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## **PAY BACK TIME IN SUDAN? DARFUR IN THE INTERNATIONAL CRIMINAL COURT**

*Nsongurua J. Udombana*<sup>†</sup>

“Human rights must prevail over human wrongs. International law  
must prevail over international crime.”<sup>1</sup>

- Mr. Benjamin B. Ferencz, Pace Peace Center

### **I. INTRODUCTION**

The United Nations (U.N.) Security Council (UNSC) is the foremost organ with the repetitive primary mandate of maintaining international peace and security in accordance with the principles and purposes of the U.N.<sup>2</sup> It made history on March 31, 2005 when it adopted Resolution 1593,<sup>3</sup> empowering the Prosecutor of the International Criminal Court (ICC) to

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1. Benjamin B. Ferencz, a former Nürnberg prosecutor, Address to the Rome Conference on Creating a Permanent International Criminal Court at Pace Peace Center ¶ 7 (June 16, 1998), <http://www.un.org/icc/speeches/616ppc.htm> [hereinafter Ferencz, Address].

2. U.N. Charter 1945, art. 24, ¶¶ 1-2 [hereinafter U.N. Charter]. One of the purposes of the UN is “[t]o maintain international peace and security, and to that end: to take effective collective measures for the prevention and removal of threats to the peace, and for the suppression of acts of aggression or other breaches of the peace.” *Id.* art. 1, ¶ 1.

3. S.C. Res. 1593, U.N. Doc. S/RES/1593 (March 31, 2005) [hereinafter S.C. Res. 1593].

investigate grave crimes allegedly committed in Darfur, western Sudan.<sup>4</sup> Resolution 1593 is historic for being the first UNSC referral since the 1998 Rome Statute establishing the ICC entered into force on July 1, 2002.<sup>5</sup> Resolution 1593 itself sets July 1, 2002 as a point of departure for investigations of the alleged Darfur crimes,<sup>6</sup> predictably because the jurisdiction *ratione temporis* of the ICC takes effect from the date its constitutive treaty entered into force.<sup>7</sup>

Darfur is the fourth referral after the entry into force of the ICC Statute; the other three are state referrals. In December 2003, the Ugandan President, Yoweri Museveni, referred the situation concerning the Lord's Resistance Army (LRA) to the ICC Prosecutor;<sup>8</sup> the Prosecutor has already determined that there is a sufficient basis to investigate the charges against the LRA.<sup>9</sup> In early 2004, the President of the Democratic Republic of Congo (DRC) referred the ICC Prosecutor to crimes allegedly committed in the territory of the DRC, which crimes fall within the jurisdiction of the Court. The DRC asked the Prosecutor to investigate these allegations in order to determine if one or more persons should be charged with such crimes, and the authorities committed to cooperate with the Court.<sup>10</sup> In January 2005, the Prosecutor received a letter from the Government of the Central African Republic (CAR), referring the crimes within the jurisdiction of the Court committed anywhere on the territory of the CAR since the enactment of the ICC Statute.<sup>11</sup>

4. *See id.* ¶ 1.

5. *See* U.N. Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court, June 15 – July 17, 1998, Rome Statute of the International Criminal Court, U.N. Doc. A/CONF.183/9 (July 17, 1998), *available at* [http://www.icc-cpi.int/library/about/officialjournal/Rome\\_Statute\\_120704-EN.pdf](http://www.icc-cpi.int/library/about/officialjournal/Rome_Statute_120704-EN.pdf) [hereinafter ICC Statute].

6. *See* S.C. Res. 1593, *supra* note 3, ¶ 1.

7. *See* ICC Statute, *supra* note 5, art. 11, ¶ 1 (“The Court has jurisdiction only with respect to crimes committed after the entry into force of this Statute”).

8. Press Release, Int'l Criminal Court, President of Uganda Refers Situation Concerning the Lord's Resistance Army (LRA) to the ICC (Jan. 29, 2004), *available at* [www.icc-cpi.int/pressrelease\\_details&id=16&1=en.html](http://www.icc-cpi.int/pressrelease_details&id=16&1=en.html).

9. *See id.* For analysis, see Payan Akhavan, *The Lord's Resistance Army Case: Uganda's Submission of First State Referral to the International Criminal Court*, 99 AM. J. INT'L L. 403 (2005).

10. For updates on the referral, see Press Release, Int'l Criminal Court, Prosecutor Receives Referral of the Situation in the Democratic Republic of Congo (April 19, 2004), *available at* [www.icc-cpi.int/pressrelease\\_details&id=19.html](http://www.icc-cpi.int/pressrelease_details&id=19.html).

11. For updates on the referral, see Press Release, Int'l Criminal Court, Prosecutor Receives Referral Concerning Central African Republic (Jan. 7, 2005), *available at* [www.icc-cpi.int/pressrelease\\_details&id=87.html](http://www.icc-cpi.int/pressrelease_details&id=87.html).

All four referrals—Uganda, DRC, CAR, and Darfur—emanate in Africa and each is connected to conflict, seemingly confirming stereotypes that the continent is perpetually at war with itself.<sup>12</sup> The now defunct Organization of African Unity (OAU) gave credence to these stereotypes, when it stated, “Africa, at present, holds the record of inter-state wars and conflicts.”<sup>13</sup> It might well be that the international community is using Africa as an experimental ground for the emerging norms and institutions of international criminal justice, with African states wittingly encouraging such an experiment. The last decade has seen an increasing criminalization of Africa, including the two *ad hoc* tribunals—the International Criminal Tribunal for Rwanda (ICTR) and the Special Court for Sierra Leone’s War Crimes (Special Court)—that are still sitting in the continent. The international community, especially the African Union (AU), must find lasting solutions to Africa’s peace, security, and development challenges. It is wrong to mistake a particular medicine—international criminal justice—as the elixir of Africa’s many ailments.

This article examines the question of accountability in Sudan and justice for victims of the Darfur atrocities. In welcoming the UNSC’s decision to confront impunity, the article will explore the roots and relevance of Resolution 1593, and reflect on challenges facing the Prosecutor and the ICC in this quest. The first part explores factors that led to the referral and situates the Darfur crisis in the context of state failure, resulting from years of autocracy and instability that define Sudan. It also examines the report of the U.N. Commission of Inquiry (UNCI) on Darfur, which largely influenced the adoption of Resolution 1593.<sup>14</sup> The second part examines the source of authority for Resolution 1593, and assesses its significance *vis-a-vis* the ICC, perpetrators of the Darfur crimes, their victims, and the cause of justice generally. In the third part, the article reflects on matters arising from the Darfur referral, including questions of admissibility. The Rome Statute, for example, requires the ICC to “satisfy itself that it has jurisdiction” and that the case is

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12. See generally ANTHONY CLAYTON, *FRONTIERSMEN: WARFARE IN AFRICA SINCE 1950* (1999); and CIVIL WARS IN AFRICA: ROOTS AND RESOLUTION (Taisier Ali & Robert Matthews eds., 1999).

13. OAU, Yaoundé Declaration (Africa: Preparing for the 21st Century), ¶ 6, OAU Doc. AHG/Decl.3 (XXXII) (July 8-10, 1996), available at [www.africanreview.org/docs/govern/yaounde.pdf](http://www.africanreview.org/docs/govern/yaounde.pdf) (last visited Dec. 9, 2005) [hereinafter Yaounde Declaration].

14. See S.C. Res. 1593, *supra* note 3, pmbl (referring to the Report of the International Commission of Inquiry on Darfur).

admissible.<sup>15</sup> It even permits the Prosecutor to “seek a ruling from the Court regarding a question of jurisdiction or admissibility.”<sup>16</sup>

The article concludes by appealing to the international community to give all necessary support to the ICC in order to fight impunity, which is a major reason for grave and gross human rights violations in the world.<sup>17</sup> As to methodology, the article employs the traditional legal exegesis, with prescriptions embedded in the textual analysis.

## II. THE ROAD TO THE HAGUE

Several remote and immediate causes led to the search for international criminal justice in Sudan, and in particular, the referral of Darfur to the ICC. This part explores these events, including the recommendations of the UNCI, and join issues with the absentee members of the UNSC on Resolution 1593.

### *A. State Failure and the Darfur Conflict*

“A state,” says Henry Kissinger, “is by definition the expression of some concept of justice that legitimizes its internal arrangements and of a projection of power that determines its ability to fulfill its minimum functions—that is, to protect its population from foreign dangers and domestic upheaval.”<sup>18</sup> There are strong reasons to believe that today’s Sudan does not fit Kissinger’s attributes of a state. One reason is that Sudan has the hallmarks of a failed state,<sup>19</sup> which occurs when a state is

15. See ICC Statute, *supra* note 5, art. 19, ¶ 1.

16. See *id.* art. 19, ¶ 3.

17. See U.N. Comm’n on Human Rights, *Report of the Working Group on Enforced or Involuntary Disappearances, Question of the Human Rights of All Persons Subjected to Any Form of Detention or Imprisonment – Question of Enforced or Involuntary Disappearances*, ¶ 18-19, U.N. Doc. E/CN.4/1990/13 (Jan. 24, 1990), reprinted in *TRANSITIONAL JUSTICE: HOW EMERGING DEMOCRACIES RECKON WITH FORMER REGIMES* 473 (Neil Kritz ed. 1995); cf. U.N. Comm’n on Human Rights, Res. on Impunity, ¶ 8, U.N. Doc. E/2002/23-E/CN.4/2002/200 (April 26, 2000) (“Convinced that the practice and expectation of impunity for violations of international human rights or humanitarian law encourage such violations and are among the fundamental obstacles to the observance of international human rights and humanitarian law and the full implementation of international human rights and humanitarian law instruments . . .”) [hereinafter Resolution on Impunity].

18. HENRY KISSINGER, *DOES AMERICA NEED A FOREIGN POLICY? TOWARD A DIPLOMACY FOR THE 21ST CENTURY* 20 (Simon and Schuster 2001) (stressing that when “these elements are in flux simultaneously . . . [then] a period of turbulence is inevitable”).

19. See Gerard Prunier & Rachel M. Gisselquist, *The Sudan: A Successfully Failed State*, in *STATE FAILURE AND STATE WEAKNESS IN A TIME OF TERROR* 101 (Robert I. Rotberg

“utterly incapable of sustaining itself as a member of the international community.”<sup>20</sup> From a “service delivery” perspective, state failure occurs when the authority within a state is “unable to provide the most fundamental services that make up the state’s obligations in its contract with society.”<sup>21</sup> Among these services include physical security, basic health care, education, transportation and communications infrastructure, monetary and banking systems, and a system for resolving disputes.<sup>22</sup> It also includes the inability to impose law and order, as in civil wars, revolutionary wars, genocides, politicides, and adverse or disruptive regime transitions.<sup>23</sup>

Of course, the failed state phenomenon is not always intentional, and the attempt to situate all conceivable problems in such a phenomenon could lead to reductionism. Outside intervention could, in itself, be both a symptom of and a trigger for state collapse. Some commentators argue that “the failed state discourse is rooted in the hypocrisy of the major transnational system that brought conveniently “the failed state” rhetoric to deny culpability.”<sup>24</sup> Thus, a failed state may be subject to involuntary restrictions of its sovereignty, such as political or economic sanctions, the presence of foreign military forces on its soil, or other military constraints, such as a no-fly zone. Nevertheless, the state collapse in Sudan is not due to the implacable tides of great issues beyond human control; it is squarely the “failure of leadership,”<sup>25</sup> including Omar El-Bashir’s fanatical application of Taliban-style Islamic law that discriminates against non-Muslims.

Darfur, where the Government of the Sudan (GoS) wars against its population, has become a byword for impunity, a wilderness of atrocity and crime, and probably the world’s worst humanitarian disaster. The problem started sometime in February 2003, when some rebel groups—the

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ed., 2003) [hereinafter STATE FAILURE AND STATE WEAKNESS] (“The Sudan today is indeed a failed state”).

20. Gerald B. Helman & Steven R. Ratner, *Saving Failed States*, 89 FOREIGN POLICY 3 (1992-1993), available at [www.foreignpolicy.com](http://www.foreignpolicy.com) (last visited Oct. 31, 2005). See generally Robert I. Rotberg, *Failed States, Collapsed States, Weak States: Causes and Indicators*, in STATE FAILURE AND STATE WEAKNESS, *supra* note 19, 3 (discussing the flawed institutions and infrastructure associated with failed states); Gary King & Langche Zeng, *Improving Forecasts of State Failure*, 53(4) WORLD POLITICS 623 (2001).

21. See Ben N. Dunlap, *State Failure and the Use of Force in the Age of Global Terror*, 27 B.C. INT’L & COMP. L. REV. 453, 458 (2004).

22. See *id.*

23. See *id.*

24. Mammo Muchie, *Wanted: A Union Government*, NEW AFRICAN, Dec. 2001, at 38-39.

25. G. NORMAN ANDERSON, SUDAN IN CRISIS 274 (1999).

Sudan Liberation Army (SLA), and later the Justice and Equality Movement (JEM)—accused the Arab-ruled GoS of decades of malign neglect and oppression of black Africans in favor of Arabs. Acting on Victor Hugo’s philosophy—that rebellion is the language of the unheard, these groups saw rebellion as their only remaining option to shake off a yoke they no longer wanted to shoulder.<sup>26</sup> The result was a SLA attack on government military forces at El Fasher in north Darfur in April 2003. The GoS was not being in possession of sufficient military resources to repel the attacks—arguably because many of its forces were still locked in a long-drawn civil war in the south. The GoS, therefore, allegedly recruited a militia composed of a loose collection of fighters, but mostly of Arab background, known as the “Janjaweed”—literally “devils on horseback”—to respond to the rebellion.<sup>27</sup> With active government support, the militias attacked and continue to attack villages, systematically targeting civilian communities that share the same ethnicity as the rebel groups, killing, looting, forcibly displacing people, destroying hundreds of villages and polluting water supplies.

The extensive media reports of atrocities in Darfur compelled the UNSC to adopt Resolution 1566 on September 18, 2004,<sup>28</sup> requesting the Secretary-General, *inter alia*, to—

rapidly establish an international commission of inquiry in order immediately to investigate reports of violations of

26. See United Nations High Commissioner, *Report of The United Nations High Commissioner For Human Rights and Follow Up To The World Conference On Human Rights, May 7, 2004, Situation of Human Rights in the Darfur Region of the Sudan*, ¶ 5, E/CN.4/2005/3 [hereinafter *Situation of Human Rights in Darfur*].

27. International Commission of Inquiry on Darfur, *Report of the International Commission of Inquiry on Darfur to the United Nations Secretary-General, Pursuant to Security Council Resolution 1564 of 18 September 2004*, Jan. 25, 2005, ¶ 66 [hereinafter *UNCI Report*] available at [http://www.un.org/News/dh/sudan/com\\_inq\\_darfur.pdf](http://www.un.org/News/dh/sudan/com_inq_darfur.pdf). See also *id.* ¶ 67 (“From available evidence and a variety of sources including the Government itself, it is apparent that faced with a military threat from two rebel movements and combined with a serious deficit in terms of military capabilities on the ground in Darfur, the Government called upon local tribes to assist in the fighting against the rebels.”). Cf. Human Rights Watch, *Entrenching Impunity: Government Responsibility for International Crimes in Darfur*, Vol. 17, No. 17(A), at 1 (Dec. 2005), available at <http://hrw.org/reports/2005/darfur1205/darfur1205text.pdf> [hereinafter *Entrenching Impunity*] (stating that the GoS recruited the Janjaweed militias “through informal networks of ruling party insiders, former military personnel, and leaders of nomadic tribes”). See also *id.* at 9 (“[T]he Sudanese government recruited the “Janjaweed” militias as the main ground forces for the government’s counterinsurgency campaign in Darfur.”).

28. S.C. Res. 1564. U.N. Doc. S/Res/1564 (2004). The resolution was adopted under Chapter VII of the U.N. Charter.

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.<sup>29</sup>

The UNCI submitted its report on January 25, 2004, confirming that the GoS, in its response to the insurgency, has committed acts against the civilian population in Darfur. It established clear links between the Sudanese State and the Janjaweed militias, and stated that militias “have received weapons, and regular supplies of ammunition which have been distributed to the militias by the army, by senior civilian authorities at the locality level.”<sup>30</sup> The UNCI also found that the Sudanese armed forces have committed vast attacks on civilians in Darfur villages.<sup>31</sup> It noted that many of the alleged crimes, which were committed “directly or through surrogate armed groups,” have been widespread and systematic, thus amounting to “gross violations of human rights and humanitarian law.”<sup>32</sup> The UNCI established “two irrefutable facts about the situation in Darfur.”<sup>33</sup>

Firstly, there were more than one million internally displaced persons (IDPs) inside Darfur (1,65 million according to the United Nations) and more than 200,000 refugees from Darfur in neighbouring Chad to the East of the Sudan. Secondly, there were several hundred destroyed and burned villages and hamlets throughout the three states of Darfur.<sup>34</sup>

Noting that the Sudanese justice system has demonstrated its inability and unwillingness to investigate and prosecute the perpetrators of the crimes,<sup>35</sup> the UNCI “strongly” recommended to the UNSC to refer the Darfur situation to the ICC, as the crimes “meet all the thresholds” of the ICC Statute.<sup>36</sup> It also recommended the establishment of a reparation

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29. *Id.* ¶ 12.

30. *UNCI Report, supra* note 27, at ¶ 111.

31. *See id.* at ¶ 240.

32. *Id.* ¶ 185.

33. *Id.* ¶ 226.

34. *Id.*

35. *See id.* ¶ 647.

36. *UNCI Report, supra* note 27, at ¶ 647.



system for the victims of the crimes, whether or not perpetrators have been identified.<sup>37</sup> Two months after the UNCI Report, the UNSC responded by adopting Resolution 1593, referring the Darfur situation to the ICC. Resolution 1593 expressly referenced “the report of the [UNCI] on violations of international humanitarian law and human rights law in Darfur.”<sup>38</sup> Subsequent parts of this article will explore the wider implications of the resolution; but the next segment joins issues with the absentee UNSC members.

### *B. Joining Issues with Absentee States*

Resolution 1593 was adopted by a vote of 11 in favor,<sup>39</sup> none against, with 4 abstentions—Algeria, Brazil, China, and the United States (U.S.). China and the U.S., the two permanent absentee members, are not parties to the ICC Statute; but their abstentions appear to have been strategic in order to avoid a possible veto, given their well-known opposition to the ICC.

