DARFUR GOES TO THE INTERNATIONAL CRIMINAL COURT (PERHAPS)

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The authors consider the recent referral by the UN Security Council of the situation in the western region of Sudan (Darfur) for investigation and prosecution to the International Criminal Court. The paper focuses on the context of this referral, especially since the referral signals a capitulation by the United States of America (which had the power to veto the referral) in the face of worldwide pressure for the United Nations to take action against perpetrators of atrocities in Sudan. In considering the referral, the authors point out that the International Criminal Court has been handed a hot potato. Because it is one of the first cases that the court will hear, the spotlight will be on the court's effectiveness as an instrument of international criminal justice. Sudan is not party to the court's statute, however, and accordingly owes the court no obligation to cooperate in the investigation and prosecution of Sudanese offenders.

Introduction

History was made on 31 March 2005 when the United Nations (UN) Security Council passed Resolution 1593 (2005) referring the prosecution of those responsible for the numerous atrocities committed in the Darfur region in western Sudan to the newly established International Criminal Court (ICC).[1] However, what may at first glance be seen as a moral victory for the ICC over its sceptics, most notably the United States (US), may turn out to be something very different in the light of the initial response of the Sudanese government to the referral. Regardless of the role that this resolution ultimately plays in the already tumultuous history of the ICC, it is without doubt the most significant event since the court's inception and is worthy of further analysis.

To fully appreciate the importance of the resolution, we begin by providing an overview of the establishment and functioning of the ICC and the responses to its establishment of the international community, particularly the US, but also regional organisations such as the African Union (AU) and the European Union (EU). Against this background, we assess the way forward for the effective operationalisation of the ICC to deal with Darfur-type situations.

The International Criminal Court

The 'revolutionary institution'[2] that is the International Criminal Court (ICC) came into force on 1 July 2002 and is the culmination of initiatives that began after World War I. The founding document of the court is the

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Rome Statute, which was adopted after the UN Diplomatic Conference of Plenipotentiaries on the Establishment of a Permanent International Criminal Court in Rome on 17 July 1998.[3] The statute empowers the court to prosecute crimes of genocide, crimes against humanity, and war crimes. As Cassese notes,[4] only in time will one be able to gauge the effect that this institution will have on the international legal order. Even so, in the context of the Security Council referral to the ICC of the Darfur 'situation', some preliminary points regarding its functioning need to be noted.

The court was established by a multilateral treaty. This is probably one of its pitfalls as it means that the court can only exercise territorial jurisdiction or personal jurisdiction in relation to states that are parties to the Rome Statute. The exceptional quality of the court's jurisdiction is that the court is a novel mechanism which does not base its jurisdiction solely on the Security Council's 'Chapter VII power', as do the *ad hoc* tribunals for the former Yugoslavia (International Criminal Court for Yugoslavia, or ICTY) and Rwanda (International Criminal Court for Rwanda, or ICTR), or on 'special agreements' such as the 'hybrid' Special Court for Sierra Leone. Rather, the court 'inherits' the jurisdiction of states parties to the Rome Statute. Thus the court has jurisdiction *ratione loci* as well as jurisdiction *ratione personae*. The former grants the court jurisdiction over crimes committed in the territory of a state party and the latter over crimes committed by nationals of a state party.

One can thus say that the ICC is primarily a treaty-based mechanism and does not have 'universal jurisdiction' of its own. The jurisdictional limitations (above) of the court are particularly important for our study, as these limitations necessitated the referral brought about by Resolution 1593 (2005). Aside from the territoriality and nationality triggers for the court's jurisdiction, the court might come to deal with a case via a Security Council referral. Article 13(b) of the court's statute envisages a situation where the Security Council, acting under its Chapter VII authority, refers a *situation* to the ICC for investigation and possible prosecution. Through such a referral, the court may be seized with jurisdiction in relation to crimes committed on the territory of a state that is not party to the ICC regime, such as Sudan. A referral by the Security Council provides the ICC with jurisdiction over countries and their nationals, irrespective of whether those countries are party to the Rome Statute.[5]

The reason is that the power of referral comes from Chapter VII of the UN Charter and not the Rome Statute and is thus binding on all states. For the referral to be lawful, it must be exercised in accordance with Chapter VII; that is, the situation referred to the court must constitute a 'threat to peace and security' within the international community. However, such a referral must be an exceptional occurrence, which, until recently, appeared highly unlikely, judging from the initial responses to the court, specifically from veto-bearing states such as the US and China.

