other legal institutions, see Stryker 1989), reflecting the tension between a formal and a more substantive orientation of law that pervades international even more than domestic criminal law.¹⁰ On the one side of the dividing line is law's formal rationality, oriented toward a system of legal criteria alone. Codifications such as the Rome Statute have indeed laid the groundwork for the pursuit of legal rationales, beginning to revolutionize a world in which foreign affairs were subject to political reasoning alone.¹¹ Some legal philosophers in fact argue that international criminal justice and human rights law can secure legitimacy in the long run only through strict adherence to formal legal criteria and abstinence from political rationales (Fichtelberg 2005).

Yet the court has to work against strong contenders, as the space granted the law has not been fully conceded among foreign policy makers. The words of one of my interviewees illustrate this lack of acceptance. This respondent, from the foreign ministry of a major European country, who specialized on issues of the ICC within his ministry's Division of International Law and represented his country in the Assembly of States, expressed his frustration as follows:

As to my interlocutors in the [foreign ministry] . . . there were constantly conflicting perceptions. I do remember quite a number of quarrels I had with my colleagues in the political department. . . . And the reason is that we had two different approaches. Their approach was purely political. My approach was both political, but also legal and judicial. And that is extremely difficult to combine at times. Because, if you are only confined to making political assessments, then it is difficult to evaluate the work of a court, to accept a court, to accept any independent legal institution. And that is really something new in the international field where people are trained to assess complex issues by political means only. And you can find that very, very tangibly when you talk to United Nations staff, because they have for decades been trained in having an exclusively political view on issues. Now there is a new factor, a new player on the ground [the ICC], which does not make a political assessment, but which simply applies the law. That is a new phenomenon, and I think for those who have an exclusively political approach, that is difficult to accept.

Actors in foreign policy who fend for the autonomy of international law obviously face contending forces within their own ministries and within in the UN. In addition, the Rome Statute opens the

door to substantive, political concerns to intrude into the work of the ICC. The UNSC and its permanent and temporary members—countries that are no strangers to the consideration of geopolitical and economic interests—are authorized to refer cases to the ICC.¹² This intrusion of political rationales is further supported by Article 16 of the Rome Statute, a window built into the edifice of the statute to keep political considerations in plain view: “No investigation or prosecution may be commenced or proceeded with under this Statute for a period of 12 months after the Security Council, in a resolution adopted under Chapter VII of the Charter of the United Nations, has requested the Court to that effect; that request may be renewed by the Council under the same conditions.”¹³ Decision makers on the court will thus have to be mindful of the UNSC’s political reasoning if they hope to maintain control over their cases. The court’s vulnerability vis-à-vis political powers is further increased by the fact that many countries have not yet ratified the Rome Statute, including ones—as is well known—as powerful as the United States, the People’s Republic of China, and Russia.¹⁴

Finally, apart from external pressures, substantive outcomes of legal decision making also matter directly to jurists. Max Weber (1978), in his classic on the sociology of law, sees status interests of lawyers as a bulwark against the application of a purely formal rationality. Legal decision makers resent, he argues, being reduced to automatons into which one drops facts and fees and out of which spew decisions (and opinions). Instead, lawyers seek discretion, enabling them to consider ethical maxims or practical concerns of politics, economics, or geopolitics in their legal decisions. The long history of criminal law speaks to this tension between formal and substantive rationality. Historically, the pendulum has swung to alternately privilege formal rational or substantive rational models. In international criminal law, substantive considerations have particular weight, as thousands of lives may be at stake if conditions on the ground and practical consequences of legal decisions are disregarded. Applied to the case of Darfur, many foreign policy makers, including several interviewees for this book, expressed concern that charges against President al-Bashir might threaten the North-South agreement and the referendum on the independence of South Sudan. It is hard to imagine that these concerns were not on the minds of decision makers at the ICC.

In short, despite its particular institutional logic, criminal law is no stranger to internal contradictions and conflicts. Conflicts between formal legal criteria and substantive concerns, while dividing legal and political actors, also create ambivalences and internal tensions within the legal field. The ICC and the case of Darfur are no exceptions.