#### 1. China's Position

In explanation of their position after the vote, the Chinese representative to the U.N. argued that the referral should have been done with the consent of the GoS.<sup>40</sup> He, however, failed to indicate how the international community could have obtained such consent from an intransigent regime. Before Resolution 1593, the UNSC had adopted a number of resolutions, each expressing concern over the Darfur crisis and declaring the crisis a threat to international peace and security.<sup>41</sup> In

37. *See id.* at ¶ 649 (“The Security Council should, however, act not only against the perpetrators but also on behalf of victims. In this respect, the Commission also proposes the establishment an International Compensation Commission, consisting of fifteen (15) members, ten (10) appointed by the United Nations Secretary-General and five (5) by an independent Sudanese body.”).

38. S.C. Res. 1593, *supra* note 3, pmbi.

39. The 11 members that voted for the resolution are Argentina, Benin, Denmark, France, Greece, Japan, Philippines, Romania, Russia, Tanzania, and United Kingdom. *See* Press Release, Security Council Refers Situation in Darfur, Sudan, to Prosecutor of International Criminal Court, U.N. Doc. SC/8351 (Mar. 31, 2005), *available at* <http://www.un.org/News/Press/docs/2005/sc8351.doc.htm> [hereinafter UNSC Press Release 8351].

40. *See id.* (Wang Guangya, the China's representative, reporting to the UNSC).

41. *See* S.C. Res. 1556, pmbi. U.N. Doc. S/RES/1556 (July 30, 2004); S.C. Res. 1590, pmbi., U.N. Doc. S/RES/1590 (Mar. 24, 2005) [hereinafter S.C. Res. 1556] (“Determining that the situation in Sudan continues to constitute a threat to international peace and security.”); and S.C. Res. 1591, pmbi., U.N. Doc. S/RES/1591 (Mar. 29, 2005) [hereinafter S.C. Res. 1591]. On the meaning of “threat to the peace,” *see* LELAND GOODRICH,

Resolution 1556 of 1994, the UNSC expressed “its grave concern at the ongoing humanitarian crisis and widespread human rights violations, including continued attacks on civilians that are placing the lives of hundreds of thousands at risk.”<sup>42</sup> The resolution called on all parties to the conflict to refrain from any violence against civilians.<sup>43</sup> This resolution did not prize the parties to do so; in fact, it was the first in a series of frustrations that the UNSC was going to experience with Khartoum.

On March 29, 2005, the UNSC adopted a sanctions resolution to provide for targeted sanctions on travel and assets for those officials and individuals who are complicit in the atrocities in Darfur and in contributing to the general problems in Sudan.<sup>44</sup> The resolution directed U.N. Member States to ensure that none of their nationals, or persons within their territories, made resources available to, or for the benefit of, perpetrators of Darfur crimes or such entities.<sup>45</sup> It directed the Secretary-General to appoint a sanctions panel, in consultation with a committee made up of all the members of the UNSC. Like previous resolutions, the sanctions resolution has not prompted Khartoum to take steps towards stopping the atrocities in Darfur. Against this background of reiterated failure and incessant peril, it is not clear how the GoS could have given its consent to the Darfur referral.

## 2. The U.S. Position

The U.S., on its part, argued that “it did not agree to a Council referral of the situation in Darfur to the Court.”<sup>46</sup> At a press conference on April 1, 2005, the U.S. Secretary of State, Condoleezza Rice, explained her country’s decision to abstain rather than veto Resolution 1593:

Sudan is an extraordinary circumstance. I believe that it was Secretary Powell who talked about the fact that we believe a genocide is being committed in Sudan. Whatever you want to call it, there are clearly crimes against humanity being committed in Sudan and there are people who have to be held accountable for those crimes . . . . It is a humanitarian crisis, it is a moral crisis, and it is a crisis that is

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EDVARD HAMBRO, & ANNE PATRICIA SIMONS, CHARTER OF THE UNITED NATIONS: COMMENTARY AND DOCUMENTS 295-97 (3d rev. ed. 1969).

42. S.C. Res. 1556, *supra* note 41, pmb1.

43. *See id.* pmb1. & ¶ 5.

44. S.C. Res. 1591, *supra* note 41, pmb1.

45. *See id.*

46. UNSC Press Release 8351 *supra* note 39 (Anne Woods Patterson, reporting to the UNSC).

extraordinary in its scope and in its potential for even greater damage to those populations.<sup>47</sup>

Earlier, the U.S. representative to the U.N. had noted: "While the United States believed that a better mechanism would have been a hybrid tribunal in Africa, it was important that the international community spoke with one voice in order to help promote effective accountability."<sup>48</sup> It seems that the U.S. had in mind the type of hybrid Special Court jointly established between the Government of Sierra Leone and the U.N. in 2000 to prosecute perpetrators of grave crimes during that country's brutal civil war.<sup>49</sup> Although hybrid tribunals have some promise—of legitimacy, capacity, and norm penetration,<sup>50</sup> they are not the "be all" or "end all" of events. Even the Special Court project in Sierra Leone is not quite a success story as to serve as a precedent elsewhere in Africa.

The Special Court is having credibility and financial problems, largely because the international community is giving half-hearted support to the Court. Nigeria, which ironically is a member of the Management Committee of the Special Court, has been harboring Charles Taylor, Liberia's former rebel leader turned ruler, since August 2003.<sup>51</sup> Taylor has

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47. Condoleezza Rice, U.S. Sec'y of State, Remarks with Hungarian Foreign Minister Ferenc Somogyi After Meeting at the Treaty Room in the White House ¶ 11 (April 1, 2005), available at <http://www.state.gov/secretary/rm/2005/44104.htm>.

48. See UNSC Press Release 8351 *supra* note 39.

49. The Statute of the Special Court for Sierra Leone's War Crimes (Special Court Statute), is an integral part of the Agreement Between the United Nations and the Government of Sierra Leone on the Establishment of a Special Court for Sierra Leone, Oct. 4, 2000 [hereinafter Agreement]. The Agreement, in turn, is an annex to the Report of the Secretary-General on the Establishment of a Special Court for Sierra Leone. See The Secretary-General, *Report of the Secretary General on the Establishment of a Special Court for Sierra Leone, delivered to the Security Council*, U.N. Doc. S/2000/915/Annex (Oct. 4, 2000). For a commentary on the Special Court, see Nsongurua J. Udombana, *Globalization of Justice and the Special Court for Sierra Leone's War Crimes*, 17 EMORY INT'L L. REV. 55 (2003).

50. Laura A. Dickinson, Comment, *The Promise of Hybrid Courts*, 97 AM. J. INT'L L. 295 (2003) (setting out three basic arguments in support of hybrid tribunals). According to Dickinson, hybrid tribunals have legitimacy as they are locally situated and involve local actors as prosecutors, adjudicators and defenders. They also enhance capacity building by contributing to the legal training of local personnel. The third promise is that of norm penetration, that is, introducing international legal norms into the local context in a way that is not simply an imposition. See *id.*

51. See Nsongurua J. Udombana, *Accountability for International Crimes: Charles Taylor and the Nigerian Burden*, in AFRICAN PERSPECTIVES ON INTERNATIONAL CRIMINAL JUSTICE 103 (Evelyn A. Ankumah & Edward K. Kwakwa eds., 2005) (addressing the dilemma posed by Taylor's asylum in Nigeria).

been charged as a person bearing the greatest responsibility for grave crimes, including war crimes and crimes against humanity committed during the gruesome civil war in Sierra Leone.<sup>52</sup> Recently, Justice Emmanuel Ayoola, then President of the Special Court, reminded the UNSC that Taylor's trial is crucial for the "strong impact that this would have on the perception that the people of Sierra Leone and of Africa have of the Special Court and of similar institutions, and on the Court's contribution to combating the culture of impunity."<sup>53</sup>

Funding for the Special Court has almost dried up, and with only a few months until the end of its mandate,<sup>54</sup> the Court has not completed a single case let alone handing down a conviction. The root of the problem is the Court's normative deficiency, as it was not established under Chapter VII of the U.N. Charter, unlike similar ad hoc experiments in the former Yugoslavia<sup>55</sup> and in Rwanda.<sup>56</sup> In other words, the Special Court is not funded from the assessed contributions of U.N. Member States; it is a donor-driven institution and has been left to "carry bowls begging for financial grants from states and institutions."<sup>57</sup> Such an experience certainly does not advance the legitimacy and credibility of any institution created for international criminal justice. Darfur requires an institution that will have less time sourcing for funds and more time dispensing criminal justice.

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52. See *Prosecutor v. Charles G. Taylor*, Case No. SCSL – 03 – 01 (2003) available at <http://www.sc-sl.org/Documents/SCSC-03-01-I-001.pdf> (March 3, 2003) [hereinafter *Taylor's Indictment*]. This and other indictments before the Special Court are available on the website of the Special Court. See [www.sc-sl.org](http://www.sc-sl.org) [hereinafter without any cross-reference referred to as Special Court Web site].

53. Briefing to the Security Council by Justice Emmanuel Olayinka Ayoola, President, The Special Court for Sierra Leone, May 24, 2005, available at <http://www.sc-sl.org/Press/ayoola052405.pdf> [hereinafter *Special Court Briefing*].

54. There is a likelihood of an extension of the Court's mandate beyond the December 2005 dateline.

55. See *Statute of the International Criminal Tribunal for the former Yugoslavia*, adopted May 25, 1993; S.C. Res. 827, U.N. Doc. S/RES/827 (May 25, 1993) [hereinafter *ICTY Statute*].

56. See *Statute of the International Criminal Tribunal for the Prosecution of Persons Responsible for Genocide and Other Serious Violations of International Humanitarian Law Committed in the Territory of Rwanda and Rwandan Citizens Responsible for Genocide and Other Such Violations Committed in the Territory of Neighboring States, between 1 January 1994 and 31 December 1994*, adopted Nov. 8, 1994; S.C. Res. 955, U.N. Doc. S/RES/955 (Nov. 8, 1994); amended by S.C. Res. 1165, U.N. Doc. S/RES/1165 (April 30, 1998) [hereinafter *ICTR Statute*].

57. Udombana, *Globalization of Justice*, *supra* note 49, at 128.

### 3. Algeria's Position

Algeria, one of two non-permanent members to abstain from the Resolution 1593 vote, reasoned that "the [AU] was best placed to carry out so delicate an undertaking because it could provide peace, while also satisfying the need for justice."<sup>58</sup> Some African leaders, including the Chairman of the AU, have also floated the idea of an African led tribunal for Darfur. Such calls are certainly good for the AU's image, but they seriously exaggerate the institution's capacity to restore lasting peace in Sudan and give justice to victims and perpetrators of the Darfur mayhem. The issue at stake is not whether Africa should be allowed to manage its affairs but whether the AU has the institutional capacity to punish impunity in Sudan. The AU has noble goals<sup>59</sup> and probably means well for Sudan, but it is a child that is still learning to walk on its own. Many of its vital organs are non-existent, including the proposed AU Court of Justice,<sup>60</sup> which in any event, will not exercise jurisdiction over individuals.<sup>61</sup>

Lack of political will on the part of Member States also conspire against an effective AU involvement to stop the carnage in Sudan. Almost three years into the Darfur mayhem, the AU has managed to muster only approximately 7,000 personnel from Member States for its African Mission in the Sudan (AMIS).<sup>62</sup> This number is made up of 686 military observers, 4,890 troops and 1,176 civilian police.<sup>63</sup> Until October 2005, the force level

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58. UNSC Press Release 8351, *supra* note 39 (reporting Abdallah Baali, Algeria's representative to the UNSC).

59. The AU was established in 2000 and inaugurated in 2002, with the goal, *inter alia*, of achieving greater unity and solidarity between African countries and peoples and promoting peace, security, and stability in Africa on the continent. *See* Constitutive Act of the African Union (AU), adopted July 11, 2000, entry into force May 26, 2001, art. 3 (a)&(f), CAB/LEG/23.15 (2000), *amended by* the Protocol on Amendments to the Constitutive Act of the African Union, July 11, 2003 [hereinafter AU Act]. Among the principles that guide the Union is peaceful resolution of conflicts among Member States through such appropriate means as the AU Assembly may decide upon as well as peaceful co-existence of Member States and their right to live in peace and security. *Id.* art. 4(e)&(i).

60. A Court of Justice is an organ of the AU. *See id.* art. 5. Its statute, composition and functions are defined in a separate protocol, pursuant to Article 18(2) of the AU Act. *See* Protocol of the Court of Justice of the African Union, adopted during the 2nd Ord. Sess. of the AU Assembly, July 2002 [hereinafter Protocol of AU Court], *available at* [www.africa-union.org](http://www.africa-union.org) [hereinafter without any cross-reference referred to as AU Web site].

61. The personal jurisdiction of the Court will be limited to States and inter-governmental organizations. *See* Protocol of AU Court; *see id.* art. 18.

62. *See* Communiqué of the 17th Meeting of the AU Peace and Security Council (PSC), Oct. 20, 2004, ¶ 4, PSC/PR/Comm.(XVII) [hereinafter PSC Communiqué 17] (enhancing the AMIS).

63. *See id.* ¶ 7.

was about 2,000 troops, with a weak mandate of AMIS to monitor and observe compliance with ceasefire agreements between the GoS and rebel groups. The mandate was slightly modified in October 2005 to include: "Protect[ing] civilians whom it encounters under imminent threat and in the immediate vicinity, within resources and capability, it being understood that the protection of the civilian population is the responsibility of the GoS."<sup>64</sup>

The present writer insists that AMIS, as currently constituted, is still not the firewall needed to stop unremitting atrocities in Darfur. The force is beset with poor logistical planning and a lack of funds, such that belligerents do not seem to notice its presence. As the ethnic cleansing continues in Darfur, AMIS is busy "picking up the pieces and muddling through, doing too little too late." The AU itself is complicit in the continuing impunity in Sudan. In December 2005, for example, the AU allowed the GoS to chair the meeting of its Peace and Security Council (PSC) in Addis Ababa; Sudan is also hosting the January 2006 AU Assembly Summit in Khartoum.<sup>65</sup> The AU has chosen to disregard the elementary lesson that buying off bad behavior only encourages more.

The point is that Africa's variety and Sudan's peculiarity clearly inhibits a concerted action by the AU, but the scope of the Darfur crisis certainly demands a significant response by the UNSC. Refreshingly, the U.N. Secretary-General and UNSC are reviewing their options on Darfur, including having the U.N. take over the peacekeeping function from AMIS possibly when its current mandate expires on March 31, 2006.<sup>66</sup>

#### 4. Brazil's Position

Brazil, which chaired the UNSC at the time, was the second of the non-permanent members to abstain from Resolution 1593 vote. Its representative insisted that Brazil favored the resolution though it abstained because of its operative paragraph 6 of Resolution 1593 (limiting the reach of the ICC) which, according to him, would not strengthen the

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64. *Id.* ¶ 6. Its further mandate includes: "Protect[ing] both static and mobile humanitarian operations under imminent threat and in the immediate vicinity, within capabilities." *Id.*

65. See Human Rights Watch, *Sudan: A Shameful Place for an African Summit* (Nov. 2005), available at <http://hrw.org/english/docs/2005/11/17/africa12047.htm> (calling on the AU not to reward the sponsors of crimes against humanity with the honor of hosting its summit or ascending to its presidency).

66. See *UN Weighs Options for Sudan's Darfur Region As Funds for African Union Force Run Low*, U.N. NEWS AGENCY, Jan. 12, 2006, available at <http://www.un.org/apps/news/story.asp?NewsID=17146&Cr=sudan&Cr1=>.

role of the Court.<sup>67</sup> Brazil, in effect, decided to throw the baby away with the bath water!

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What, in any event, is the effect of abstention from a UNSC vote, particularly by a permanent member? International legal scholars have long debated this question, based on different interpretations of the U.N. Charter.<sup>68</sup> The Charter calls for “the concurring votes of the permanent members” if the UNSC is adopting a substantive resolution<sup>69</sup> but contains a proviso that seems to distinguish abstention from a “concurring vote[.]”<sup>70</sup> The proviso was originally interpreted as identifying a narrow category of cases in which a permanent member’s abstention would not obstruct any substantive decision.<sup>71</sup> The practice of the UNSC seems to establish that abstention of a permanent member does not affect the legality of a substantive resolution, a position that the International Court of Justice (ICJ) also maintains in the *South West Africa* case.<sup>72</sup>

### III. THE LEGALITY AND SIGNIFICANCE OF RESOLUTION 1593

After determining the legality of Resolution 1593, this part examines the significance of referral, in the broader context of the ICC’s relevance to the quest for international justice and accountability in Darfur

#### A. *The Source of Authority for Resolution 1593*

By what authority does Resolution 1593 anchor? The first hook may be found in the triggering mechanism of the ICC, which is an autonomous procedure and constitutes a key component of the procedural system of

67. See UNSC Press Release 8351, *supra* note 39 (reporting Ronaldo Mota Sardenberg, Brazil’s representative to the UNSC).

68. See Yuen-Li Liang, *Abstention and Absence of a Permanent Member in Relation to the Voting Procedure in the Security Council*, 44 AM. J. INT’L L. 694 (1950). See also Frederic L. Kirgis Jr., *The Security Council’s First Fifty Years*, 89 AM. J. INT’L L. 506, 510 (1995).

69. See U.N. Charter, *supra* note 2, art. 27, ¶ 3.

70. See *id.*

71. See U.S. DEP’T OF STATE, CONF. SER. NO. 71, REPORT OF THE PRESIDENT ON THE RESULT OF THE SAN FRANCISCO CONFERENCE 71-77 (1945); FOREIGN RELATIONS OF THE UNITED STATES 1258-60 (1945).

72. See *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) Notwithstanding Security Council Resolution 276 (1970)*, Advisory Opinion, 1971 I.C.J. 16, 22 (June 21) [hereinafter *South West Africa Case*].

the ICC Statute.<sup>73</sup> States parties to the Statute granted to the Court a deactivated jurisdiction that is activated only when a particular crisis “defined by personal, temporal[,] and territorial parameters” occur.<sup>74</sup> The potential jurisdiction of the Court could be activated under three situations.<sup>75</sup> The first is if “[a] situation in which one or more of such crimes appears to have been committed is referred to the Prosecutor by a State Party in accordance with article 14.”<sup>76</sup> The second is if the UNSC, acting under Chapter VII of the U.N. Charter, refers to the Prosecutor any “situation in which one or more of such crimes appears to have been committed.”<sup>77</sup> And the third is if “[t]he Prosecutor has initiated an investigation in respect of such a crime in accordance with article 15.”<sup>78</sup>

For a “State Party” referral, the ICC Statute requires, at a minimum, state acceptance of the jurisdiction of the Court;<sup>79</sup> the territorial state or state of nationality must either be a party to the statute or have accepted the exercise of jurisdiction by the Court with respect to the crime in question.<sup>80</sup> Sudan does not meet the requirement for a “State Party” referral under the ICC Statute. Even if it did, there is little hope of the GoS ever initiating such a referral, since Khartoum is a participant-victim in the Darfur saga. This makes a UNSC referral the most viable option, obviously a progressive development of international law. During the elaboration of the U.N. Charter, attempts were made to empower the UNSC to refer matters to the ICJ. These efforts were thwarted at San Francisco.<sup>81</sup> The U.N. Charter, however, included what Frederic Kirgis refers to as “a potentially significant provision for enforcing the Court’s

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73. See generally ICC Statute, *supra* note 5, arts. 5, 71, 75, 85 (covering criminal and civil proceedings that are distinct from the triggering procedures).