A further restriction on the court's ability to adjudicate cases is the 'principle of complementarity'. In terms of this principle the court will only be able to admit a case before it – where the other jurisdictional bases of nationality and territoriality are present – if the state party concerned is unwilling or unable to prosecute the offender nationally. This principle, which is alluded to in Articles 1 and 17 as well as the Preamble of the Rome Statute, is a novel idea. It effectively affords states parties primary jurisdiction over 'international crimes' committed within their jurisdiction, and is the reverse of the *ad hoc* tribunals for Yugoslavia and Rwanda, which enjoyed primacy over national legal systems. The effect of this principle is to prevent states from frustrating the prosecution of individuals by using their primary jurisdiction as a shield. Article 17(2) expressly prevents such a scenario and obliges states parties to prosecute offenders or surrender them to the court so that it may do so. This 'coercion' of states parties is one of many positive 'knock-on' effects of this principle.[6] The principle of complementarity appears to envisage that the ICC will be prevented from exercising jurisdiction, even if it is a non-state party that insists on prosecuting one of its nationals for having committed an ICC crime. (We will return to this aspect in due course.)

Sudan is a non-state party and has been described by the UN commission tasked with investigating crimes in the Darfur region as unwilling and unable to tackle the investigation

and prosecution of mass atrocities that have been committed in the area. The commission found that as far as mechanisms for ensuring accountability for the atrocities committed in Sudan are concerned, the "Sudanese courts are unable and unwilling to prosecute and try the alleged offenders. Other mechanisms are needed to do justice."[7]

Contempt for the court: US objections to the ICC

In reviewing the establishment of the ICC it is necessary to take account of the 'unhappy and extravagant'[8] objections of the US to the court. The US does not stand alone in its opposition to the ICC; it has unlikely allies in China, Iraq and Libya, and a more predictable ally in Israel. Together these states formed part of a group of only seven countries that voted against the Rome Statute.[9]

The US has advanced numerous reasons for its discontentment with the ICC, all of which have sparked a flurry of academic debate, the sheer volume of which places thorough discussion of these objections well beyond the scope of this paper.

Nonetheless, one of the predominant reasons is the court's apparent jurisdiction over nationals of non-party states and the resultant binding nature of the Rome Statute on non-party states. David Scheffer, the American Ambassador-at-Large for War Crimes Issues, has labelled this the "single most fundamental flaw in the Rome Treaty"[10] and told the Senate Foreign Relations Committee that "the treaty purports to establish an arrangement whereby US armed forces operating overseas could be conceivably prosecuted by the international court even if the US has not agreed to be bound by the treaty … This is contrary to the most fundamental principles of treaty law."[11]

Michael Scharf succinctly rebuts this assertion regarding the binding nature of the Rome Statute on non-party states:

> Ambassador Scheffer's argument confuses the concepts of obligations of non-party states and the exercise of jurisdiction over the nationals of such states. To untangle the confusion, Philippe Kirsch, the Chairman of the Rome Diplomatic Conference, recently wrote, "This does not bind non-parties to the statute. It simply confirms the recognized principle that individuals are subject to the substantive and procedural criminal laws applicable in the territories to which they travel, including laws arising from treaty obligations."[12]

Another often-quoted reason for US opposition to the ICC is that it (the US) fears that its nationals will be subjected to politically motivated prosecution as a result of the 'new' jurisdiction exercised over them by virtue of the Rome Statute. A related motivation is that the US objects to any state or tribunal other than itself exercising jurisdiction over its nationals. Again, these objections fail to recognise that in terms of territorial and personal jurisdiction, many states already potentially have jurisdiction over American nationals, and the *ad hoc* tribunals for Yugoslavia, Rwanda and Sierra Leone all have jurisdiction over US nationals.[13]

This cursory analysis of the ICC and the US objections to it reveal that the role of the ICC in the international legal order is not yet settled. While the court has received strong support from many states, it has received even stronger hostility from the US. In its struggle for legitimacy, the ICC will wish to make a firm statement with its inaugural cases. Moreover, the Darfur referral, being the first Security Council referral of a situation to the ICC – made possible by the US decision not to veto the decision – is a monumental moment for the court as it steps beyond its classical treaty-based constraints to exercise jurisdiction over a non-party state, Sudan.