CONCLUSIONS: DARFUR IN THE JUSTICE CASCADE

Responses to the Darfur conflict are part of what Kathryn Sikkink has called the justice cascade: mass violence and grave violations of human rights have led the UNSC, ICID, and ICC to pursue individual criminal accountability. This pursuit is driven by forces that advanced the justice cascade in the first place: international organizations and social movement organizations, specifically INGOs with a human rights focus.

The case of Darfur thus provides insights into the strengths and limits of the justice cascade. Clearly, ICC charges are a victory for those who drive the justice cascade. Yet might this be a Pyrrhic victory? Realist critics who focus on the actual distribution of (hard) power point to the fact that none of the principal actors have thus far been apprehended and that powerful nations in fact have sought to appease the government of Sudan and its leaders in the pursuit of political goals.

But despite such constraints, the judicial process produced representations of the Darfur conflict and its participants, and it has cast them in the frame of criminal violence, even before a case has gone to trial. The publication of the ICID report and the ICC's indictments depicted powerful political actors as criminal perpetrators. This depiction was, as indicated in the introduction, and explored in greater detail below, communicated to a world audience. Supporters of the justice cascade consider this a success.

Simultaneously, however, the production of a judicial narrative of Darfur also illustrates the narrative constraints of criminal law. Analysis of crucial segments of the ICID report shows that the commission was well aware of the social and political conditions of the conflict. Yet such insights are marginalized in a "background" section. They do not color the conclusions and recommendations. In the logic of criminal law, the mass violence is attributed to a very few, albeit powerful, individuals. Other contributors are omitted from the narrative. Structural conditions and the organizational context within which the accused acted are not reflected in the conclusions. Further, while the ICID narrative avoids the simplification of social reality encountered in some social movement narratives, and while the report does acknowledge criminal violence by rebel groups, it divides the world of Darfur neatly into perpetrators and victims. And the commission's and the ICC's goal is justice, and the remedy is punishment, irrespective of concerns about competing actors.

The criminal law narrative obviously contradicts the accounts of historians and political scientists such as Alex de Waal and Mahmood

Mamdani, encountered in the introduction. It is more compatible with the narrative provided by sociologist-criminologists John Hagan and Wenona Rymond-Richmond. Yet, different from this social scientific examination, and despite its reference to “command responsibility” and “joint criminal enterprise,” the commission report does not spell out the organizational mechanisms through which violent motivations were mobilized and actors on the ground ideologically and materially equipped for perpetration. The report also does not engage in the fine-grained and statistically sophisticated analysis of data such as that found in the Atrocities Documentation Survey (already available when the ICID did its work). It was this analysis, however, that enabled Hagan and Rymond-Richmond to document the role of racial motives in the atrocities. The statistical patterns they identified suggested to them, in contradistinction to the commission’s report, that genocide had been committed.

This critical discussion, while highlighting the limits of criminal law narratives, is not to deny the capacity of criminal investigations, charges, or trials to contribute to the formation of collective representations and memories of mass atrocities. In fact, subsequent chapters—especially chapter 9—demonstrate their representational effectiveness.¹⁵

In sum, social and political forces that drove the justice cascade also helped move the case of Darfur toward judicial intervention by exactly those institutions that they had helped build in the first place. While no Darfur case has reached the trial stage, court interventions have provided a criminal law and justice frame through which the events of Darfur can be interpreted. Media communicated this frame to a broad public in a diverse array of countries, through a process analyzed in chapters 8 and 9. Criminal law’s representation of Darfur thus provides a highly relevant definition of social reality, and the hopes of practitioners such as Justice Jackson and President Roosevelt seem defensible. Yet the limitations of criminal law-inspired accounts, diagnosed in historical and sociological literature, are also at work in the case of Darfur. Law’s institutional logic produces a limited representation of mass violence that neglects central elements of social reality.

The court does not act alone, of course, in building a criminal justice representation of the mass violence in Darfur. It is supported, and in fact preceded, by actors at the fringes of the judicial field, human rights INGOs and governments that spearheaded the definition of Darfur’s violence as criminal and even as genocidal. Their representations are the foci of chapters 2 and 3.