74. Héctor Olásolo, Guest Lecture Series of the Office of the Prosecutor, The Triggering Procedure of the International Criminal Court, Procedural Treatment of the Principle of Complementarity, and the Role of Office of the Prosecutor 5 (Mar. 26, 2004), [http://www.icc-cpi.int/library/organs/otp/040326\\_Olasolo.pdf](http://www.icc-cpi.int/library/organs/otp/040326_Olasolo.pdf).

75. See ICC Statute, *supra* note 5, art. 13; see also Olásolo, *supra* note 74, at 5.

76. ICC Statute, *supra* note 5, art. 13(a); *cf. id.* art. 14 (“A State Party may refer to the Prosecutor a situation in which one or more crimes within the jurisdiction of the Court appear to have been committed requesting the Prosecutor to investigate the situation for the purpose of determining whether one or more specific persons should be charged with the commission of such crimes.”).

77. *Id.* art. 13(b).

78. *Id.* art. 13(c); *cf. id.* art. 15(1) (“The Prosecutor may initiate investigations *proprio motu* on the basis of information on crimes within the jurisdiction of the Court.”).

79. See *id.* art. 12(2)-(3).

80. See *id.*

81. See RUTH B. RUSSEL ASSISTED BY JEANNETTE E. MUTHER, A HISTORY OF THE UNITED NATIONS CHARTER 661 (1958).



judgments,”<sup>82</sup> referring to Article 94(2) of the Charter, which authorizes the UNSC, “at the request of the prevailing party in the ICJ proceedings, [to] decide upon measures to be taken to give effect to the [Court’s] judgment.”

By permitting the UNSC to refer situations to, or defer situations from, the ICC, architects of the ICC Statute were “render[ing] homage to the Security Council’s decisive contribution in the *renaissance* of penal international law.”<sup>83</sup> Some believe that Article 13(b) of the ICC Statute, which permits UNSC referral, “situates the ICC on a continuum with [earlier] *ad hoc* international criminal tribunals,” such as the ICTY and ICTR.<sup>84</sup> This makes the ICC an “‘*ad hoc* permanent’ international criminal tribunals”<sup>85</sup> at the disposal of the UNSC for the prosecution of international crimes “without the need to establish new tribunals.”<sup>86</sup> The difference, however, is that the *ad hoc* tribunals (properly so-called) are subsidiary organs of the UNSC, albeit one with judicial characters.<sup>87</sup> The ICC is not; it actually wrest some powers from the UNSC, by effectuating a change in interstate relations and removing an important category of interstate disputes out of the realm of diplomacy, where the UNSC holds court, to the realm of compulsory adjudication.<sup>88</sup>

The second hook that anchors Resolution 1593 is the U.N. Charter,<sup>89</sup> which mandates the UNSC to “determine the existence of any threat to the peace, breach of the peace, or act of aggression” and to “decide what measures shall be taken” to maintain or restore international peace and security.<sup>90</sup> The UNSC exercises a wide discretionary power in determining the existence of threats to the peace, breaches of the peace, or acts of aggression.<sup>91</sup> The ICC Statute itself did not define the extent of the UNSC’s powers or situations in which it is proper for it to exercise those

82. Kirgis Jr., *supra* note 68, at 509.

83. Luigi Condorelli & Santiago Villalpando, *Referral and Deferral by the Security Council*, in *THE ROME STATUTE OF THE INTERNATIONAL CRIMINAL COURT: A COMMENTARY* 627, 628 (Antonio Cassese et al. eds., 2002) [hereinafter *COMMENTARY ON THE ROME STATUTE*].

84. *Id.*

85. *Id.*

86. *Id.*

87. *See, e.g.*, U.N. Charter, *supra* note 2, art. 29 (“The Security Council may establish such subsidiary organs as it deems necessary for the performance of its functions”).

88. *Cf.* Madeline Morris, *High Crimes and Misconceptions: The ICC and Non-Party States*, 64 *LAW & CONTEMP. PROBS.* 13, 25-26 (2001).

89. *See* S.C. Res. 1593, *supra* note 3, pmb1 (invoking Chapter VII of the Charter).

90. U.N. Charter, *supra* note 2, art. 39.

91. *Cf.* Prosecutor v. Tadic, Case No. IT-94-1-I, Decision on Defence Motion for Interlocutory Appeal on Jurisdiction, ¶ 29 (Oct. 2, 1995) [hereinafter *Tadic Motion*].

powers. The *travaux préparatoires* indicates that this omission was deliberate,<sup>92</sup> but the Statute allows the UNSC to refer only “[a] situation in which one or more . . . crimes appears to have been committed.”<sup>93</sup> This phraseology was debated and agreed upon essentially to allow the UNSC to refer to the ICC a general matter or situation, rather than a specific case.<sup>94</sup> The rationale was to preserve the Court’s independence in the exercise of its jurisdiction.<sup>95</sup> Thus, the bringing of individual prosecution is a matter within the discretion of the ICC, based on investigations by the Prosecutor.<sup>96</sup>

Clearly, Resolution 1593 constitutes a measure “not involving the use of armed force”<sup>97</sup> within the meaning of Article 41 of the U.N. Charter. Some commentators have argued that as a precondition for the exercise of its powers under Chapter VII of the Charter, the UNSC should first determine the existence of a factual situation objectively identifiable and constituting a threat to the peace, a breach of the peace, or an act of aggression.<sup>98</sup> It is only after such a determination, the argument continues, that the UNSC can decide whether one or more of the crimes in Article 5 of the ICC Statute have been committed.<sup>99</sup> This proposition is like preaching to the choir, since the practice of the UNSC reflects such an approach. An example was Resolution 808 of 1993, which established the

92. See Preparatory Committee, *Report of the Preparatory Committee on the Establishment of an International Criminal Court*, ¶¶ 129-31, delivered to the General Assembly, U.N. Doc. A/51/22 (Sept. 13, 1996) [hereinafter *Report of the Preparatory Committee*].

93. ICC Statute, *supra* note 5, art. 13(b) (emphasis added); *Cf. id.* arts. 13(a), 14(1), 15(5)-(6), 18(1), 19(3) (employing the word “situation”).

94. *Cf. Olásolo, supra* note 74, at 5 (arguing that “[t]he [ICC] Statute uses the expression situation . . . to refer to exceptional circumstances—not structural ones—that constitute a departure from the status quo . . . [which] are easily distinguishable from the more restrictive content of the expression ‘case’”).

95. Lionel Yee, *The International Criminal Court and the Security Council: Articles 13(b) and 16*, in *THE INTERNATIONAL CRIMINAL COURT: THE MAKING OF THE ROME STATUTE* 143, 147 (Roy S. Lee ed., 1999) [hereinafter *THE MAKING OF THE ROME STATUTE*].

96. See *id.* See also Ad Hoc Committee, *Report of the Ad Hoc Committee on the Establishment of an International Criminal Court*, ¶¶ 120-21, delivered to the General Assembly, A/50/22 (1995) [hereinafter *1995 Ad Hoc Committee Report*].

97. U.N. Charter, *supra* note 2, art. 41.

98. See Olásolo, *supra* note 74, at 5. The ICC does not yet have jurisdiction over the “crime” of aggression. It will only do so when states have agreed on its definition and set out conditions for the Court’s exercise of jurisdiction. ICC Statute, *supra* note 5, art. 5(2).

99. See, e.g., F. Lattanzi, *The Rome Statute and State Sovereignty: ICC Competence, Jurisdictional Links, Trigger Mechanism*, in *ESSAYS ON THE ROME STATUTE OF THE INTERNATIONAL CRIMINAL COURT* 51, 62-63 (Flavia Lattanzi & William A. Schabas eds., 1999).

ICTY.<sup>100</sup> The resolution was adopted after the UNSC expressed “its grave alarm at continuing reports of widespread violations of international humanitarian law occurring within the territory of the former Yugoslavia.”<sup>101</sup> It then concluded that the situation constituted “a threat to international peace and security”<sup>102</sup> and declared its determination “to put an end to such crimes and to take effective measures to bring to justice the persons who are responsible for them.”<sup>103</sup>

On the eve of the establishment of the ICTY by the UNSC, the Permanent Representative of France wrote to the Secretary-General arguing that “the establishment of a [*ad hoc*] Tribunal would be an appropriate measure if . . . it seems likely to attain or facilitate the objective of restoring international peace and security.”<sup>104</sup> A few years later, the ICTY Appeals Chamber upheld the validity of the creation of the ICTY by the UNSC under its Chapter VII mandate.<sup>105</sup> The preliminary conclusion from this brief analysis is that the Darfur referral is both legitimate and legal, as was the previous institutional arrangements by the UNSC under its Chapter VII mandate.

### *B. The Significance of the Darfur Referral*

The Darfur referral is significant in many respects. Resolution 1593 is a tacit recognition of the ICC by the U.S. and China—their abstentions notwithstanding; and such recognition is a vital first step towards giving the ICC the legitimacy it needs to achieve true universality. In adopting Resolution 1593, the UNSC also implicitly acknowledges the important role the ICC will play in the international criminal justice system, complementing the UNSC in its primary responsibility of maintaining and promoting international peace and security. Along with the ICJ, the ICC is expected to contribute significantly to the legitimacy and perceived fairness of the international order. The ICC Statute itself proclaims that the crimes within the Court’s jurisdiction “threaten the peace, security and well-being of the world,”<sup>106</sup> a proclamation that must be placed in the logic

100. S.C. Res. 808, ¶ 1, U.N. Doc. S/RES/808 (Feb. 22, 1993).

101. *Id.* pmbl.

102. *Id.*

103. *Id.*, cf. S.C. Res. 955, pmbl., U.N. Doc. S/RES/955 (Nov. 8, 1994) (establishing the ICTR, for similar wordings).

104. Letter from the Permanent Representative of France to the Secretary-General, UN Doc. S/25266, at 13 (Feb. 10, 1993).

105. See Prosecutor v. Dusko Tadic (Opinion and Judgment), ¶¶ 28-48, Case No. IT-94-1-T (Feb. 13, 1995) (as amended), reported in 35 I.L.M. 32 (1996) [hereinafter Tadic Judgment].

106. *Id.* pmbl.

of the U.N. Charter system. Architects of the ICC also intended it to relate closely to the U.N.,<sup>107</sup> particularly the UNSC, which has the mandate to adopt necessary measures to confront situations threatening international peace and security.

The referral also removes any anxiety regarding the ICC's competence to commence investigation and prosecution over Darfur, that is, in the absence of UNSC approval. At the preparatory stages of the Rome Statute, the International Law Commission (ILC) expressed concern that there could be situations where the Prosecutor might be unable to commence a *proprio motu* investigation, that is, where the UNSC is already dealing with the situation under its Chapter VII mandate.<sup>108</sup> The ICC Statute itself does not suggest such an interpretation, although it permits the UNSC to make a deferral to the ICC *requesting* it not to activate its potential jurisdiction with regard to a particular situation.<sup>109</sup>

The referral is a big step towards restoring real peace in Sudan, since peace cannot be bought at the price of justice. Prosecuting perpetrators of the Darfur mayhem and making reparations to victims are essential for victims to come to terms with their loss.<sup>110</sup> Such an exercise could have a positive impact on peace and security in Sudan,<sup>111</sup> unless peace is intended to be a brief interlude between conflicts.<sup>112</sup> The process of accountability is also the process of reconciliation and restoration of peaceful relations.<sup>113</sup>

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107. *See id.* art. 2.

108. *Cf.* Draft Statute of the International Criminal Court, art. 23(3), Report of the International Law Commission (ILC) U.N. GAOR, 49th Sess., Supp. No. 10, U.N. Doc. A/49/10 (1994) [hereinafter 1994 ILC Report].

109. *See* ICC Statute, *supra* note 5, art. 16. Such a request lasts for 12 months, though the UNSC may renew it. *See id.*

110. *Cf.* Michael Scharf, *Justice Versus Peace, in* THE UNITED STATES AND THE INTERNATIONAL CRIMINAL COURT NATIONAL SECURITY AND INTERNATIONAL LAW 182 (Sarah Sewall & Carl Kaysen eds., 2000) [hereinafter THE UNITED STATES AND THE ICC] (arguing that prosecuting and punishing violators of grave crimes “would give significance to the victims’ suffering and would serve as partial remedy for their injuries.”).

111. *See* UNCI Report, *supra* note 27, at ¶ 648.

112. *Cf.* M. Cherif Bassiouni, *Searching for Peace and Achieving Justice: The Need for Accountability*, 59 *L. & Contemp. Prob.*, 9, 13 (1996).

113. *See* UNCI Report, *supra* note 27, at ¶ 648; *cf.* Luigi Condorelli & Annalisa Ciampi, *Comments on the Security Council Referral of the Situation in Darfur to the ICC*, 3 INT’L CRIM. JUST. 590, 592 (2005) (writing, “it is hardly questionable that investigations and prosecutions of crimes perpetrated in Darfur before an independent, impartial and fair institution is a means of removing serious obstacles to national reconciliation and the restoration of peaceful relations in Darfur, thus contributing to international peace and security”); Resolution on Impunity, *supra* note 17, pmb1 (“Recognizing that accountability

The referral also has the potential to deter vigilante justice, now or in the future; it will discourage those who would want to seek revenge and take justice in their own hands. On the other hand, and in the admirable words of Louise Arbour, "The abandonment - even the postponement - of the process of justice is an affront to those who obey the law and a betrayal of those who rely on the law for their protection; *it is a call for the use of force in revenge* and, therefore, a bankruptcy of peace."<sup>114</sup>

The Darfur referral is intended to serve as an instrument of truth and memory. Truth "is the cornerstone of the rule of law"<sup>115</sup> and the truth of Darfur needs to be fairly, credibly, and transparently told. Criminal trials of the nature envisaged by Resolution 1593 "can generate a comprehensive record of the nature" and extent of violations, reveal "how they were planned and executed, the fate of individual victims, who gave [the orders]," and who carried them out.<sup>116</sup> The ICC appears to be the most credible institution to hear the Darfur story, given its "entirely international composition and a set of well-defined rules of procedure and

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of perpetrators, including their accomplices, for grave human rights violations is one of the central elements of any effective remedy for victims of human rights violations and a key factor in ensuring a fair and equitable justice system and, ultimately, reconciliation and stability within a State").

114. Louise Arbour, UN High Commissioner for Human Rights, Address to the UN Commission of Human Rights, *in* U.N.: No More Delay on Darfur, Human Rights Watch, Mar. 18, 2005 available at <http://hrw.org/english/docs/2005/03/18/sudan10337.htm> (emphasis added); *cf.* Warren Christopher, *in* UN SCOR, 3175th mtg, 12-13, UN Doc. S/PV.1375, (Feb. 23, 1993), *in* PAYAM AKHAVAN, JUSTICE IN THE HAGUE, PEACE IN THE FORMER YUGOSLAVIA? A COMMENTARY ON THE UNITED NATIONS WAR CRIMES TRIBUNAL, 20 HUM. RTS. Q. 737, 750 (1998) ("[B]old tyrants and fearful minorities are watching to see whether ethnic cleansing is a policy the world will tolerate. If we hope to promote the spread of freedom, or we hope to encourage the emergence of peaceful, multi-ethnic democracies, our answers must be a resounding 'no.'").

115. CHERIE BOOTH, PROSPECTS AND ISSUES FOR THE INTERNATIONAL CRIMINAL COURT: LESSONS FROM YUGOSLAVIA AND RWANDA, *in* FROM NUREMBERG TO THE HAGUE: THE FUTURE OF INTERNATIONAL CRIMINAL JUSTICE 157, 183 (Philippe Sands, ed., 2003).

116. *See* Scharf, *Justice versus Peace*, *supra* note 110, at 182; *cf.* Antonio Cassese, *On the Current Trends Towards Criminal Prosecution and Punishment of Breaches of International Humanitarian Law*, 9 EUR. J. INT'L. L. 2, 14 (1998) (stressing the commemorative potentials of criminal trials). *See generally* LAWRENCE DOUGLAS, THE MEMORY OF JUDGMENT: MAKING LAW AND HISTORY IN THE TRIALS OF THE HOLOCAUST (2001).

evidence.”<sup>117</sup> As Michael Scharf asserts, “[t]he most authoritative rendering of the truth is the crucible of a trial that accords full due process.”<sup>118</sup>

The UNCI has argued that resorting to the ICC is the most reasonable and potentially effective option for ensuring justice over Darfur, “as the investigation and prosecution in the Sudan of persons enjoying authority and prestige in the country and wielding control over the State apparatus is difficult or even impossible.”<sup>119</sup> The UNCI also argues that trying the crimes outside Sudan, “far away from the community over which those persons still wield authority and where their followers live, might ensure a neutral atmosphere and prevent the trials from stirring up political, ideological or other passions.”<sup>120</sup> The weakness in this argument is that if the trial takes place at The Hague, it will pose problems in terms of access by victims and potential witnesses given the distance between the two countries. This plausibly explains why the UNSC has asked the ICC and the AU “to discuss practical arrangements that will facilitate the work of the Prosecutor and of the Court, including the possibility of conducting proceedings in the region, which would contribute to regional efforts in the fight against impunity.”<sup>121</sup> Such an arrangement could help in developing infrastructures for the host country, though it will obviously be at the expense of the Sudanese justice system that is in dire need of rehabilitation.

Although the goals of penal sanctions remain controversial among penologists,<sup>122</sup> deterrence always features prominently in such discourses.<sup>123</sup> Consequently, the Darfur referral sends a very clear, strong, and unmistakable signal to would-be violators of international criminal law that impunity is not assured and that international crime is no longer

117. *UNCI Report*, *supra* note 27, at ¶ 648; *cf.* BOOTH, *supra* note 115, at 184 (arguing that “the materials collected by the ICC which have passed its strict rules of admissibility of evidence can contribute to the creation of objective accounts of events which will play an important role in fighting forgetting”).

118. Scharf, *Justice versus Peace*, *supra* note 110, at 182.

119. *UNCI Report*, *supra* note 27, at ¶ 648.