In this context the extraordinary nature of Resolution 1593 (2005) becomes apparent: it represents an apparent capitulation by the US after its hitherto vehement opposition to the ICC.

The situation in Darfur

With a territory covering about 2.5 million square kilometres Sudan is the largest country in Africa. It has an estimated population of 39 million and shares borders with Egypt in the north, the Red Sea, Eritrea and Ethiopia in the east, Uganda, Kenya and the Democratic Republic of the Congo (DRC) in the south, and the Central African Republic (CAR), Chad and Libya in the

west. The predominant religion in Sudan is Islam and the predominant language is Arabic.[14]

Sudan has had a violent history. Since gaining independence in 1956 it has been ruled by military regimes – occasionally interspersed with periods of democratic rule – and power has repeatedly come to be held/exercised through *coups d'état*.[15] The current president, General Omar Hassan al-Bashir, came to power after a *coup d'état* in June 1989 that resulted in the exile or imprisonment of many Sudanese.[16]

Since February 2003, the region of Darfur in western Sudan has been ravaged by mass-scale atrocities seemingly motivated by a mixture of underlying racial, religious, and socio-economic tensions. The UN has labelled it the worst humanitarian disaster in the world today (pre-tsunami) and the World Health Organisation (WHO) has stated that the death rate in the region was three times the emergency threshold.[17] There are varying reports about the exact number of civilians killed and displaced by the conflict, the most horrific being a recent report by the British House of Commons International Development Committee, which states that the WHO's earlier estimate was "a gross underestimate", the real figure probably being over 300,000.[18] Most deaths were not caused directly by the violence, but indirectly by disease and starvation arising from the conflict.[19] The UN recently increased its estimate of the number of Darfurians displaced by the conflict to 2.4 million, a figure that continues to escalate.[20]

The conflict is rooted in tensions over arable land. Sporadic violence was reported in the 1980s and 1990s[21] with clashes between 'African' and 'Arab' tribes. The fighting has been exacerbated by 'competing economic interests' (largely over oil reserves) and the 'political polarisation' of the region.[22]

Tensions boiled over in April 2003, when the Sudanese Liberation Army/Movement (SLA/M), made up of discontented 'African' rebels, attacked numerous government installations. One such attack, in which 75 Sudanese soldiers were killed, was on an airport in al-Fashir.

In response, the Sudanese government, relying on the underlying racial tensions in the region, called on local tribes to assist in repelling the rebels. Evidence suggests that the Sudanese government armed and provided military support, largely as air support, to the 'Arab' militia (known as the 'Janjaweed')[23], who have since killed, raped and robbed black 'Africans'. Although the Sudanese government continues to deny any involvement in these atrocities,[24] survivors and aid workers, as well as the UN International Commission of Inquiry on Darfur and numerous human rights organisations,[25] contest that denial and tend to confirm it. The Sudanese government admits creating 'self-defence militias'[26] (paramilitary units known as the Popular Defence Forces, or PDF), but denies any involvement with the 'Janjaweed', which has been responsible for most of the violence.[27]

The situation in western Darfur has been exacerbated and complicated by the ongoing north-south civil war in Sudan, which began in 1983 and ended on 9 January 2005 when First Vice President Taha and SLA/M Chairman John Garang signed the Comprehensive Peace Agreement.[28] It is estimated that two million people died as result of this 21-year civil war[29] and it has been suggested that the impunity enjoyed by perpetrators of war crimes and crimes against humanity in this conflict has encouraged/contributed to the atrocities in Darfur.[30] In response to the situation, in February 2005 the Security Council unanimously passed a resolution to deploy 10,000 peacekeepers to southern Sudan to monitor the peace treaty. In addition, the AU despatched peacekeepers as part of the African Mission in Sudan (AMIS).

Response of the international community to Darfur

The slowness of the international community

The reaction of the international community to the conflict has been typically slow. It seems that everyone was ready to report on the seriousness of the conflict, but no one was prepared to offer any tangible solutions. The international community mobilised itself, to some extent, to treat the symptoms of the crisis by supplying humanitarian aid, but little or no effort has been made to treat the cause of the problem.