120. *Id.*

121. S.C. Res. 1593, *supra* note 3, ¶ 3.

122. For exploratory studies on penology, *see generally* ANDREW VON HIRSCH & ANDREW ASHWORTH, *PRINCIPLED SENTENCING: READINGS ON THEORY AND POLICY* (2d ed. 1998); *CONTEMPORARY PUNISHMENT: VIEWS, EXPLANATIONS, & JUSTIFICATIONS* (Rudolph J. Gerber & Patrick D. McAnany eds., 1972); *THEORIES OF PUNISHMENT* (Stanley E. Grupp ed., 1971); NIGEL WALKER, *WHY PUNISH?* (1991). *See also* Miriam J. Aukerman, *Extraordinary Evil, Ordinary Crime: A Framework for Understanding Transitional Justice*, 15 *HARV. HUM. RTS. J.* 39, 44 et seq. (2002) (over-viewing goals of criminal justice).

123. *See, e.g.*, ARYEH NEIER, *WAR CRIMES* 81-84 (1998) (proposing deterrence, retribution, and incapacitation as purposes of criminal punishment).

tolerated.<sup>124</sup> Deterrence, in this context, “refers to the attempt to integrate or to reintegrate those persons who believe themselves to be beyond the reach of international criminal law.”<sup>125</sup> Of course, the most potent deterrent against crimes is not necessarily the length of the sentence imposed, but the subjective assessment of the offender as to the likelihood of his being indicted, arrested, tried and convicted.<sup>126</sup>

Above all, the Darfur referral is significant, not for the mere prosecutions and punishments of its perpetrators that will likely follow, or even for reparations that might be provided for victims. Such acts, though important in themselves, can never balance several thousands of innocent and harmless lives that have been slaughtered on the altar of racial hatred, the emotional trauma that survivors will be left to endure, and the valuable properties that the GoS and its Janjaweed militias have mindlessly destroyed. If the Darfur trial will have any significance, it will lie elsewhere other than, or more appropriately, in addition to, the punishment that will be meted out to perpetrators. Its legacy will be in the re-affirmation of the right of all persons—black and white, women and men, children and adults, poor and rich, weak and strong, Christians and Muslims, Jews and Gentiles, including Animists—to live in peace and dignity with each other regardless of their race, sex, status, or creed.

The present writer commends the UNSC for adopting Resolution 1593 to provide an appropriate mechanism that will lift the veil of impunity in Sudan, an impunity that has allowed human wrongs to continue unchecked in Darfur. Resolution 1593 is a victory for the rule of law, for international justice, and for lasting and sustainable peace in Sudan. A failure to respond to justice issues in Darfur “would have reduced the

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124. Amnesty Int'l, *Sudan: Who Will Answer for the Crimes?*, AI Index: AFR 54/006/2005, Jan. 18, 2005, available at <http://web.amnesty.org/library/print/ENGAFR540062005> [hereinafter *Sudan: Who will answer for the crimes?*] (documenting serious international crimes committed in Darfur and elsewhere in Sudan, and calling on the international community to take prompt action to challenge the climate of impunity and lay the foundations for full reparations to victims, justice, and durable peace in the whole country).

125. *Prosecutor v. Stacic*, Case No. IT-97-24-T, Judgment, ¶ 902 (July 31, 2003) (“Such persons must be warned that they have to respect the fundamental global norms of substantive criminal law or face not only prosecution but also sanctions imposed by international tribunals. In modern criminal law this approach to general deterrence is more accurately described as deterrence aiming at reintegrating potential perpetrators into the global society”) [hereinafter *Stacic* case].

126. *See id.*

Council to irrelevance in ending impunity and protecting human rights and international humanitarian law.<sup>127</sup>

#### IV. MATTERS ARISING FROM THE DARFUR REFERRAL

The Darfur referral raises several important issues, including the question of jurisdiction, which lies at the heart of any judicial process. A court acts in futility if it later turns out that it lacked both personal and material jurisdiction. Related to jurisdiction is the question of complementarity, which is very sensitive given that the existence of the ICC is a challenge to sovereignty. Then there are questions of sovereign immunity, which may be invoked given the involvement of top Sudanese government officials in the Darfur fray; the exclusion of the ICC's jurisdiction with respect to certain category of persons; cooperation with the Court, including funding; and of course, compensation for victims of the Darfur atrocities.

This part examines the legal and practical issues arising from the Darfur referral. In general, the ICC Statute does not contain specific regulations on UNSC referral, unlike "States Parties" referral or *proprio motu* investigation by the Prosecutor. This means that regulations governing investigations and prosecutions of the alleged Darfur crimes can only be by analogies and inferences from the provisions of the ICC Statute, U.N. Charter, and comparative jurisprudence.

##### A. Investigation and Prosecution

Article 53 of the ICC Statute provides the legal basis for the start of investigation. Some commentators, however, contend that this article is a *sui generis* procedure in the case of a UNSC referral, since there is no opponent, and that Article 18's admissibility proceedings are inapplicable.<sup>128</sup> This means that, with regard to the situation referred to by the UNSC, the Prosecutor is simply "entrusted with [the power to take] the final decision whether or not to activate the potential jurisdiction of the Court."<sup>129</sup> From the point of view of legal analysis, Article 53 allows the Prosecutor to initiate an investigation "having evaluated the information made available to him."<sup>130</sup> To take this step he must determine that there is a reasonable basis to proceed with an investigation, a determination that is

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127. UNSC Press Release 8351, *supra* note 39, at 4 (reporting Lauro Baja, Philippine representative to the UNSC).

128. Olásolo, *supra* note 74, at 9.

129. *Id.*

130. ICC Statute, *supra* note 5, art. 53(1).



part of prosecutorial discretion—"the principal manifestation of the statutory principle of prosecutorial independence, as . . . expressed in declaratory and functional terms in [A]rticle 42" of the Statute.<sup>131</sup>

Determining a reasonable basis for investigation, however, involves satisfying three conditions laid down in the statute. The Prosecutor must first determine whether the information available to him provides a reasonable basis to believe that a crime within the jurisdiction of the ICC has been or is being committed,<sup>132</sup> that is to say, genocide,<sup>133</sup> crimes against humanity,<sup>134</sup> and war crimes.<sup>135</sup> Secondly, the Prosecutor must determine whether "[t]he case is or would be admissible under Article 17" of the Statute.<sup>136</sup> Thirdly, the Prosecutor must determine whether, "taking into account the gravity of the crime and the interests of victims, there are nonetheless substantial reasons to believe that an investigation would not serve the interests of justice."<sup>137</sup>

Comparatively, the jurisprudence of the ICTY sets out four requirements for determination whether a violation should be subject to investigation, as per Article 3 of the ICTY Statute:

the violation must constitute an infringement of a rule of international humanitarian law.

the rule must be customary in nature or, if it belongs to treaty law, the required conditions must be met.

the violation must be "serious," that is to say, it must constitute a breach of a rule protecting important values, and the breach must involve grave consequences for the victim.

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131. See also Morten Bergsmo & Pieter Kruger, *Initiation of an Instigation*, in COMMENTARY ON THE ROME STATUTE OF THE INTERNATIONAL CRIMINAL COURT: OBSERVERS' NOTES, ARTICLE BY ARTICLE 701, 702 (Otto Triffterer ed., 1999) ("The principle of the independence of the Office of the Prosecutor is based on the interest of impartial justice on which the credibility and legitimacy of the criminal justice process depends.").

132. ICC Statute, *supra* note 5, art. 53(1)(a); *cf. id.* art. 22(1) ("A person shall not be criminally responsible under this Statute unless the conduct in question constitutes, at the time it takes place, a crime within the jurisdiction of the Court.").

133. See *id.* art. 6.

134. See *id.* art. 7.

135. See *id.* art. 8.

136. *Id.* art. 53(1)(b).

137. *Id.* art. 53(1)(c).

the violation of the rule must entail, under customary or conventional law, the individual criminal responsibility of the person breaching the rule.<sup>138</sup>

The “information” referred to in Article 53(1)(a) of the Rome Statute primarily relates to information accompanying the referral. In the case of Darfur, it is expected that the UNSC has already supplied the Prosecutor with all supporting documents at its disposal. This includes, presumably, the sealed file that the UNCI handed over to the U.N. Secretary-General having names of persons believed to be responsible for the Darfur crimes. If the referral had been *priopro motu*, under Article 13(c), then the Prosecutor is authorized to seek additional information to enable him to make a suitable analysis of the situation in question.<sup>139</sup> Some commentators believe that there is no reasonable ground to prevent the Prosecutor from taking liberty to obtain such additional information even in “States Party” or UNSC referrals. The purpose of the provision, they argue, “is to ensure that the Prosecutor has a sufficient basis to consider the seriousness of the information received before taking steps to launch a full investigation . . . .”<sup>140</sup>

If the above argument is correct, and logic and common sense support it, then the Prosecutor, in establishing preliminary violations of international criminal law, should also investigate “reports” of such violations committed by all parties to the conflict. He should examine, *inter alia*, the report of the UNCI, which, as earlier indicated, found that crimes against humanity and war crimes have been committed in Darfur. The UNCI, however, was hesitant on genocide;<sup>141</sup> before deciding whether or not to prosecute for genocide, the Prosecutor should examine other reports from the AU and other inter- and non-governmental organizations, local and international media, and academic experts.

The ICC Statute provides a safeguard to prevent any possible abuse of prosecutorial discretion. In the case of *proprio motu* investigation, the Statute obliges the Prosecutor to obtain the authorization of the Pre-Trial Chamber before embarking on an investigation.<sup>142</sup> No such authorization is required for investigations arising from UNSC referrals, but the

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138. Tadic Motion, *supra* note 91, ¶ 94.

139. See ICC Statute, *supra* note 5, art. 15(2).

140. Bergsmo & Kruger, *supra* note 131, at 705.

141. For a critique of the UNCI’s conclusion on the question of genocide, see Nsongurua J. Udombana, *Escape from Reason: Genocide and the International Commission of Inquiry on Darfur*, INT’L LAWYER (forthcoming spring 2006, on file with author).

142. See ICC Statute, *supra* note 5, art. 15(3).

regulations of the ICC require the Prosecutor to inform the Presidency in writing as soon as he receives an Article 13(b) referral.<sup>143</sup> He is also expected to “provide the Presidency with any other information that may facilitate the timely assignment of a situation to a Pre-Trial Chamber.”<sup>144</sup> The ICC Statute also expects the Prosecutor to determine that a reasonable basis exists before proceeding on an investigation.<sup>145</sup> This requirement of reasonableness appears in several provisions of the Statute, in the context of assessment of information and evidence. Article 58(1)(a), for example, provides for the Pre-Trial Chamber to have “reasonable grounds to believe that the person has committed a crime within the jurisdiction of the court.”<sup>146</sup>

Some commentators have argued that the requirement of “reasonable grounds” is less stringent than the “beyond reasonable doubt” criterion applicable to the weighing of evidence at trial and that it amounts to no more than assessing the evidence to show “the existence of a prima facie case against one or more perpetrators.”<sup>147</sup> This reasoning is based on the fact that “only evidence untested in the specific case under preparation is available prior to confirmation hearing and trial.”<sup>148</sup> Nevertheless, these safeguards are necessary because the decision of whether or not to prosecute is among the most important decisions the Prosecutor has to make. Furthermore, these cases are often “infused with political implications.”<sup>149</sup>

In identifying perpetrators to prosecute, the Prosecutor must exercise due diligence to avoid partial justice, though some difficulties should be

143. See International Criminal Court, Regulations of the Court, Regulation 45, U.N. Doc. ICC-BD/01-01-04 (May 26, 2004), available at [http://www.icc-cpi.int/library/about/officialjournal/Regulations\\_of\\_the\\_Court\\_170604-EN.pdf](http://www.icc-cpi.int/library/about/officialjournal/Regulations_of_the_Court_170604-EN.pdf) [hereinafter ICC Regulations].

144. See *id.*

145. See, e.g., ICC Statute, *supra* note 5, arts. 15(3), (4) & (6); 53(1)(a) & (1)(c).

146. *Id.* art. 58(a)(1).

147. Bergsmo & Kruger, *supra* note 131, at 706.

148. *Id.*

149. Allison Marston Danner, *Enhancing the Legitimacy and Accountability of Prosecutorial Discretion at the International Criminal Court*, 97 AM. J. INT'L L. 510, 510 (2003); cf. Silvia A. Fernández De Gurmendi, *The Role of the International Prosecutor*, in THE MAKING OF THE ROME STATUTE, *supra* note 95, at 175, 181 (“Those who argued against granting proprio motu powers to the Prosecutor feared an overzealous or politically motivated prosecutor targeting, unfairly or in bad faith, highly sensitive political situations. Sometimes [the I.C.C. Prosecutor was] feared as a ‘lone ranger running wild’ around the world with excessive powers . . .”). See generally Daniel D. Ntanda Nsereko, *Prosecutorial Discretion Before National Courts and International Tribunals* 3 J. INT'L CRIM. JUST. 124 (2005).

envisaged, given the mass atrocities committed in Darfur. The same due diligence is expected in the investigation of crimes. Thus, the ICC Statute enjoins the Prosecutor to respect the interests and personal circumstances of victims and witnesses, including age, gender, and health, taking into account the nature of the crime, in particular where it involves sexual violence, gender violence or violence against children.<sup>150</sup> Given the global character of the ICC, its statutory provisions and limited resources,<sup>151</sup> the Prosecutor must make broader strategic investigative and prosecutorial choices. The ICC Prosecutor has itself indicated that, as a general rule, it will “*focus its investigative and prosecutorial efforts and resources on those who bear the greatest responsibility, such as the leaders of the State or organisation allegedly responsible for those crimes.*”<sup>152</sup> However, the choice of who to prosecute must be informed by intelligent analysis. The standard, to use the UNCI’s formula, requires “*a reliable body of material consistent with other verified circumstances, which tends to show that a person may reasonably be suspected of being involved in the commission of a crime.*”<sup>153</sup>

It is necessary, before concluding this segment, to note that the ICC Prosecutor, on June 6, 2005, concluded that the statutory requirements for initiating an investigation in Darfur were satisfied.<sup>154</sup> In arriving at this decision, the Prosecutor conducted what he called a “thorough analysis,” after receiving the UNCI Report, “request[ing] information from a variety of sources, leading to the collection of thousands of documents . . . [and] interview[ing] over 50 independent experts.”<sup>155</sup>

150. See ICC Statute, *supra* note 5, art. 54(1)(b).

151. See ICC, *Paper on some policy issues before the Office of the Prosecutor*, ICC Doc. ICC-OTP 2003, at 7, available at [http://www.icc-cpi.int/library/organs/otp/030905\\_Policy\\_Paper.pdf](http://www.icc-cpi.int/library/organs/otp/030905_Policy_Paper.pdf) [hereinafter *Policy Paper*] (defining a general strategy for the ICC Office of the Prosecutor, highlighting the priority tasks to be performed and determining institutional frameworks capable of ensuring the proper exercise of its functions).

152. *Id.* (italics in the original).

153. *UNCI Report*, *supra* note 27, at ¶ 524 (italics in the original).

154. Press Release, Office of the Prosecutor of the International Criminal Court, The Prosecutor of the ICC Opens Investigation in Darfur, U.N. Doc. OTP/LSU/066-05, (June 6, 2005), available at

<http://www.icc-cpi.int/press/pressreleases/107.html> [hereinafter *Prosecutor Opens Investigation*].

155. *Id.*

### *B. Darfur and the Challenge of Complementarity*

The discipline of international criminal law is regulated through multiple legal regimes, with domestic courts as primary legal regimes. Transnational criminal justice is primarily meted out by domestic courts, which apply domestic law based on provisions of criminal codes, special criminal laws or through the implementation of treaty provisions into domestic criminal law.<sup>156</sup> National investigations and prosecutions, where they can properly be undertaken, are normally the most effective in bringing offenders to justice. States normally have the best access to evidence and witnesses and their enforcement agencies are usually at the disposal of the national prosecution system.<sup>157</sup>

Conscious of the need to maintain a balance between national sovereignties and demands of international criminal justice, the ICC Statute enshrines the principle of complementarity and accords primacy to national legal systems for crimes within the Court's jurisdiction. The Preamble to the Statute states implicitly that the effective prosecution of crimes of international concern "must be ensured by taking measures at the national level and by enhancing international cooperation" and calls on "every State to exercise its criminal jurisdiction over those responsible for international crimes." These provisions, which restate existing norms according to which states have obligations to prosecute and punish such crimes,<sup>158</sup> is supported by an explicit announcement that the ICC "shall be complimentary to national criminal jurisdictions."<sup>159</sup> The Statute confirms these preambular provisions in Article 1 and works out its details in Articles 17 and 20.<sup>160</sup> Article 17 deals with questions of admissibility, while Article 20 deals with the *ne bis in idem* rule. The *ne bis in idem* rule protects both an accused person and the Court; an accused person from

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156. See Ilias Bantekas, *Head of State Immunity in the Light of Multiple Legal Regimes and Non-Self-Contained System Theories: Theoretical Analysis of ICC Third Party Jurisdiction against the Background of the 2003 Iraq War*, 10 J. CONF. & SEC. L. 21, 24 (2005) (arguing that the domestic legal regime is more coherent than those established under ad hoc institutional arrangements, largely because domestic criminal jurisdiction with regard to transnational offences emanated from treaty practice and customary law that produced certain specific rules through time).

157. See *Policy Paper*, *supra* note 151, at 1-2.

158. Cf. *id.* at 5 ("[T]he principle underlying the concept of complementarity is that States remain responsible and accountable for investigating and prosecuting crimes committed under their jurisdiction and that national systems are expected to maintain and enforce adherence to international standards.").

159. ICC Statute, *supra* note 5, pmb1.

160. See generally K. Hall, *The Principles of Complementarity, in THE MAKING OF THE ROME STATUTE*, *supra* note 95, at 41.

being prosecuted twice for the same conduct, and the Court from squandering its limited resources where justice has already been done.<sup>161</sup>

The principle of complementarity is akin to the local remedies rule used in classic international law to protect state sovereignty against “excessive infringement by state to state claims on behalf of private individuals.”<sup>162</sup> The rule states that “a State should be given the opportunity to redress an alleged wrong within the framework of its own domestic legal system before its international responsibility can be called into question at [the] international level.”<sup>163</sup> The local remedies rule reinforces the subsidiary and complementary relationship of the international system to those of internal protection. To the extent possible, an international judicial tribunal should be prevented from playing the role of a court of first instance, a role that it cannot under any circumstances arrogate to itself.<sup>164</sup> However, the point of difference with the local remedies rule is that the jurisdiction of international criminal tribunals has essentially been primary, whether with reference to the Nuremberg Tribunal or the ICTY and ICTR.

A vital question is whether “national jurisdictions,” in relation to complementarity, are limited to states directly concerned with a given crisis, that is, the territorial or nationality states? The answer must be in the negative, since the ICC cannot be taken as a substitute for any of the existing mechanisms for prosecuting “grave crimes” under international humanitarian law (IHL).<sup>165</sup> The ICC merely complements these other

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161. See John Jones & Steven Powles, *INTERNATIONAL CRIMINAL PRACTICE* 396 (2003).

162. Jost Delbrück, *The Exhaustion of Local Remedies Rule and the International Protection of Human Rights: A Plea for a Contextual Approach*, in *DES MENSCHEN RECHT ZWISCHEN FREIHEIT UND VERANTWORTUNG* 213, 217 (Jürgen Jekewitz et al. eds., 1989).

163. A. A. CANCADO TRINDADE, *THE APPLICATION OF THE RULE OF EXHAUSTION OF LOCAL REMEDIES IN INTERNATIONAL LAW* 1 (1983).

164. See *Aksoy v. Turkey*, 6 Eur. Ct. H.R. 2260 (1996). For an analysis of the local remedies rule in relation to human rights litigation and adjudication in Africa, see also Nsongurua J. Udombana, *So Far So Fair: The Local Remedies Rule in the Jurisprudence of the African Commission on Human and Peoples' Rights*, 97 AM. J. INT'L. L. 1 (2003).

165. See, e.g., Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field, Aug. 12, 1949, art. 49, 75 U.N.T.S. 31 [hereinafter First Geneva Convention]; Geneva Convention for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea, Aug. 12, 1949, art. 50, 75 U.N.T.S. 85 [hereinafter Second Geneva Convention]; Geneva Convention Relative to the Treatment of Prisoners of War, Aug. 12, 1949, art. 129, 75 U.N.T.S. 238 [Third Geneva Convention]; and Geneva Convention Relative to the Protection of Civilian Persons in Time of War, Aug. 12, 1949, art. 146, 75 U.N.T.S. 287 [hereinafter Fourth Geneva Convention].

mechanisms, meaning that other states, including non-states Parties to the ICC Statute, can equally prosecute the most serious crimes of international concern, based on the universality principle<sup>166</sup> or under obligations arising from IHL. Héctor Olásolo, thus, concludes that:

the investigations and/or prosecutions undertaken by the national Courts of any State, Party or not-Party to the Rome Statute, preclude the activation and exercise of its jurisdiction by the ICC in as much as such States have introduced in their national legislation the jurisdictional links (territoriality, nationality of the accused or of the victim, principle of universal jurisdiction) that they are claiming to remain seized with a given matter.<sup>167</sup>

In sum, the ICC is not a court of first instance; it is not even a court of appeal; rather, it is a court of last resort.<sup>168</sup> The ICC is not allowed to exercise jurisdiction over international crimes where national systems genuinely investigate or prosecute such crimes. It is allowed to do so only if it considers that national authorities are unwilling or unable to carry out genuine investigations and/or prosecutions.<sup>169</sup> This will be the case where proceedings before national courts are intended to shield accused persons from criminal responsibility;<sup>170</sup> or where there has been an unjustified delay

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166. The universality principle allows any nation to prosecute a limited set of heinous offenses, even absent any connection to the crime, due to their universal condemnation. *See generally* STEPHEN MACEDO, *UNIVERSAL JURISDICTION: NATIONAL COURTS AND THE PROSECUTION OF SERIOUS CRIMES UNDER INTERNATIONAL LAW* (Stephen Macedo ed., 2004) (setting out the “Princeton Principles on Universal Jurisdiction”); LUC REYDAMS, *UNIVERSAL JURISDICTION: INTERNATIONAL AND MUNICIPAL LEGAL PERSPECTIVES* (2003); and Johan Van der Vyver, *Universal Jurisdiction*, 1999 S. AFR. Y.B. INT’L L. 107.

167. Olásolo, *supra* note 74, at 15.

168. *Cf.* Michael Scharf, *The Case for Supporting the International Criminal Court*, in *INTERNATIONAL DEBATE SERIES: SHOULD THE UNITED STATES RATIFY THE TREATY ESTABLISHING THE INTERNATIONAL CRIMINAL COURT?* 5, 7 (2002) (stressing that the ICC “would be a *last resort* which comes into play only when domestic authorities are unable or unwilling to prosecute.”) (emphasis added).

169. *See* ICC Statute, *supra* note 5, arts. 17, 20(3); *cf. id.* art. 20(3)(b) (allowing the ICC to retry an accused person where former proceedings were “conducted in a manner which, in the circumstances, was inconsistent with an intent to bring the person concerned to justice.”).

170. *See id.* art. 17(2)(a); *cf. id.* art. 20(3)(a) (allowing the ICC to retry an accused person where former proceedings were done to shield the persons concerned from proper criminal prosecution). Evidence of shielding may exist in different forms, such as legislation, orders, amnesty decrees, instructions and correspondence. An example of an explicit order was the Barabarossa Jurisdiction Order issued by the German High Command in May 1941,

in the proceedings in order to defeat the cause of justice;<sup>171</sup> or where judges are not independent and impartial;<sup>172</sup> or where the national legal system has collapsed.<sup>173</sup> Other instances that could permit admissibility by the ICC have been cited;<sup>174</sup> one is where the ICC and the territorial State incapacitated by mass crimes agree that a consensual division of labor is the most logical and effective approach; another is where conflicting groups oppose prosecution at each other's hands, preferring an impartial prosecution by a neutral ICC: "In such cases there will be no question of 'unwillingness' or 'inability' under article 17."<sup>175</sup>

On the basis of the ICC Statute and general international law, the ICC should have no difficulty in assuming jurisdiction over the alleged Darfur crimes, since none of the conditions for complementarity holds in Sudan. There is also no indication that any other state is willing to commence proceedings over Darfur. Although Khartoum has reportedly announced its intention to establish a special tribunal in Sudan to try perpetrators of serious crimes in Darfur,<sup>176</sup> there are reasons to believe that such a tribunal, if established at all, will be a Kangaroo court. To be credible, the tribunal would require Khartoum to take enormous and effective efforts to ensure its independence and credibility, a situation that is unlikely to occur given Khartoum's complicity in the commission of the Darfur crimes.

The unwillingness or inability (or both) of the GoS to prosecute the perpetrators of the Darfur atrocities is self-evident, though it may be necessary to provide further proofs. The UNCI, for example, has stated that the GoS has "failed to demonstrate that it had taken measures to prosecute those involved in the attacks that had taken place [in Darfur] since February 2003."<sup>177</sup> The Human Rights Watch collaborates:

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establishing that for "crimes committed against inhabitants by the Wehrmacht and its auxiliaries ... prosecution is not obligatory and would take place only if necessary for the maintenance of discipline or the security of the Forces." THE GERMAN HIGH COMMAND TRIAL, LAW REPORTS OF TRIALS OF WAR CRIMINALS 29-31 (1994) (1949).

171. See ICC Statute, *supra* note 5, art. 17(2)(b).

172. See *id.* art. 17(2)(c); *cf. id.* art. 20(3)(b) (allowing the ICC to retry an accused person where former proceedings were "not conducted independently or impartially").

173. See ICC Statute, *supra* note 5, art. 17(3).

174. See *Policy Paper*, *supra* note 151, at 5.

175. *Id.*

176. See Hum. Rts. Watch, *ICC Takes Key Step to Bring Justice to Darfur* (June 6, 2005), available at <http://hrw.org/english/docs/2005/06/06/sudan11076.htm>.

177. UNCI Report, *supra* note 27, at ¶ 428 (reporting also that the GoS cited "just one case relevant to the Commission's mandate and on which the judicial system had taken action in 2003.").



The Sudanese government has failed to prosecute serious crimes committed in Darfur. Instead of pursuing accountability for war crimes and crimes against humanity committed by government officials and Janjaweed members, it has made no genuine effort to investigate—much less discipline or prosecute—any of the individuals responsible. Instead, it has created a facade of accountability through sham prosecutions and created ad hoc government committees that produce nothing.<sup>178</sup>

The government's unwillingness can also be discerned by its refusal to rein in the Janjaweed militias, as repeatedly demanded by the international community.<sup>179</sup> These militias are consolidating "ethnic cleansing" by attacking IDPs—mostly farmers—who try to return to their homes. According to the Human Rights Watch, "[T]he Janjaweed are not only persons whose criminal past is forgiven, they are also assured that they will not have to face local criminal prosecution for any of the crimes committed while pursuing and evicting, looting and pillaging, the ethnic groups allegedly aligned with the rebels."<sup>180</sup> There is, meanwhile, a growing insecurity for humanitarian operations, as the recent arrest and phantom charge of Paul Foreman—head of Médecins Sans Frontières (MSF)—in Khartoum attests.<sup>181</sup>

As regards inability, the GoS will be unable to obtain the key evidence and testimony, even if it was in a position to obtain the accused persons. The reason is because of the near-collapse of the Sudanese justice system. From a substantive legal perspective, the UNCI has stated that

178. *Entrenching Impunity*, *supra* note 27, at 1. *See also id.* at 52 ("Despite overwhelming information that the Sudanese government has planned, coordinated, and implemented a campaign of ethnic cleansing resulting in crimes against humanity and war crimes in Darfur, not a single mid- or high-ranking civilian official or military officer has been investigated, disciplined, or prosecuted.").

179. Both the UNSC and the AU have deplored the failure of the GoS to disarm the Janjaweed militias, apprehend their leaders and associates and bring them to justice. *See, e.g.*, S.C. Res. 1591, *supra* note 41, ¶ 1.

180. Hum. Rts. Watch, *Darfur Destroyed: Ethnic Cleansing by Government and Militia Forces in Western Sudan*, Vol. 16, No. 6(A), at 49 (May 2004), available at <http://www.globalpolicy.org/security/issues/sudan/2004/HRWreport2.pdf> [hereinafter *Darfur Destroyed*].

181. *See* BBC News, *Second Sudan Aid Worker Arrested* (May 31, 2005), available at <http://news.bbc.co.uk/2/hi/africa/4595911.stm>. Paul Foreman was arrested by Sudanese authorities on May 31, 2005, on the unproven claim that an MSF report on rape published on March 8 violated Sudanese law and that the report is "false." *Id.*

“The Sudan Criminal Act and the Criminal Procedure Act do not contain substantive and procedural provisions that can be applied to the special situation of crimes committed during an armed conflict.”<sup>182</sup> From an adjectival legal perspective, the judicial system will be incapable of addressing the serious challenges resulting from Darfur.<sup>183</sup> Victims have themselves expressed their lack of confidence in the ability of the judiciary to act independently and in an impartial manner,<sup>184</sup> and they have a reason to be cynical, since there is little proof that the Sudanese judiciary is effective.<sup>185</sup> The independence of the court in Sudan exists in rhetoric than reality; as the UNCI reports, the judiciary has been seriously compromised such that judges disagreeing with the executive in Khartoum often suffer harassment or dismissal.<sup>186</sup> Thus, even if the Sudanese courts were willing to be seized of Darfur, there is no guarantee that an invisible hand in Khartoum will not manipulate the conduct of proceedings to ensure that accused persons are not found guilty.

These grounds should make any challenge to the ICC jurisdiction based on the principle of complementarity unsustainable. Nevertheless, the ICC must not put itself as a competitor for jurisdiction, since seizure of jurisdiction by the ICC over the Darfur crimes does not necessarily solve the problem of justice delivery in Sudan. Sudan is a war-torn country marked by devastated institutions, exhausted resources, diminished security, and a traumatized and divided population. The ICC must help the country to come to terms with large-scale past abuses and, more importantly, to re-establish the rule of law. Resolution 1593 itself calls on the ICC, in collaboration with the international community, to support domestic efforts towards promoting the rule of law, “protect[ing] human rights and combat[ing] impunity in” Sudan.<sup>187</sup> Such a call is understandable, since the ICC can only prosecute leaders who bear most responsibility for the Darfur crimes—given its limited human and material resources,<sup>188</sup> leaving national jurisdictions to prosecute “lower-ranking perpetrators.”<sup>189</sup>

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182. *Id.* ¶ 470.

183. *See id.* ¶ 431. *See also id.* ¶ 647 (“The Sudanese justice system has demonstrated its inability and unwillingness to investigate and prosecute the perpetrators of these crimes”).

184. *See id.*

185. *See id.* ¶ 438.

186. *UNCI Report, supra* note 27, at ¶ 432.

187. *See* S.C. Res. 1593, *supra* note 3, ¶ 4.

188. *See Policy Paper, supra* note 151, at 3 (“The Court is an institution with limited resources.”).

189. *Id.* (stressing, “The strategy of focusing on those who bear the greatest responsibility for the crimes may leave an “impunity gap” unless national authorities, the international

The ICC must, therefore, seize every opportunity—it should also create opportunities—to support reform of Sudan's justice system and help fill the country's glaring rule of law vacuum. The approach, to borrow the language of the U.N. Secretary-General, “must be comprehensive in its attention to all of its interdependent institutions, sensitive to the needs of key groups and mindful of the need for complementarity between transitional justice mechanisms.”<sup>190</sup>

### C. Exemptions from Reach of the ICC

Resolution 1593 contains a problematic provision, which gives states that are not parties to the ICC Statute exclusive jurisdiction over nationals, current or former officials, and personnel they contribute to operations in Sudan, as mandated by the UNSC or the AU.<sup>191</sup> This provision, which should be read on conjunction with Resolution 1591,<sup>192</sup> provides protection for contributing states to the peacekeeping and related humanitarian efforts in Sudan. The exemption, however, subsumes the independence of the ICC to the political and diplomatic vagaries of the UNSC, which is really unnecessary, as the ICC Statute contains necessary checks and balances to prevent politically motivated prosecutions. Fears to the contrary are wholly unwarranted. Richard Dicker, the director of Human Rights Watch's International Justice Program, has also criticized the exemption in Resolution 1593 as violating long-established principles of jurisdiction. While welcoming the resolution as a historic step towards justice for massive human rights violations in Darfur, Dicker nevertheless argues that the exemption undermines the ICC's ability to prosecute those personnel accused of crimes concerning operations in Sudan.<sup>193</sup>

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community and the Court work together to ensure that all appropriate means for bringing other perpetrators to justice are used”). *See also id.* at 7.

190. The Secretary General, Report of the Rule of Law and Transitional Justice in Conflict and Post-Conflict Societies, Summary, U.N. Doc. S/2004/616 (Aug. 23, 2004), available at <http://documents-dds-ny.un.org/doc/UNDOC/GEN/N04/395/29/pdf/N0439529.pdf?OpenElement> [hereinafter Rule of Law and Transitional Justice].

191. *See* S.C. Res. 1593, *supra* note 3, ¶ 6.

192. *See* S.C. Res. 1591, *supra* note 41 (establishing the U.N. Mission in Sudan (UNMIS), with a view towards expeditiously reinforcing the effort to foster peace in Darfur).

193. *See* Human Rights Watch, *U.N. Security Council Refers Darfur to the ICC U.N. Security Council Refers Darfur to the ICC Historic Step Toward Justice; Further Protection Measures Needed* (Mar. 31, 2005), available at <http://hrw.org/english/docs/2005/03/31/sudan10408.htm> (“The resolution's exemption is offensive, and it sets no precedent for the future. We oppose this exemption giving non-ICC states exclusive jurisdiction over personnel they contribute to Security Council or African Union operations in Sudan”).

Dicker's criticism is rightly focused, but it is obvious that Resolution 1593 was a product of political conflict and compromise. The exemption provision is "the voice of Jacob," and it is one out of similar exemptions since the entry into force of the ICC Statute. In July 2002, the U.S. secured UNSC Resolution 1422, which asked the ICC to defer any investigation or prosecution of any case involving peacekeeping personnel acting under the auspices of the U.N. and who are nationals of a state that are not parties to the Rome Statute.<sup>194</sup> The U.S. refused to renew the mandate of any U.N. peacekeeping missions unless the UNSC passed that resolution, which many characterized as "blackmail."<sup>195</sup> In 2003, the U.S. forced the UNSC to make an exemption in Resolution 1497,<sup>196</sup> in relation to U.N. operations in Liberia—a State Party to the ICC Statute. The resolution provided, *inter alia*, that—

current or former officials or personnel from a contributing State, which is not a party to the Rome Statute of the [ICC], shall be subject to the exclusive jurisdiction of that contributing State for all alleged acts or omissions arising out of or related to the Multinational Force of the [U.N.] stabilization force in Liberia, unless such exclusive jurisdiction has been expressly waived by that contributing State.<sup>197</sup>

The U.S. has additionally negotiated a series of so-called "Article 98" agreements,<sup>198</sup> which blackmail several states—about a hundred—to sign

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194. See Resolution 1422 of 2002, U.N. SCOR, 57th Sess., 4572d mtg., U.N. Doc. S/RES/1422 (2002). For a commentary, see C. Stahn, *The Ambiguities of Security Council Resolution 1422 (2002)*, 14 EUR. J. INT'L L. 85 (2003).

195. See, e.g., Lloyd Axworthy, *International Criminal Court: Stop the U.S. Foul Play*, GLOBE & MAIL, July 17, 2002, at A13 (reporting Canadian Foreign Minister as saying that the resolution sets dangerous precedent of the "use of blackmail on peacekeeping to achieve the purely self-interested objective of one of the council's permanent members"). See also William Orme, *Dispute May End U.N. Role in Bosnia Diplomacy: U.S. Clashes with Allies in a Failed Bid to Win Global Court Immunity, Then Vetoes an Extension of Balkans Peacekeeping Mission*, L.A. TIMES, July 1, 2002, at A1.

196. See S.C. Res. 1497, U.N. Doc. S/RES/1497 (2003).

197. *Id.*, ¶ 7.

198. Cf. ICC Statute, *supra* note 5, art. 98(2) (providing: "The Court may not proceed with a request for surrender which would require the requested State to act inconsistently with its obligations under international agreements pursuant to which the consent of a sending State is required to surrender a person of that State to the Court").

and commit themselves not to surrender U.S. nationals to the ICC.<sup>199</sup> In 2002, the U.S. Congress enacted legislation threatening a variety of measures against countries that cooperate with the ICC.<sup>200</sup> In May 2002, the Bush administration “filed for divorce from the court”<sup>201</sup> and repudiated the Clinton Administration’s prior signing of the ICC Statute.<sup>202</sup>

There are various arguments to America’s opposition to the ICC.<sup>203</sup> In 2002, Ronald Rumsfeld, Bush’s Defense Secretary, summarized the familiar but stale official position. He alleged the “lack of adequate checks and balances on powers of the [Court’s] prosecutors and judges; the dilution of the U.N. Security Council’s authority over international criminal prosecutions; and the lack of an effective mechanism to prevent politicized prosecutions of American servicemembers and officials.”<sup>204</sup> For many commentators, these reasons are both indefensible and absurd. William Schabas, for example, has argued that, “these so-called shortcomings are also features of the international tribunals to which the United States has accorded enthusiastic support, from Nuremberg and Tokyo to the more recent generation.”<sup>205</sup> It is interesting that no other nation has raised the allegations that the U.S. is making against the ICC.<sup>206</sup> The reason might be that not everyone shares the U.S. vision of freedom and enlightenment, and those who did are backsliding, as images of

199. See, e.g., Eric Schwartz, *The US Assault on World Criminal Court*, BOSTON GLOBE, July 1, 2002, at A11; and Peter Slevin, *U.S. Presses Allies on War Crimes Court; Aid Wielded in Push for Immunity Pacts*, WASH. POST, Aug. 27, 2002, at A12.