A peace initiative was proposed in August 2003, initiated by the President of Chad, who convened a meeting between representatives

of the warring parties. Although the second main rebel group, the Justice and Equality Movement (JEM), refused to attend the meeting, the event was relatively successful as it resulted in the signing of a 45-day ceasefire by the parties. Subsequently, the parties, including the JEM, met on numerous occasions under the mediation of the AU and Chad, and concluded various ceasefire agreements. However, despite these ostensibly positive initiatives, the parties were not able to resolve the conflict and the violence continued.[31]

The initial response of the UN was to focus on the humanitarian aspect of the conflict, calling for international aid and warning that Darfur was facing the worst humanitarian crisis since 1988.[32] The United Nations Emergency Relief Coordinator, Jan Egeland, said that "[t]he humanitarian situation in Darfur has quickly become one of the worst in the world" and urged the government and militias to help facilitate the delivery of aid and to honour an agreement they had signed in September 2003 to that effect.[33] His pleas were reiterated by the Secretary General, who called for 'unimpeded' access for aid, as well as for the parties to continue with the peace talks.[34] On 23 December 2003 the UN announced its plans to relocate 10,000 refugees from the border to a more secure location inland.[35]

The UN continued with this uncomplicated minimalist approach into the new year and finally, on 31 March 2004, the Secretary General made a strong statement labelling the "civilian casualties and human rights violations unacceptable" and said he was "very disturbed" by the situation in Darfur.[36] On 2 April 2004 Jan Egeland briefed the Security Council on the situation in Darfur. The Security Council subsequently released a statement expressing its "deepest concern about the 'massive humanitarian crisis' in Darfur" and calling "on all parties to the conflict to protect civilians and reach a ceasefire".[37] At the same time, the Office of the High Commission for Human Rights announced that it would be sending a 'fact-finding mission' to Darfur.[38]

On 7 April 2004, at a meeting commemorating the 1994 Rwandan genocide, the Security Council President – for April – underscored the council's commitment to combating genocide and acknowledged its "obligation not to fail [the victims of the genocide/the world's peoples] again". Also, while unveiling a plan to combat genocide, Deputy Secretary General Louise Fréchette said, "We have abundant warning that something horrible is going on in the Greater Darfur region of Sudan."[39] If there was a time for the UN to take concrete measures to address the conflict in Darfur, it was at this point. However, the momentum was affected the very next day when the SLA and JEM signed a ceasefire agreement in N'Djamena, ostensibly signalling the end of the hostilities in Darfur and shifting the focus back onto the less-complicated issue of humanitarian aid.[40]

The ceasefire was not respected, however. In the light of prevailing hostilities, the Secretary General wrote to Sudan's President Al-Bashir on 13 May 2004 imploring him to maintain the ceasefire and disarm the Janjaweed.[41] Then, on 25 May 2004, over a year after the conflict in the Darfur had begun, the Security Council issued a statement calling on the government of Sudan to "ensure that the Janjaweed militias are neutralized and disarmed", The statement recorded the council's "deep concern at the continuing reports of large-scale violations of human rights and of international humanitarian law in Darfur, including indiscriminate attacks on civilians, sexual violence, forced displacement and acts of violence, especially those with an ethnic dimension", and accordingly l demanded "that those responsible be held accountable".[42]

On 25 June 2004, the Secretary General again highlighted the urgency and scale of the situation, stating that those living in Darfur are "suffering a catastrophe". He downplayed the importance of classifying the crimes being committed and said "[w]e don't need a label to propel ourselves to act".[43] He was correct in asserting the irrelevance of semantic classifications, but the UN did not act immediately. The Secretary General also averred that because Sudan had signed the Rome Statute of the International Criminal Court, it was 'morally bound' to act in accordance with its principles.[44]

After numerous additional statements by the Secretary General and others regarding the seriousness of the situation and the Sudanese government's continued failure to adequately address it, the Security Council passed Resolution 1556 (2004). However, far from offering a much-

needed political solution to the crisis, Resolution 1556 merely politely asked the Sudanese government to fulfil its earlier commitment to facilitating humanitarian relief, disarming the Janjaweed, investigating and prosecuting violations of human rights and international humanitarian law, protecting the civilian population and resuming talks with dissident groups in Darfur with a view to resolving the conflict. Furthermore, far from providing concrete, politically coercive sanctions that would befall the Sudanese government in the event of its failure to fulfil these commitments, the resolution merely provided that the Security Council would consider further actions in the event of non-compliance.