200. See American Servicemembers’ Protection Act of 2002, Pub. L. No. 107-206, 116 Stat. 820 (2002) [hereinafter ASPA].

201. Kathleen Wilson, *Ambassador Describes “New Diplomacy”: Bush Appointee Also Defends Decision on International Court*, VENTURA COUNTY STAR, Oct. 24, 2002, at B2.

202. See Press Release, Richard Boucher, International Criminal Court: Letter to UN Secretary General Kofi Annan, (May 6, 2002), available at <http://www.state.gov/r/pa/prs/ps/2002/9968.htm> (reading a letter to U.N. Secretary General Kofi Annan from Under Secretary of State for Arms Control and International Security John R. Bolton). For a discussion of this action and its legal implications, see Edward T. Swaine, *Unsigning*, 55 STAN. L. REV. 2061 (2003).

203. See generally THE UNITED STATES AND THE ICC, *supra* note 110.

204. News Release, United States Department of Defense, Secretary Rumsfeld Statement on the ICC Treaty (May 6, 2002), available at [http://www.defenselink.mil/releases/2002/b05062002\\_bt233-02.html](http://www.defenselink.mil/releases/2002/b05062002_bt233-02.html).

205. William Schabas, *United States Hostility to the International Criminal Court: It’s All About the Security Council*, 15 EUR. J. INT’L L. 701, 701 (2004).

206. See Remarks by Benjamin Ferencz, *The International Criminal Court: The First Year and Future Prospects*, 97 AM. SOC’Y INT’L L. PROC. 259 (2003) [hereinafter Ferencz, Remarks].

prisoner abuse at Abu Ghraib and Guantanamo Bay circulate the globe and supply fresh evidence of America's arrogance and depravity.<sup>207</sup>

The U.S. claim to exceptionalism and its "holier-than-thou" attitude in international affairs hang on an implied but false claim that it can bring about universal peace through the implementation of its own values of democracy and self-determination. Such a claim does violence to the notion of equality before the law, which is ingrained in the basic principles of sovereign equality and reciprocity in international law.<sup>208</sup> As Benjamin Ferencz, Nuremberg's former Prosecutor argues, the notion that the law should apply to everyone except the U.S. is "simply untenable."<sup>209</sup> Besides, September 11, 2001 has shown that the U.S. is not immune from adversities that afflict the rest of humanity and that "No State, no matter how powerful, can by its own efforts alone make itself invulnerable to today's threats."<sup>210</sup> Multilateralism, not unilateralism, remains for now, the best policy in solving problems with global reach. As Harry Truman, incidentally former U.S. President, wisely counseled in his speech to the final plenary session of the founding conference of the U.N., "we all have to recognize - no matter how great our strength - that we must deny ourselves the licence to do always as we please."<sup>211</sup>

Nevertheless, the exemption clause in Resolution 1593 must be seen as a necessary sacrifice to end impunity in Sudan. There is reason for optimism that this campaign will succeed, even if it takes one faltering step after the other. As Andrew Boyd observed of the UNSC some years back,

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207. See James Risen, *G.I.'s are Accused of Abusing Iraqi Captives*, N.Y. TIMES, Apr. 29, 2004, at A15; Don Van Natta Jr., *Questioning Terror Suspects in a Dark and Surreal World*, N.Y. TIMES, Mar. 9, 2003, § 1, at 1 (describing the atrocities in Guantánamo Bay prison, including deprivation of sleep, food, and water; covering detainees' heads with hoods; and forcing them to stand in physically stressful positions); Jeremy Waldron, *Torture and Positive Law: Jurisprudence for the White House*, 105 COLUM. L. REV. 1681, 1682 (2005) (stressing that what took place at Abu Ghraib "was not just a result of the depravity of a few poorly trained reservists, but the upshot of a policy determined by intelligence officials to have military police at the prison "set favorable conditions" (that was the euphemism) for the interrogation of detainees"); and generally Fleur Johns, *Guantánamo Bay and the Annihilation of the Exception*, 16 EUR. J. INT'L L. 613 (2005).

208. See IAN BROWNLIE, *PRINCIPLES OF PUBLIC INTERNATIONAL LAW* 289 (1998) ("The sovereignty and equality of states represent the basic constitutional doctrine of the law of nations.").

209. Ferencz, Remarks, *supra* note 206, at 259.

210. Cf. A More Secure World: Our Shared Responsibility, Report of the High-Level Panel on Threats, Challenges and Change 11, U.N. Doc.A/59/565 (Dec. 2, 2004), available at <http://www.un.org/secureworld/report.pdf> [hereinafter A More Secure World].

211. *Id.* at 4.

“the first time the tool is used there are almost bound to be complaints, from one quarter or another, that it is bent sinisterly.”<sup>212</sup>

#### *D. Should There Be Immunity for Impunity?*

Immunity constitutes a procedural bar to the ordinary jurisdiction of a court, and it is probable that President El-Bashir and his officials will invoke head-of-state and official immunities before the ICC. They will seek to rely on customary law, which in the context of civil and criminal jurisdictions, precludes the arraignment of foreign sovereigns or their officials in foreign courts in actions relating to their official acts. This doctrine is based on the maxim *par in parem non habet imperium*,<sup>213</sup> which is simply a specific application of the general principle of sovereign equality. The justification for this doctrine is the need to promote international equality, respect among nations, and freedom of action by heads of state without fear of repercussions.<sup>214</sup>

Modern examples of the stymieing effect of immunities abound, though mostly in relation to civil suits.<sup>215</sup> In relation to U.S. practice, *Saudi Arabia v. Nelson*<sup>216</sup> provides one example; there, the plaintiff alleged that Saudi government officers had tortured him but he was barred from suing Saudi Arabia in a U.S. court on account of the government's foreign sovereign status. The case *Bouzari v. Islamic Republic of Iran*<sup>217</sup> provides an example of Canadian practice, relating to claims of torture barred by Canadian State Immunity Act. However, in the recent UK case of *Jones*

212. ANDREW BOYD, *FIFTEEN MEN ON A POWDER KEG: A HISTORY OF THE U.N. SECURITY COUNCIL* 222 (1971).

213. “An equal has no power over an equal.” See BLACK'S LAW DICTIONARY 1673 (7th ed. 1999).

214. See, e.g., *Spanish Gov't v. Lambège et Pujol*, Cass., D. 1849, I, 5, 9 (finding that “a government cannot be subjected to the jurisdiction of another against its will, and that the right of jurisdiction of one government over litigation arising from its own acts is a right inherent to its sovereignty that another government cannot seize without impairing their mutual relations”); Lakshman Marasinghe, *The Modern Law of Sovereign Immunity*, 54 MOD. L. REV. 664, 668–78 (1991).

215. See generally Lee M. Caplan, *State Immunity, Human Rights, and Jus Cogens: A Critique of the Normative Hierarchy Theory*, 97 AM. J. INT'L L. 741, 742 n.7 (2003).

216. *Saudi Arabia v. Nelson*, 507 U.S. 349 (1993). See also *First American Corp. v. Sheikh Sayed Bin Sultan Al-Nahyan*, 948 F. Supp. 1107, 1119 (D.D.C. 1996); and *Alicog v. Kingdom of Saudi Arabia*, 860 F. Supp. 379, 382 (S.D. Tex. 1994), *aff'd*, 79 F.3d 1145 (5th Cir. 1996).

217. *Bouzari v. Islamic Republic of Iran*, No. 00–CV–201372 (Ont. Sup. Ct. J. May 1, 2002).

and *Mitchell v. Saudi Interior Ministry and Others*,<sup>218</sup> the Court held that acts of torture can never be assimilated to official state acts and do not, therefore, attract the civil immunity of the state or the individual perpetrators.

The good news is that international law has not yet passed the age of childbearing. International criminal law, in particular, has deflated the balloon of head-of-state immunity and no longer treats such a doctrine as an article of blind faith, particularly when it relates to criminal conduct of state officials. Major international law instruments and the jurisprudence of national and international tribunals now make it clear that head-of-state immunity is no longer a defense to prosecution for international crimes. The Nuremberg trials first established a powerful precedent for holding leaders accountable in a court of law who had committed grievous crimes against humanity, including genocide. The Nuremberg Charter,<sup>219</sup> which authorized the trials, read, *inter alia*, “The official position of defendants, whether as Heads of State or responsible officials in Government Departments, shall not be considered as freeing them from responsibility or mitigating punishment.”<sup>220</sup>

The Nuremberg Principles,<sup>221</sup> which grew out of the Nuremberg trials, flatly rejects any immunity for impunity. It provides: “The fact that a person who committed an act which constitutes a crime under international [criminal] law acted as Head of State or responsible Government official does not relieve him from responsibility under international law.”<sup>222</sup> The French Cour de Cassation referred to the Nuremberg Principles as being “consistent with the general principles of law recognised by the community of nations.”<sup>223</sup> Both the Nuremberg trials and Principles provided templates for “immunity” clauses in subsequent instruments. The Draft Code of the International Law Commission

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218. *Jones and Mitchell v. Saudi Interior Ministry and Others*, C.A. (Oct. 28, 2004), available at [www.redress.org/news/jones%20v%20saudi%20arabia.pdf](http://www.redress.org/news/jones%20v%20saudi%20arabia.pdf).

219. See Agreement for the Prosecution and Punishment of the Major War Criminals of the European Axis, and Charter of the International Military Tribunal, 58 Stat. 1544, 82 U.N.T.S. 280 (Aug. 8, 1945) [hereinafter Nuremberg Charter].

220. *Id.* art. 7.

221. See Affirmation of the Principles of International Law Recognized by the Charter of the Nuremberg Tribunal, G.A. Res. 95(1), U.N. GAOR, 1st Sess., pt.2, at 1144, U.N. Doc. A/236 (1946) (affirming the principles of international law recognized by the Nuremberg Charter); and Principles of International Law Recognized in the Charter of the Nuremberg Tribunal and in the Judgment of the Tribunal, G.A. Res. 488, 2nd Sess., U.N. Doc. A/CN.4/SER.A/1950/Add.1 (1950) [hereinafter Nuremberg Principles].

222. See Nuremberg Principles, *supra* note 221, princ. III.

223. *Klaus Barbie case*, Cass. (Ch. Crim.), Oct. 6, 1983, *Receuil Dalloz Sirey*, Jr. 113, 120 (1984) (on file with author).



(ILC)<sup>224</sup> provides: “The official position of an individual who commits a crime against the peace and security of mankind, even if he acted as head of State or Government, does not relieve him of criminal responsibility or mitigate punishment.”<sup>225</sup> The Draft Code is not binding as a matter of international law but it is an authoritative instrument, parts of which may constitute evidence of customary international law.<sup>226</sup>

Then comes the ICC Statute, which unambiguously provides:

This Statute shall apply equally to all persons without any distinction based on official capacity. In particular, official capacity as a Head of State or Government, a member of a Government or parliament, an elected representative or a government official shall in no case exempt a person from criminal responsibility under this Statute, nor shall it, in and of itself, constitute a ground for reduction of sentence.<sup>227</sup>

Both the ICTY and ICTR Statutes are similarly worded.<sup>228</sup> Although the wording of the ICC Statute seems pretty clear, as does earlier other instruments, some commentators insist that there are practical problems regarded sitting heads of state, and that current international criminal instruments provide no guidance. Claire De Than and Edwin Shorts, for example, maintain that immunity limitations apply to *former*, as opposed to *sitting*, heads of states. Their reasoning is that “there is not only a great deal of practical difficulty in indicting [a sitting head of state] . . . for an international crime, but also a legal barrier in the form of his technical

224. See Draft Code of Crimes Against the Peace and Security of Mankind 1996 [hereinafter Draft Code], in *Report of the International Law Commission on the Work of its Forty-Eighth Session: 6 May - 26 July 1996*, G.A. Res. 51/160, 51 U.N. GAOR 51st Sess., Supp. No. 49, at 93-104, 83, U.N. Doc. A/51/49 (1996) [hereinafter *Report of ILC 1996*].

225. *Id.* art. 7.

226. *Prosecutor v. Furundzija*, Case No. IT-95-17/1, ¶ 227 (Dec. 10, 1998) (holding that, at the very least, the Draft Code may “be indicative of the legal views of eminently qualified publicists representing the major legal systems of the world”) [hereinafter *Furundzija*].

227. See ICC Statute, *supra* note 5, art. 27(1). See also *id.* art. 27(2) (“Immunities or special procedural rules which may attach to the official capacity of a person, whether under national or international law, shall not bar the Court from exercising its jurisdiction over such a person”).

228. See ICTY Statute, *supra* note 55, art. 7(2) (“The official position of any accused person, whether as Head of State or Government or as a responsible Government official, shall not relieve such person of criminal responsibility nor mitigate punishment”); and ICTR Statute, *supra* note 56, art. 6(2) (similarly worded).

identification with his State.<sup>229</sup> However, they add that a blanket application “contains much merit as a practical step in addressing the visible trend toward impunity for gross human rights violations and serious international crimes that pervaded the twentieth century, and shows no real sign of stopping.”<sup>230</sup>

Municipal judicial tribunals also affirm individual criminal responsibility for international crimes, regardless of the identity of the suspect. In the much-debated *United States v. Noriega*,<sup>231</sup> the U.S. arrested General Manuel Noriega, the de facto leader of Panama, in 1990 and charged him in a US court, *inter alia*, for engaging in a criminal enterprise in violation of U.S. racketeering and drug laws. Noriega’s charge presented the court with “several issues of first impression,”<sup>232</sup> one of which was the traditional immunity and jurisdiction defenses, defenses which the court refused to uphold. The Court, however, made clear that certain criminal activities, such as the trafficking of narcotics, would not be considered an official act.

Immunity issues resurfaced again in the *Pinochet* case,<sup>233</sup> which was particularly unique, because it was the first time a former head of state was arrested for crimes against humanity, and the first time that an English court removed the immunity from a Head of State for international crimes. One of the issues of consideration was whether Pinochet continued to enjoy immunity for acts committed during his tenure as head of state. Despite his initial victory, the House of Lords, on March 24, 1999, ruled that Pinochet was not entitled to immunity for violations of international

229. CLAIRE DE THAN & EDWIN SHORTS, *INTERNATIONAL CRIMINAL LAW AND HUMAN RIGHTS* 52-53 (London Sweet & Maxwell 2003) [hereinafter DE THAN & SHORTS]; cf. Bantekas, *supra* note 156, at 28 (arguing for exceptions in the case of “acts, even abhorrent criminal acts, committed by a serving Head of State, serving Government members and serving Heads of diplomatic missions and their families” and that “[t]his type of immunity is called *ratione personae* and is granted for the benefit of the particular individual on account of his or her office”).

230. DE THAN & SHORTS, *supra* note 229, at 53.

231. See *United States v. Noriega*, 746 F. Supp. 1506 (S.D. Fla. 1990), *aff’d*, 117 F.3d 1206 (11th Cir. 1997). See also *Separation of Powers-Head of State Immunity-Eleventh Circuit Holds that the Executive Branch’s Capture of Noriega Exempts Him from Head of State Immunity-United States v. Noriega*, 117 F.3d 1206 (11th Cir. 1997), 111 HARV. L. REV. 849, 849 (1998) [hereinafter *Separation of Powers*].

232. Adam Isaac Hasson, *Extraterritorial Jurisdiction and Sovereign Immunity on Trial: Noriega, Pinochet, and Milosevic—Trends in Political Accountability and Transnational Criminal Law*, 25 B.C. INT’L & COMP. L. REV. 125, 126 (2002).

233. See generally *Regina v. Bartle*, Ex parte Pinochet, 3 W.L.R. 1456 (H.L. 1998) [hereinafter *Pinochet* 1]; and *Regina v. Bow Street Magistrate*, Ex parte Pinochet, 2 W.L.R. 827 (H.L. 1999) [hereinafter *Pinochet* 2].

criminal law, or serious human rights violations, since such allegations could not be considered official acts under principles of immunity.<sup>234</sup> Like the Nuremberg trials, the *Noriega* and *Pinochet* decisions have set powerful precedents for contemporary international tribunals seeking to prosecute foreign leaders for human rights violations, and other violations of international and domestic law.<sup>235</sup>

The emergent norm that denies immunity to any individual charged for grave crimes, in whatever capacity they were committed, is a concrete achievement of contemporary international law. Some commentators sustain this norm on the distinction between official and private acts, meaning that criminal acts of state officials are not regarded as acts of states.<sup>236</sup> Other scholars criticize this reasoning as “unsound and even preposterous from the strictly legal viewpoint.”<sup>237</sup> They offer an alternative basis, which sustains the denial on peremptory norms, such as those protecting human rights. These norms “prevail over ‘simple’ customary rules, such as that granting state immunity; [and] no legal effects can be therefore attached to acts which are null and void because of their inconsistency with peremptory norms.”<sup>238</sup> In support of this latter

234. *See id.* *See also* Ruth Wedgwood, *Augusto Pinochet and International Law*, 46 MCGILL L.J. 241 (2000) (exploring the interplay between historicized law and normative standards of human rights law by considering how the House of Lords dealt with the question of General Pinochet’s immunity); Ruth Wedgwood, *40th Anniversary Perspective: International Criminal Law and Augusto Pinochet*, 40 VA. J. INT’L L. 829, 831 (2000); and Michael Byers, *The Law and Politics of the Pinochet Case*, 10 DUKE J. COMP. & INT’L L. 415, 415-16 (2000).

235. Slobodan Milosevic, former President of Yugoslavia, is currently standing trial before the ICTY for war crimes and crimes against humanity. *See* Prosecutor v. Milosevic, Trial Chamber, Indictment No. IT-02-54 (pending). *See also* William Miller, *Slobodan Milosevic’s Prosecution by the International Criminal Tribunal for the Former Yugoslavia: A Harbinger of Things to Come for International Criminal Justice*, 22 LOY. L.A. INT’L & COMP. L.J. 553, 554-55 (2000).

236. *See, e.g.*, A. Bianchi, *Denying State Immunity to Violators of Human Rights*, 46 AUST. J. PUB. & INT’L L. 195, 227 (1993/94) (recalling the distinction between ‘official’ and ‘unofficial’ public acts made by some US courts, starting with the 1980 *Filartiga v. Peña Irala* case, and extending it to the field of state immunity, “by way of analogy.”).

237. *See, e.g.*, Antonio Cassese, *When May Senior State Officials Be Tried for International Crimes? Some Comments on the Congo v. Belgium Case*, 13 E.J.I.L. 853, 869 (2002). *See also* Steffen Wirth, *Immunity for Core Crimes? The ICJ’s Judgment in the Congo v. Belgium Case*, 13 EURO. J. INT’L L. 877, 890 (2002) (arguing that the distinction is “not the most satisfactory method of dealing with the problem”); J. Wouters, *The Judgment of the International Court of Justice in the Arrest Warrant Case: Some Critical Remarks*, 16 LEIDEN J. INT’L L. 253, 262 (2003).

238. Andrea Gattini, *War Crimes and State Immunity in the Ferrini Decision*, 3 J. INT’L CRIM. JUST. 224, 234-35 (2005).

argument, one could refer to the AU Act, enshrining respect for the sanctity of human life, and condemnation and rejection of impunity as one of the normative principles that should guide the AU in the conduct of international relations.<sup>239</sup>

Whatever might be the legal basis for this normative shift, the general opinion seems to be that the time for flogging dead paradigms is past. Classic, Westphalian, international law “principles were an expression of the conviction that domestic rulers were less likely to be arbitrary than crusading foreign armies bent on conversion.”<sup>240</sup> Parts of the mental furniture of that era were concepts of sovereignty, immunity, and non-interference in the internal affairs of states. In the modern era, however, these principles have become principal obstacles to the universal rule of law, justice, and human rights. Most modern governments have become predators that must be contained in order to advance individual freedoms. The emergent universal rule of law demands that there should be no outside-of-law and that everyone, everywhere, should be accountable for his or her deeds, regardless of position.

The applicability of this new paradigm still has to be worked out, particularly as it affects sitting heads-of-state; but in principle, there is no reason to be defensive on this shift. A society has a right to limit itself and an individual is only a part of the international society, no matter how highly placed, and a part cannot be greater than the whole. African or other tyrants cannot continue to use state apparatus to slaughter the very citizens they were supposed to protect, and then hide under the façade of immunity. Granting immunity to sitting heads-of-state for international crimes they commit represents the ultimate hypocrisy, and makes nonsense of any modest advances that international (human rights) law has made in the last few decades. What such immunity means is that while victims of horrifying atrocities struggle to put their suffering behind them, their perpetrators are left under the panoply of power undisturbed to commit further atrocities and eventually retire to write their ‘memoirs.’ Upholding such immunity “mock[s] the dead and make[s] cynics of the living.”<sup>241</sup> It shamefully vindicates the ancient philosopher, Anacharsis, who maintained that laws were like cobwebs, strong enough to detain only the weak, but too weak to hold the strong. It could embolden persons who in the future desire to take a course of conduct that is in deliberate violation of international criminal law. It could lead to desperate

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239. See AU Act, *supra* note 59, art. 4(o).

240. KISSINGER, *supra* note 18, at 21.

241. ROBERT H. JACKSON, TRIAL OF WAR CRIMINALS: REPORT OF ROBERT H. JACKSON TO THE PRESIDENT, DEP'T. OF STATE 3 (1945).

consolidations of power by despots, as shelters from prosecutions for atrocities they commit.

The ICC must not allow President El-Bashir and his officials to run away from justice with the Darfur crimes. Even if Darfur is a slip, it is at least a case of failed security for which El-Bashir should be held accountable. His officials, including the regional administrative officials in Darfur, military commanders, and militia leaders, should also be investigated, either as a matter of individual criminal responsibility or command responsibility.<sup>242</sup> History has shown that the involvement of highly placed functionaries or officials of states makes the commission of most international crimes possible; it is great men, potential saints, not little men, who become merciless fanatics. The Janjaweed militia leaders must not be allowed to hide behind the façade of state or superior orders as justification for their heinous atrocities in Darfur, since they were under no legal obligation to obey such orders, and they cannot pretend not to know that such orders were unlawful.<sup>243</sup> There comes a point when a man must refuse to answer to his leader if he is also to answer to his own conscience. In any event, an order on anyone to commit genocide or crimes against humanity is “manifestly unlawful.”<sup>244</sup>

#### *E. The Victim Trust Fund*

One of the defects in traditional criminal justice systems has been its focus on the offender and its neglect of the offended. The ICTY and ICTR were, for example, established essentially for rectificatory justice, that is, to deal “with injustice in terms of direct physical violence suffered by people during conflict.”<sup>245</sup> The problem with rectificatory or retributive justice has been its *ex post facto* nature, which does not always bring real healing to victims of grave crimes. A limited *ad hoc* court, created after the event, “is hardly the best way to ensure universal justice.”<sup>246</sup>

Things are different now, as emerging criminal norms now require states to develop reparation programs for common post-conflict challenges, including the loss of property by displaced persons and refugees. Indeed, states are increasingly being obliged, in the face of

242. See *Entrenching Impunity*, *supra* note 27, at 1.

243. See ICC Statute, *supra* note 5, art. 33(1). See generally CRIMES OF WAR: A LEGAL, POLITICAL-DOCUMENTARY, AND PSYCHOLOGICAL INQUIRY INTO THE RESPONSIBILITY OF LEADERS, CITIZENS, AND SOLDIERS FOR CRIMINAL ACTS IN WARS (Richard A. Falk, Gabriel Kolko & Robert Jay Lifton 1971).

244. ICC Statute, *supra* note 5, art. 33(2).

245. RAMA MANI, BEYOND RETRIBUTION: SEEKING JUSTICE IN THE SHADOWS OF WAR 7 (Blackwell Publishers, Inc. 2002).

246. Ferencz, Address, *supra* note 1, at ¶ 5.

widespread human rights violations, to act not only against perpetrators, but also on behalf of victims through the provision of reparations.<sup>247</sup> In post-conflict situations and in the realm of international criminal law, both the demands of justice and the dictates of peace require that something should be done to compensate victims. The ICC Statute meets this demand by balancing retributive and restorative justice, enabling the ICC not only to hold individuals accountable for egregious crimes, but also to provide restitution for victims of such crimes from the pockets of the criminal.<sup>248</sup> In honoring the victims' right to benefit from remedies and reparation, "the international community keeps faith and human solidarity with victims, survivors and future human generations, and reaffirms the international legal principles of accountability, justice and the rule of law."<sup>249</sup> This development reflects, in Hans Holthuis's apt words, "a shift of emphasis from the highly legal-technical to the utmost practical."<sup>250</sup>

As for Darfur, the UNCI had recommended that the UNSC should establish a Compensation Commission under Chapter VII of the U.N. Charter. The 15-member Commission was to sit in Darfur—the place where the crimes were committed. The UNCI suggested five Chambers, each comprising three members and dealing with different categories of victims, including victims of rape.<sup>251</sup> Generally, the establishment of such a Commission could be justified on moral, if not on legal, grounds; but there are voices of dissent!<sup>252</sup> Regrettably, Resolution 1593 ignored this vital issue but merely recalled Articles 75 and 79 of the ICC Statute and

247. Rule of Law and Transitional Justice, *supra* note 190, at ¶ 54.

248. See ICC Statute, *supra* note 5, pmbl. See also *id.* art. 75(2) ("The Court may make an order directly against a convicted person specifying appropriate reparations to, or in respect of, victims, including restitution, compensation and rehabilitation").

249. M. Cherif Bassiouni, Special Rapporteur, *The Right to Restitution, Compensation and Rehabilitation for Victims of Gross Violations of Human Rights and Fundamental Freedoms - Final Report of the Special Rapporteur, M. Cherif Bassiouni*, submitted in accordance with Resolution 1999/33, Jan. 18, 2000, pmbl., E/CN.4/2000/62 available at [http://www.unhchr.ch/Huridocda/Huridoca.nsf/\(Symbol\)/E.CN.4.2004.NGO.125.En?Opendocument](http://www.unhchr.ch/Huridocda/Huridoca.nsf/(Symbol)/E.CN.4.2004.NGO.125.En?Opendocument) (last visited Oct. 26, 2005).

250. Hans Holthuis, Address by the Registrar of the ICTY to the Plenary of the Preparatory Commission of the International Criminal Court during its Eighth Session (Oct. 1, 2001), available at [www.iccnw.org/html/ICTY.html](http://www.iccnw.org/html/ICTY.html); also available at <http://listserv.buffalo.edu/cgi-bin/wa?A2=ind0110&L=justwatch-l&D=0&P=5461&F=P> (last visited Oct. 27, 2005).

251. See generally UNCI Report, *supra* note 27, at ¶¶ 570, 590-603.

252. *Contra*. Christian Tomuschat, *Darfur—Compensation for the Victims*, 3 J. INT'L CRIM. JUST. 579 (2005) (arguing that there is no customary international rule governing individual reparation claims and that no general international forum for the assertion of such claims has come into being).

encouraged “States to contribute to the ICC Trust Fund for Victims.”<sup>253</sup> With this abdication of responsibility by the UNSC, the ICC now carries the burden of ordering reparations and compensations for victims of the Darfur mayhem. The ICC Statute empowers the Court to “establish principles relating to reparations to, or in respect of, victims, including restitution, compensation and rehabilitation.”<sup>254</sup> Reparations issues in the context of transitional justice naturally raise questions of “who,” “how,” and “what.” Who, for example, should be included among victims to be compensated? How much compensation should be awarded or rewarded? What kinds of harm should be covered, and how should it be quantified? How are the different kinds of harm to be compared and compensated and how should the compensation be distributed?

Generally, the ICC is permitted to determine the scope and extent of any damage, loss and injury to, or in respect of victims, and to state the principles on which it is acting.<sup>255</sup> The ICC Rules of Procedure and Evidence defines “victims” as “natural persons who have suffered harm as a result of the commission of any crime within the jurisdiction of the Court.”<sup>256</sup> However, a careful reading of the ICC Statute itself shows that “victims” are broadly defined. They include child soldiers, that is, minors pressed into military service and suffering great ordeals by being forced into front line service. (Conscripting or enlisting children under the age of 15 into the national armed forces, or using them to participate actively in hostilities itself constitutes a war crime under the Rome Statute).<sup>257</sup> They include rape victims needing help, not just for the material loss in a war, but also for trauma counseling.<sup>258</sup> The ICC Rules also “include organizations or institutions that have sustained direct harms to any of their property which is dedicated to religion, education, art, or science or charitable purposes, and to their historic monuments, hospital and other places and objects for humanitarian purposes.”<sup>259</sup>

253. S.C. Res. 1593, *supra* note 3, ¶ 3.

254. *See* ICC Statute, *supra* note 5, art. 75(1).

255. *Id.*

256. Rules of Procedure and Evidence of the ICC, R. 85(a), *available at* <http://www.campusdenhaag.nl/documenten/bonneau.doc> (last visited Oct. 27, 2005) [hereinafter ICC Rules].

257. *See* ICC Statute, *supra* note 5, art. 8(2)(xxvi).

258. *See, e.g., id.* art. 43(6) (requiring the Registrar to set up “a Victims and Witnesses Unit,” which “shall include staff with expertise in trauma, including trauma related to crimes of sexual violence”). *See also id.* art. 54(1)(b) (on the duties and powers of the Prosecutor with respect to investigation).

259. ICC Rules, *supra* note 256, R. 85(b).

In pursuance of the above provisions, read in conjunction with Article 79 of the Statute,<sup>260</sup> the ICC has established a Victims Trust Fund (VTF). Its Registry administers the VTF with supervision by an independent Board of Directors.<sup>261</sup> The aim of the VTF is to channel money to victims, sometimes from monies that the ICC will order an offender to pay as compensation. The funds may be allocated either to individuals, or to a collectivity; payments may be made directly to victims or to other bodies, such as aid organizations. Where a convict does not have the necessary funds to pay the compensation imposed, the Court will seek external sources, such as grants from governments, international organizations and individuals.

Trials at the ICC will necessarily involve victims who have often been severely damaged, given the nature of the Court's mandate. Providing justice to these victims is important, but a component of that justice must include the provision of help and compensation to enable them to rebuild lives often shattered by war. In Darfur, more than 1.65 million persons have been internally displaced, with more than 200,000 refugees in neighboring Chad. There has also been large-scale destruction of villages throughout the region's three states.<sup>262</sup> There can be no justice for such people unless there is a conscious effort by the international community to rebuild broken lives and homes. Even the GoS must, if it is to regain its legitimacy and credibility, put in place programs to provide reparations to Darfur victims for harms suffered, including restitution of legal rights (or just compensation where this cannot be done) and official apologies. Such concrete steps will not only complement contributions by the ICC, but they will significantly promote reconciliation and restore confidence in the State.<sup>263</sup> Authority must be exercised with humility if obedience is to be accepted with delight.

#### *F. Cooperation with the ICC*

A literal reading of Resolution 1593 gives the impression that only the GoS and other parties to the Darfur conflict are under legal obligation to "cooperate fully with and provide necessary assistance to the Court and the Prosecutor."<sup>264</sup> Such an interpretation, however, does violence to

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260. See ICC Statute, *supra* note 5, art. 79(1) (providing for the establishment of a Trust Fund "for the benefit of victims of crimes within the jurisdiction of the Court and [of the families of such victims]").

261. The ICC Statute provides that "[t]he Trust Fund shall be managed according to criteria to be determined by the Assembly of States Parties." *Id.* art. 79(3).

262. See *UNCI Report*, *supra* note 27, at ¶ 3.

263. *Cf.* Rule of Law and Transitional Justice, *supra* note 190, at ¶ 54.

264. S.C. Res. 1593, *supra* note 3, ¶ 2.



general principles of international law. Obviously, State Parties have the primary obligation to cooperate, based on the sacred principle, *pacta sunt servanda*, which by interpretation means: "Every treaty in force is binding upon the parties to it and must be performed by them in good faith."<sup>265</sup> From a realistic point of view, states do not often implement treaties merely out of respect for the *pacta sunt servanda* rule, which explains why recent treaties contain specific obligations on states to cooperate in order to facilitate compliance.

The ICC Statute first permits the Court to request cooperation from States Parties<sup>266</sup> and to seek assistance from non-States Parties,<sup>267</sup> and even inter-governmental organizations.<sup>268</sup> States Parties are expected to cooperate fully with the Court,<sup>269</sup> including surrendering accused persons within their territories<sup>270</sup> and providing other forms of assistance.<sup>271</sup> This may entail implementing necessary legislation for the executing of warrants and requests of the ICC, especially as existing domestic laws might not have envisaged obligations under the ICC Statute. This is an obligation of conduct (French *obligation de conduite*), that is, obligation requiring States to perform a specifically determined action.<sup>272</sup>

The obligation to cooperate with the ICC in respect of Darfur does not rest only on the ICC Statute; it also has, as its legal basis, the U.N. Charter, especially for non-States Parties to the Statute. Since Chapter VII of the U.N. Charter forms the basis of Resolution 1593, it is conceivable to argue that the resolution creates binding obligations on all States to take whatever steps required for their implementations.<sup>273</sup> Some commentators have argued that, with respect to Darfur, paragraph 2 of Resolution 1593

265. Vienna Convention on the Law of Treaties, art. 26, 1155 U.N.T.S. 331, 339 (May 23, 1969) [hereinafter Vienna Convention].

266. See ICC Statute, *supra* note 5, art. 87(1); see also *id.* art. 89.

267. See *id.* art. 87(5).

268. See *id.* art. 87(6).

269. See *id.* art. 86.

270. See *id.* art. 89.

271. See *id.* art. 93.

272. See *The Prosecutor v. Blaskic* (Decision on the Defence Motion Filed Pursuant to Rule 64), ¶ 8, Case IT-95-14/1 (Apr. 3, 1996) [hereinafter *Blaskic Defence Motion*].

273. Cf. U.N. Charter, *supra* note 2, art. 25 (wherein all Members States of the UN have agreed to accept and carry out decisions of the UNSC under the Charter). The Council's voting rules require that at least 9 of the 15 members must vote in favor of an action potentially binding all members of the U.N. See *id.* art. 27(3) ("Decisions of the Security Council on all other matters shall be made by an affirmative vote of nine members including the concurring votes of the permanent members . . ."). 11 members voted in favor of Resolution 1593.

excludes the possibility of extending the obligation to cooperate to all states.<sup>274</sup> The present writer rejects this interpretation and submits that Resolution 1593's call on the GoS and all other parties to the Darfur crisis to cooperate fully with the Prosecutor and the ICC applies with equal force to all Member States of the U.N., based on the above analysis.<sup>275</sup>

One implication arising from this conclusion is that, though both the ICC Statute and the U.N. Charter provide bases for obligations to cooperate with the ICC, such an obligation is probably stronger if it arises from a Chapter VII decision. The reason is because the ICC Statute is request and horizontally based, with the ICC and States being on an equal footing, based on the principle of complementarity.<sup>276</sup> However, it is possible to argue that the relationship between the ICC and states is asymmetrical and vertical, given the power of the ICC to overrule national systems where it determines, for example, that they are unwilling or unable to prosecute. As for the U.N. Charter, the relationship between the UNSC and Member States is clearly vertical, meaning that norms arising from Chapter VII are higher in hierarchy to treaty-based norms,<sup>277</sup> though such norms are not immune from review according to applicable legal principles.<sup>278</sup> Therefore, in relation to Resolution 1593, an order by the ICC Trial Chamber to any U.N. Member State to surrender or transfer persons to the custody of the Court will be considered as the application of an enforcement measure under Chapter VII. In such a situation, a State becomes an agent of the UNSC to execute the ICC order.

In practice, the ICC does not have a police force—unlike national jurisdictions; thus, it will rely upon the assistance of the GoS and other entities at the different stages of its proceedings, from the arrest of suspects to the enforcement of the sentences of the convicted.<sup>279</sup> The most immediate need will arise in relation to the arrests of indicted persons by

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274. See Condorelli & Ciampi, *supra* note 113, at 593 (admitting, in principle, that “one of the implications of a [UN]SC referral is that all state are automatically put under an international obligation to comply with requests for cooperation by the Court,” *id.*).

275. Cf. Annalisa Ciampi, *The Obligation to Cooperate*, in COMMENTARY ON THE ROME STATUTE, *supra* note 83, 1607, 1611.

276. See KRISTINA MOSKOWIAK, THE INTERNATIONAL CRIMINAL COURT: CONSENT, COMPLEMENTARITY AND COOPERATION 9 (2000); cf. Jones & Powles, *supra* note 161, at 837.

277. See Kirgis Jr., *supra* note 68, at 506; and generally Paul Szasz, *The Security Council Starts Legislating*, 96 AM. J. INT'L. L. 901 (2002).

278. See Alexander Orakhelashvili, *The Impact of Peremptory Norms on the Interpretation and Application of United Nations Security Council Resolutions*, 16 EURO. J. INT'L. L. 59, 60 (2005) (citing Judge Jennings, in [1998] ICJ REP. 110).