In August, the EU representative sent to Sudan concluded that, contrary to the US Congress's assertion, the situation in Darfur was not genocide.[45] Similarly, after sending its own observers, the AU concluded that no genocide had been committed in Darfur.

On 18 September of that year, the Security Council adopted Resolution 1564 (2004), which reiterated its feeble threat to "consider taking additional measures" should the Sudanese government continue its non-compliance with its earlier commitments and requested that the Secretary General "rapidly establish an international commission of inquiry in order immediately to investigate reports of violations of international humanitarian law and human rights law in Darfur by all parties, to determine also whether or not acts of genocide have occurred, and to identify the perpetrators of such violations with a view to ensuring that those responsible are held accountable".[46] The commission began its work on 25 October 2004 and was to report back to the Secretary General in three months (that is, on 25 January 2005).

The US was involved in this process at all times. In October 2004, US Secretary of State Colin Powell told Congress that "[w]e concluded – I concluded – that genocide has been committed in Darfur, and that the government of Sudan and the Janjaweed bear responsibility and that genocide may still be occurring".[47] However, having publicly labelled the conflict genocide, Powell continued to advocate inaction, saying that "[n]o new action is dictated by this determination".[48]

Time Magazine summed up the apathetic reaction of the international community in an article titled 'The tragedy of Sudan', which appeared in the 4 October 2004 issue:

> After 18 months of atrocities in Sudan, the international community has yet to take a single punitive action against the Sudanese government. Opposition to sanctions has come from Arab countries that are sympathetic to Khartoum and from the Security Council members, such as Pakistan and China that are heavily invested in Sudan's emerging oil industry.

The Commission of Inquiry

It took the work of the Commission of Inquiry before the UN and the international community decided to act forcefully against Sudan. Pursuant to Resolution 1564 (2004) Antonio Cassese's commission delivered its report to the Security Council. In fulfilling its mandate, the commission visited Sudan on two occasions. On its first visit, from 8 to 20 November 2004, the commission met various senior government officials, non-governmental organisation representatives, political parties and UN officials in Sudan. It also met witnesses to atrocities, internally displaced persons and tribal leaders and visited refugee camps in Chad. On its second visit, from 9 to 16 January 2005, the commission interviewed witnesses and again met officials and UN staff. The commission also sent a member to Eritrea, over 25–26 November 2004, to meet representatives of the rebel groups. Two members of the commission also met with a delegation from the AU from 30 November to 3 December 2004 in Addis Ababa to discuss the AU's role in resolving the situation in Sudan.[49] The commission reported that on the whole the government of Sudan, as well as the rebel groups, "willingly agreed to cooperate with the commission".

The commission reported that the term 'Janjaweed' was being used to describe members of the PDF and other government agencies, as well as the Arab militia.[50] This suggested that the distinction proffered by the government was a false one. In any event, the commission found that there was evidence suggesting that members of all three groups were guilty of "violations of international human rights law and humanitarian law" and that "clear links" existed between all of these groups and the Sudanese government.[51]

Based on these links and the circumstances surrounding the various attacks, the commission found that in most instances the government could be held criminally responsible for the crimes committed by these groups, in terms of the doctrine of effective control enunciated by the International Criminal Tribunal for Yugoslavia in the *Tadi* case,[52] or of the notion of superior responsibility.[53]

The commission also found that the various reported attacks by the government and the Janjaweed on civilians constituted "large-scale war crimes" and that the mass killing of civilians by the government and the Janjaweed were widespread and systematic and, as such, were "likely to amount to a crime against humanity".[54] With regard to the rebels, the commission found that although they were also responsible for attacks on civilians, there was no evidence to suggest that these attacks were widespread or systematic. Therefore, while the killing of civilians by the rebels would amount to serious war crimes, the commission did not conclude that these constituted crimes against humanity.[55] Given the horrific sexual violence committed against women and children in Darfur, the commission found that "rape or other forms of sexual violence committed by the Janjaweed and government soldiers in Darfur was widespread and systematic and may thus well amount to a crime against humanity", as would the crime of sexual slavery.[56]

Regarding the seminal question of genocide, the commission concluded that "the Government of Sudan has not pursued a policy of genocide" because of the absence of the crucial element of genocidal intent. The mental element of genocide distinguishes genocide from other crimes, including crimes against humanity. In the *Jelisic* case, the ICTY explained that "it is in fact the *mens rea* which gives genocide its speciality and distinguishes it from an ordinary crime and other crimes against international humanitarian law".[57]

What type of intention is required?

Both customary and conventional genocide require a form of aggravated criminal intention, or specific intent *(dolus specialis),* in addition to the criminal intent accompanying the underlying offence. The accused must commit the underlying offence (killing, causing serious bodily or mental harm, inflicting conditions of life calculated to physically destroy the group, imposing measures designed to prevent births within the group, forcibly transferring children) with the intent of producing the charged result; that is, the intent to destroy, in whole or in part, a national, ethnic, racial or religious group, as such. Genocide is therefore a crime perpetrated against a 'depersonalised' victim, and carried out because he or she is a member of a specific national, ethnic, racial or religious group. The specific intention of destroying all or part of the group must have been formed by the accused prior to the commission of the genocidal act. Put differently, the underlying genocidal act (killing, causing serious bodily or mental harm, etc) should be carried out to further the genocidal goal of the group's destruction.[58] Given this high bar, the commission found that there was not enough evidence to say that officials in the Sudanese government had committed genocide. However, the commission did not rule out the possibility of individuals involved in the conflict possessing the requisite genocidal intent. The commission was resolute in pointing out that their conclusion with respect to genocide "should not be taken as in any way detracting from, or belittling, the gravity of the crimes perpetrated in that region".[59]

As far as the commission's objective of identifying perpetrators is concerned, it decided to withhold the names from the public domain and placed them instead in the custody of the Secretary General, who would deliver them to the relevant prosecutor.[60]

Where mechanisms for ensuring accountability for the atrocities committed in Sudan are concerned, the commission found the "Sudanese courts are unable and unwilling to prosecute and try the alleged offenders. Other mechanisms are needed to do justice."[61] This finding was described succinctly in the *Economist,* which pointed out that "[g]iven how well organised the ethnic cleansing has been in Darfur, and the support the killers receive from the Sudanese air force, hardly anyone doubts that the orders came from the top. So few people expect trials staged by Khartoum to be impartial. If the ICC deems Sudan's investigations to be bogus and designed 'to shield the suspect[s] from criminal responsibility', it will dismiss the Sudanese challenge and unleash its prosecutors."[62]

The commission's finding is thus important. The complementarity principle built into the ICC Statute might be relied on by the Sudanese government (even as a non-party state) to argue that it is willing and able to prosecute the offenders. Should it be willing and able, then the ICC may have to acquiesce in the prosecution of offenders so as to allow the Sudanese authorities to do the job. Apparently for this reason the commission saw fit to stress that the Sudanese courts are unable and unwilling to prosecute and try the alleged offenders, thereby clearing the way for a 'clean' referral of the matter by the Security Council to the ICC.

Having thus cleared the path, the commission recommended that the Security Council refer the situation in Darfur to the ICC "to protect the civilians of Darfur and end the rampant impunity currently prevailing there". The commission endorsed the ICC as the "only credible way of bringing alleged perpetrators to justice". The commission also recommended that the Security Council establish a Compensation Commission to provide compensation to the numerous victims of the atrocities committed in Darfur.

One may ask, why the ICC? According to the commission, at least six major benefits accrue to a referral to the ICC. First, the prosecution of the crimes would be conducive to peace and security in Darfur. Second, the ICC, as the "only truly international institution of criminal justice" would ensure justice is done, regardless of the authority or prestige of the perpetrators because the ICC sits in The Hague, far from the perpetrators' spheres of influence. Third, the cumulative authority of the ICC and the Security Council would be required to compel those leaders responsible for atrocities to acquiesce to investigation and potential prosecution. Fourth, the ICC is the "best suited organ for ensuring a veritably fair trial of those indicted by the Court Prosecutor" owing to its international composition and established rules of procedure. Fifth, the ICC is the only international court that can investigate and prosecute without delay. Sixth, the ICC is the most cost-effective option.[63]

Thereafter, the commission described why it considered other possible judicial mechanisms inadvisable. It argued against the establishment of an *ad hoc* tribunal, such as those for Yugoslavia and Rwanda, on the grounds that they are expensive and notoriously dilatory in the prosecution and punishment of offenders, and consequently the 'political will' required within the international commnity to establish tribunals of this nature would be absent.[64] In addition, protracted expansion procedures, already overburdened schedules and similar concerns regarding cost militated against the expansion of the existing *ad hoc* tribunals.[65] Similarly, concerns regarding, *inter alia*, delays endemic in establishing infrastructure, as well as unavoidable cost implications, went against the creation of 'mixed courts' such as the 'hybrid' Special Court for Sierra Leone.[66]