279. See Philippe Kirsch, *The International Criminal Court: A New and Necessary Institution Meriting Continued International Support*, 28 FORDHAM INT'L L.J. 292, 306 (2005).

States. Cooperation will also be required in relation to access to victims and witnesses by the Prosecutor and *vice-versa*. A major challenge—in view of the vested interest of the GoS—will be how to ensure free movements of investigators, including access to the public information if they desire. Given the unpredictable political and security climate, and the need for protective measures and security arrangements for the majority of witnesses testifying before the Court, the GoS must be told clearly that it has the primary responsibility to guarantee security for investigators, victims and witnesses. The victims and witnesses, in particular, must be protected from possible reprisals.

Going by past antecedents, Sudan is unlikely to cooperate fully with the ICC over Darfur, if at all; but a refusal to cooperate will greatly undermine the authority of the Court. The UNSC should assist in equipping and mobilizing the AMIS or, hopefully, the U.N. peacekeeping force, in order to serve as an effective counterpoise to the forces in Sudan, and in particular to work with the ICC Prosecutor to effect arrests of indictees if necessary. The UNSC and AU will need to dangle both carrots and sticks to get the GoS to cooperate with the ICC. For example, the UNSC should be prepared to implement the sanctions resolution fully—the resolution seems to be in abeyance at the moment—should the GoS treat the ICC with contempt. Sanctions do not produce their intended effect when they are weakly enforced, often due to the strategic interests of powerful states.

The international community must be clear that the time for wishful thinking and soft diplomacy in Sudan is over. Darfur is now a test of wills and the international community must find ways to quarantine and ultimately destroy the virus of impunity, which could become an epidemic if left untreated. It must speak with one voice and should be prepared to act tough on several aspects of the referral, otherwise the credibility of the ICC as an international criminal institution will be severely damaged.

### *G. Funding the Darfur Prosecution*

Related to the question of cooperation is the specific issue of funding the Darfur referral, which is examined here separately not only because “money is a defence,”<sup>280</sup> but more especially for the tenor of Resolution 1593. The resolution frees the U.N. from any financial obligation towards the Darfur prosecution. It provides:

[N]one of the expenses incurred in connection with the referral including expenses related to investigations or

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280. Ecclesiastes 7:12 (King James).

prosecutions in connection with that referral, shall be borne by the United Nations and that such costs shall be borne by the parties to the Rome Statute and those States that wish to contribute voluntarily.<sup>281</sup>

This provision is clearly at variance with the ICC Statute and also with the decision to refer. The issue of funding the ICC, of course, was hotly debated at the preparatory meetings leading to the adoption of the Statute, with France proposing that funding for the Court should be determined by the nature of relationship between the Court and the U.N. and suggesting assessed contributions by Member States.<sup>282</sup> The final provision was a synthesis from this dialectic. Under the ICC Statute, the primary responsibility for financing the Court and its subsidiary bodies rests on States Parties to the Statute and the U.N., the latter particularly in the case of UNSC referral.<sup>283</sup> Institutions, individuals, and other entities may also make voluntary contributions to the Court, as a secondary obligation. When received, the Court must utilize such contributions in accordance with the relevant criteria laid down by the Assembly of States Parties.<sup>284</sup>

Clearly, the ICC was established via a multilateral treaty because of its implications for the type and content of the relationship between the Court and the U.N., including the need to ensure the Court's "financial and administrative viability."<sup>285</sup> In October 2004, the two institutions further solemnized their financial relationship by signing the Negotiated Relationship Agreement,<sup>286</sup> which *inter alia*, provided that "the conditions under which any funds may be provided to the Court by a decision of the General Assembly of the [U.N.] pursuant to Article 115 of the Statute shall be subject to separate arrangements."<sup>287</sup> Demanding that the U.N.

281. See S.C. Res. 1593, *supra* note 3, ¶ 7.

282. See France's proposal submitted to the March 1998 Session of the Preparatory Committee, A/AC.249/1998/L.12, cited in S. Rama Rao, *Financing the Court, Assembly of States Parties and the Preparatory Committee*, in *THE MAKING OF THE ROME STATUTE*, *supra* note 95, at 399, 403.

283. See ICC Statute, *supra* note 5, art. 115.

284. See *id.* art. 116.

285. Ad Hoc Committee, *Report of the Ad Hoc Committee on the Establishment of an International Criminal Court*, U.N. GAOR, 50th Sess., Supp No. 22, at 4, U.N. Doc. A/50/22 (1995) (stating also that a close relationship between the Court and the UN was considered to be "an essential condition of the universality and moral authority of the new institution").

286. Negotiated Relationship Agreement between the ICC and the UN, Oct. 4, 2004, available at [http://www.icc-cpi.int/library/asp/ICC-ASP-3-Res1\\_English.pdf](http://www.icc-cpi.int/library/asp/ICC-ASP-3-Res1_English.pdf) [hereinafter Negotiated Relationship Agreement].

287. *Id.* art. 13.

fund the ICC, especially for UNSC referrals, is clearly logical, since benefits and burdens go together. The UNSC cannot enjoy the benefit of prescribing norms without the corresponding burden of providing resources to facilitate the implementation of such norms.

Like the exemption of certain persons from prosecution, the exclusion of the U.N. from expenses on the Darfur trial is one more manifestation of *real politick* at the U.N. and of the U.S. aggression against the ICC. As early as December 1997, at the Sixth Preparatory Committee Meeting, the U.S. solely opposed suggestions that the ICC should be funded from the regular budget of the U.N.<sup>288</sup> Its argument was, and is, that countries opposed to the Court have no obligation to finance its expenses; and being a major contributor to the U.N., the U.S. has threatened to withhold its funds or to take other measures if this "principle" is retrenched.<sup>289</sup> Clearly, the policy of the U.S. is to turn every issue at the UNSC into a show of strength; its unofficial leadership has become official headship, "where decisions for the group are arrived at unilaterally by a leader whose overweening power ensures that subordinates will have few other options than to comply."<sup>290</sup> Such peremptory and domineering, if not imperial, mindset continues to prevent the expression of clear and robust signals from the UNSC and undermines the legitimacy of the U.N. policing mechanism. Not surprisingly, calls for UNSC reforms and the opening up of its proceedings to engender a sense of greater participation by U.N. members are growing louder with each passing day.<sup>291</sup> The paucity of representation from the broad U.N. membership has also diminished support for UNSC decisions.<sup>292</sup>

The present writer insists that the UNSC's stance on ICC funding is indefensible and unsustainable, since Resolution 1593 is a Chapter VII measure, which not only binds all Member States of the U.N.—including

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288. See generally Establishment of an International Criminal Court: Report of the 6th Committee, U.N. GAOR, 52nd Sess., U.N. Doc. A/52/651; G.A. Res. 52/160, U.N. GAOR 52nd Sess., Supp. No. 49, U.N. Doc. A/52/160 [hereinafter Report of the 6th Committee].

289. See UNSC Press Release 8351, *supra* note 39 (reporting US representative to the UNSC after Resolution 1593 vote).

290. Andrew Cooper, *Richard Higgott & Kim Nossal, Bound to Follow? Leadership and Fellowship in the Gulf Conflict*, 106 POL. SCI. Q. 391, 407 (1991).

291. See UNSC Press Release 8351, *supra* note 39 (reporting Lauro Bajo, representative of Philippines at the UNSC).

292. A More Secure World, *supra* note 210, at 80 (urging the UN to bring into the decision-making process of the UNSC "countries more representative of the broader membership, especially of the developing world"). See also David D. Caron, *The Legitimacy of the Collective Authority of the Security Council*, 87 AM. J. INT'L L. 552, 555 (1993) (calling, *inter alia*, for a reform of the veto and increase in membership of the UNSC).

the U.N. itself—but has to be interpreted in the light of the ICC Statute relating to funding of the Court. It is rash for the UNSC to exempt the U.N. from financial obligations for the Darfur prosecution before the Court's financial estimate is even known. It will probably take some months for the Court to arrive at a realistic budget, given the complexities of the Darfur conflict. A realistic approach would be for the UNSC to wait and look for possible areas of intervention. The ICC needs the U.N. to improve the Court's finances, particularly as contributions by States Parties do not often come when due. The ICC might have the capacity, in human terms, but it does not have the "funding necessary to ensure swift and effective prosecution" of Darfur crimes, contrary to Ellen Margrethe Løj's claims.<sup>293</sup> A 2005 review of the financial situation of the Court shows that "only 50 percent of contributions had been received", as at April 5, 2005.<sup>294</sup> Furthermore, only 21 States Parties to the Rome Statute have paid their 2005 contributions in full. This leaves 33,472,000 outstanding for 2005.<sup>295</sup> A total of 4,683,966 was outstanding for 2004, and 1,152,105 for 2002-2003, financial periods.<sup>296</sup> 11 States Parties have not made any payment for any financial period!<sup>297</sup>

The complexities that emerge from the Uganda and DRC deferrals, coupled with the additional responsibilities entailed in the Darfur referral, constitute a very challenging agenda for the ICC. The unlikelihood of disposing cases currently under investigations complicates these challenges. When trial commences, the Court will be constrained to provide legal aid for indigent accused persons<sup>298</sup> to ensure respect for the

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293. UNSC Press Release 8351, *supra* note 39 (reporting Danish representative to the UNSC).

294. ICC, *Report of the Committee on Budget and Finance on the Work of its Fourth Session*, 4th Sess., at 5, ICC Doc. ICC-ASP/4/2 available at [http://www.icc-cpi.int/library/asp/ICC-ASP-4-2\\_English.pdf](http://www.icc-cpi.int/library/asp/ICC-ASP-4-2_English.pdf) (April 15, 2005) [hereinafter Budget & Finance Report].

295. *See id.*

296. *See id.*

297. *See id.* at 5. Such defaulting members could lose their voting rights under the ICC Statute. *See* ICC Statute, *supra* note 5, art. 112(8) ("A State Party which is in arrears in the payment of its financial contributions towards the costs of the Court shall have no vote in the Assembly and in the Bureau if the amount of its arrears equals or exceeds the amount of the contributions due from it for the preceding two full years. The Assembly may, nevertheless, permit such a State Party to vote in the Assembly and in the Bureau if it is satisfied that the failure to pay is due to conditions beyond the control of the State Party.") *Id.*

298. For a report of the ICC on the principles and criteria for the determination of indigence for the purposes of legal aid, *see* ICC, *ICC report on the principles and criteria for the determination of indigence for the purposes of legal aid*, 4th Sess. ICC Doc. ICC-

principle of equality of arms.<sup>299</sup> This requires money, besides the considerable risk that legal aid entails. Experience with *ad hoc* tribunals has shown that the administration of legal aid could result in unreasonably high costs and abuses by some defense counsel and defendants, as some counsel could prolong proceedings for financial gain, particularly where rigorous controls are lacking.<sup>300</sup>

These are some of the reasons why the U.N. cannot stand idly by and leave the ICC to sort out the Darfur situation alone. Of course, the primary responsibility for funding the Court and its activities lies with its States Parties; but the UNSC has a particular role to play in this regard, as the Secretary-General keenly observed.<sup>301</sup> It is good for the UNSC to condemn the Darfur atrocities, as it has done in numerous resolutions, but it is better if the body also offers both direct and indirect assistance to the ICC in addressing some cost-related problems that will inevitably ensue from the referral. The UNSC should mandate relevant U.N. organs and agencies to source funds for the Court, considering the Court's infancy and its huge financial needs. As Philippe Kirsch argues, "[t]he United Nations has extensive resources which could aid investigations or prosecutions as well as the implementation of Court decisions."<sup>302</sup>

The ICC is a newborn baby, born more or less out of nothing. It is temporarily located in a building known as "de Arc," which the Government of Netherlands offered to the Court free of rent for ten years. This gesture is the equivalent to a Dutch contribution of 33 million, plus 10 million for the interior layout and design of the courtroom and other parts of the building.<sup>303</sup> Other members of the international community must help and nurture the Court to grow. As the Secretary-General pleaded: "It is now crucial that the international community ensures that this nascent institution has the resources, capacities, information and

ASP/4/CBF.1/2. The ICC Budget and Finance Committee, while receiving considering this report, noted that proposed system for determining indigence is based on principles of objectivity, flexibility and simplicity, taking into account the obligations of the person requesting legal assistance to his or her dependants. *See* Budget & Finance Report, *supra* note 294, at 14 (also recommending that "the determination of indigence should be conducted in an objective manner on the basis of a full examination of each applicant's financial assets and income").

299. *See* ICC Statute, *supra* note 5, art. 55(2)(c) (providing for the right to free legal assistance for indigent accused during an investigations, in any case where the interest of justice so require).

300. *See* Budget & Finance Report, *supra* note 294, at 14.

301. Rule of Law and Transitional Justice, *supra* note 190, at ¶ 16.

302. Kirsch, *supra* note 279, at 306.

303. *See* Ernst Hirsch Ballin, *The Responsibilities of the Host State*, 97 ASIL PROC. 260, 262 (2003).

support it needs to investigate, prosecute and bring to trial those who bear the greatest responsibility for war crimes, crimes against humanity and genocide[.]”<sup>304</sup> Canada’s voluntary contribution of \$500,000 towards the Darfur investigation is commendable;<sup>305</sup> but more is urgently needed.

## V. CONCLUSION

Now that the ICC and its Prosecutor have received clear mandates from the UNSC to investigate, prosecute, and punish crimes committed in Darfur, they must respond swiftly and assume the responsibilities entailed therein. It is obviously difficult for a judicial tribunal constituted in the middle of a conflict to undertake an effective investigation and apprehension of offenders. This is the challenge facing the ICC and its Prosecutor in Sudan, compounded by the fact that those with the monopoly of force are the ones committing the crimes in Darfur. Apparently, the UNSC was not reasoning along this line when it adopted Resolution 1593; rather, it saw the ICC referral as a halfway measure from the humanitarian military intervention (HMI) that could have stopped actual atrocities in Darfur before setting the mechanism for accountability in motion.<sup>306</sup>

The ICC will be expected to balance competing interests in Sudan—those of the victim population, the affected state and the majority states.<sup>307</sup> It should be prepared to “face serious challenges that will question its independence from political institutions, its legitimacy as an authentic interpreter of international norms, and its accountability to the states that created it and whose nationals face prosecution within its courtrooms.”<sup>308</sup> To meet these challenges, the Court must rigorously assert its independence and must not allow itself to be manipulated by power politics. In this difficult task of navigating between power and justice, the ICC has a lot to gain from the *acquis* of past and existing *ad hoc* tribunals.

304. Rule of Law and Transitional Justice, *supra* note 190, at ¶ 16.

305. See *ICC Takes Key Step to Bring Justice to Darfur*, *supra* note 176.

306. For the humanitarian argument, see Nsongurua J. Udombana, *When Neutrality Is a Sin: The Darfur Crisis and the Crisis of Humanitarian Intervention in Sudan*, 27 HUM. RTS. Q. 1149 (2005) (arguing that the grave and continuing crimes committed in Darfur justify humanitarian military intervention, given the failure of diplomacy to prize the GoS into halting the mayhem, and denouncing the apparent neutral posturing by the international community, stressing that such neutrality helps the killers and not the victims).

307. See generally Morris, *supra* note 88, at 195 (discussing the need for delineation of policies to govern the application of complementarity and balance the prioritization of interests under the ICC Statute).

308. Danner, *supra* note 149, at 511.



The ICTY and ICTR, in particular, have laid a blueprint for international criminal justice—“an international criminal forum applying rules of international law, holding persons individually responsible for crimes against humanity and war crimes, after allowing them a fair trial.”<sup>309</sup>

Assuringly, the ICC Prosecutor has promised that “[t]he investigation will be impartial and independent, focusing on the individuals who bear the greatest criminal responsibility for crimes committed in Darfur.”<sup>310</sup> The Court, on its part, must ensure respect for the rights of the accused. It must scrupulously observe due process and interpret and apply the law in ways that are consistent with internationally recognized human rights, including requirements of fairness and impartiality.<sup>311</sup> In case of ambiguity in the definition of a particular crime under the Statute, the Court must construe it in favor of the person being investigated, prosecuted, or convicted. It is true that judges are humans and subject to the influence of their environment, but the ICC judges must rise above influences of popular feeling and prejudice. The ability of the Court to force states and non-state entities to respect and comply with its decisions depends on the general perception of the legitimacy and fairness of its process.<sup>312</sup>

If the ICC does well with the Darfur case, it will undercut basic arguments against its existence, change the political situation more favorable to its work, provide a whole range of arguments to use in its defense, and a potentially new audience of which to make them. These ends make it urgent for the international community to help the ICC in bringing justice to both victims and perpetrators of the Darfur mayhem. All stakeholders in the crisis—the UN, the AU, States Parties to the Rome Statute, the GoS, and relevant segments of the civil society—should take ownership of the ICC and provide assistance to it when it desires and requires it. They should mobilize resources for a sustainable investment to enable the Court make a genuine leap, rather than a token gesture, towards international justice. The cause of justice in Sudan is worth sacrificing for, due to a variety of reasons. One reason is that the persistent and persisting crisis in Sudan poses grave challenges to neighboring states,

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309. BOOTH, *supra* note 115, at 159 (noting further that the jurisprudence of these tribunals, especially “the progressive view that crimes against humanity could be committed in peace time, and the decision that war crimes could be committed during an internal armed conflict—contributed to the debates in Rome and eventually came to be reflected in the Rome Statute”).

310. Prosecutor Opens Investigation, *supra* note 154.

311. See ICC Statute, *supra* note 5, art. 68(1).

312. See THOMAS FRANCK, FAIRNESS IN INTERNATIONAL LAW AND INSTITUTIONS 316-17 (1995) (examining fairness in the context of the ICJ).

regional stability, and international peace and security.<sup>313</sup> Another reason is that the ordinary people of Darfur will have no confidence in their reconstituted society unless justice is re-established.<sup>314</sup> Justice, not power, is the ultimate aphrodisiac.

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313. Cf. Jeremy D. Rosner, *Is Chaos America's Real Enemy?*, WASH. POST, Aug. 14, 1994, at C-1 (citing Brian Atwood's observation "that disintegrating societies and failed states . . . have emerged as the greatest menace to global stability," which he considered a "strategic threat.") Robert H. Dorff, *Democratization and Failed States: The Challenge of Ungovernability*, 26(2) PARAMETERS 17 (Summer 1996) available at <http://carlisle-www.army.mil/usawc/Parameters/96summer/dorff.htm> (last visited Oct. 29, 2005).

314. Cf. *Policy Paper*, *supra* note 151, at 7 ("If the ICC has successfully prosecuted the leaders of a State or organisation, the situation in the country concerned might then be such as to inspire confidence in the national jurisdiction.").