In advocating the referral of the situation in Darfur by the Security Council, the commission rightly pointed out that the situation in Darfur meets the requirement of Chapter VII in that it constitutes a "threat to peace and security", as was acknowledged by the Security Council in its Resolutions 1556 and 1564. Furthermore, the commission noted the Security Council's emphasis in these resolutions of the "need to put a stop to impunity in Darfur, for the end of such impunity would contribute to restoring security in the region".[67]

Proposed ad hoc tribunal by the US

Given the US' opposition to the ICC, even before the commission's report was released, the US implemented contingency plans in the event that the commission should recommend that the situation in Darfur be referred to the ICC. One such plan advocated a 'Sudan Tribunal' as an alternative to the ICC, contrary to the views of other members of the Security Council.[68] However, the commission's report 'clairvoyantly' dealt with the reasons that such a tribunal would not be an effective alternative. The US even went so far as to present its 'Sudan Tribunal' as an 'African Court' and the ICC as a 'European Tribunal', fatally ignoring the strong relations between the ICC and AU countries.[69] For these and other reasons, the US proposal was not considered an effective alternative.[70]

As momentum to refer the situation in Darfur to the ICC built up, the obstinacy of the US began to look churlish in the face of ongoing massacres in Sudan. On 24 March 2005 France proposed a resolution that would eventually become Resolution 1593 (2005). Faced with the reality that its obstinacy was doing more damage

to its reputation than the referral would, the US agreed not to veto Resolution 1593 (2005), which was then passed on 1 April 2005.

Resolution 1593 (2005)

Although the referral is a significant step in the history of the court, the road ahead is not going to be easy. The referral has drawn the court into one of the most controversial aspects of its establishment, namely the relationship between the ICC and the states that are not party to the court. In addition, the way in which the court and the Security Council deal with enforcing the referral against Sudan will determine not only the ultimate success of the resolution, but the usefulness of the court.

The challenge for the court is immense. The Security Council has referred a matter to it (a very high-profile situation), yet it has no means of enforcing the mandate of the referral, and may have to rely on the Sudanese government's cooperation to properly investigate and prosecute the offences. The Sudanese government has already indicated its 'displeasure' with the referral and has vowed not to cooperate with the court. President Omar al-Bashir has been reported as solemnly swearing "thrice in the name of Almighty Allah that [he] shall never hand any Sudanese national to a foreign court".[71]

Should this become the official position of the Sudanese government, then the court will face the very difficult task of trying to enforce its decisions against a recalcitrant state. On 7 April 2005, in a meeting at the site of the ICC, the ICC prosecutor opened a sealed list of 51 individuals named by the United Nations International Commission of Inquiry as being suspected of grave international crimes in Darfur. After careful review, the prosecutor and his advisers decided to reseal the list without making copies or taking notes, in order to maintain full confidentiality. The list is advisory and not mandatory for the prosecutor to follow.[72] Should the prosecutor decide to prosecute these individuals or others, there will still be questions about how the court came to have jurisdiction over the offenders, whether by their apprehension or voluntary handover. This task is complicated because Sudan is not a state party to the ICC and, as such, owes no treaty obligations to the court. This is an inevitable problem with the referral of situations involving non-party states to the ICC, as the referral extends the court's jurisdiction beyond the parameters of the Rome Treaty, but does not concomitantly extend the court's power to enforce that jurisdiction. This problem was foreseen by the drafters of the ICC Statute, but was never satisfactorily attended to.

The problem of recalcitrant states was experienced by the ICTY and the approach adopted there may be of assistance to the court in dealing with the potentially recalcitrant Sudan.[73] The mechanism adopted by the ICTY is a Rule 61 proceeding in terms of which the ICTY reports a state that has refused to execute its warrants of arrest to the Security Council, which in turn will take appropriate action against that state. Were the ICC to follow this example, according to Sadat and Carden, it would make 'findings of non-compliance' and direct them to the Security Council.[74] The ICC would then have to adopt a similar procedure against a recalcitrant Sudan as it could not force the Security Council to ensure Sudan's cooperation. One thing is therefore clear: active Security Council involvement will prove vital for the effective functioning of the ICC. As one noted author points out:

> [T]he Security Council could decide that compliance by all UN Member States with a particular ICC decision is a measure necessary for the maintenance of peace and security pursuant to Article 41 of the UN Charter, and, as such, bind all UN Member States under Article 25 of the Charter to comply with specific ICC decisions.[75]

Conclusion

The challenges facing the ICC are immense. It cannot afford to fail. If the referral becomes a dead letter because of Sudan's refusal to cooperate, then the ICC, after one of its first cases, will all too easily be discredited by the US for being ineffective.

In the face of these difficult, politically charged aspects of the referral, it is easy to lose sight of the significance of this momentous event for the court. For the victims in Darfur, it represents the hope of justice. As we have witnessed, it represents the extension of the ICC's jurisdic-

tion beyond the constraints of its treaty basis to the considerably larger arena of the UN. Third, following on the US' decision not to use its veto in the Security Council, it is evidence of the political capitulation of the US in the face of unrelenting pressure by ICC-friendly states who demanded that the ICC be the means by which impunity is denied to Sudan's worst criminals. And last, the Security Council's referral of a case to the ICC may have signalled the end of the short but groundbreaking run of *ad hoc* tribunals.

Against this background, and amid inaction on the part of the UN and the international community, the role of the AU in intervening through the deployment of AMIS is to be acknowledged as a constructive step towards the amelioration of the plight of the civilian population. However, in light of the limited mandate and capacity of AMIS, efforts must be pursued to make the AU mission and future regional interventions more effective as stopgap mechanisms, perhaps, pending the deployment of mandated international forces.

Darfur sadly illustrates that until these effective mechanisms for the protection of civilians are put in place, atrocities will continue. At the very least, justice for victims ought to be secured through prosecution. Sudan has vigorously defended its right to prosecute offenders and thereby to snub the referral of the situation to the ICC. Given the overwhelming evidence that many of the crimes committed in Darfur have been at the behest of senior government officials, the impartiality of Sudan's courts is suspect. In addition, the prosecutor has promised that before he starts an investigation he will assess the crimes and the admissibility of the case. He has noted that he has "an additional duty: to assess national proceedings", and has acknowledged that the Sudanese authorities have reported they have begun investigations. In terms of the complementarity principle, this could be very important, and the prosecutor acknowledged as much when he assured the press that he would "carefully and independently assess these proceedings".[76] The Security Council's referral has made this possible. At the same time, while some may wish it to fail, the ICC has stepped into the international arena, to the satisfaction of its advocates. The referral by the Security Council of the Darfur situation to the ICC signals a turning of the tide for victims of human rights abuses in Sudan. Amidst the heightened political conflict about the referral and the difficulty of ensuring Sudan's cooperation, it remains to be seen just what a force for good the ICC will ultimately prove to be. The court may justifiably have to rely on the UN Security Council to ensure that it is given the necessary respect and cooperation by Sudan to ensure an effective investigation and prosecution. In this sense too, it remains to be seen whether the Security Council will be willing to back up its referral to the ICC by demanding compliance by Sudan with requests for cooperation by the ICC. The victims of gross human rights abuses in Sudan, along with the rest of the world, will be watching.

Notes

1 The establishment of the court itself is a formidable achievement and a milestone in international criminal law. Sadat & Carden eloquently describe its significance, stating: "[T]he negotiation and adoption of the Rome Treaty worked a quiet, albeit uneasy, revolution of sorts: a surreptitious segue into the new millennium, a millennium likely to be characterized both by a new multipolar balance of power, in which the United States does not exercise an unchallenged hegemony over world affairs, and by new modalities of international governance" – L Sadat & S Carden, The new International Criminal Court: An uneasy revolution, *Georgetown Law Journal* 88(2000), pp 387–388.

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12 Ibid, p 98, extract from P Kirsch, The Rome Conference on the International Criminal Court: A comment, ASIL Newsletter 1 (Nov/Dec 1998).
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15 See Report of the International Commission of Inquiry for Darfur to the United Nations at paragraph 43.
16 See Report of the International Commission of Inquiry for Darfur to the United Nations at paragraph 47.
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18 M Hoffman, Sudan: Darfur death toll at least 300,000, British MPs say, Reliefweb, <www.reliefweb.int/rw/RWB.NSF/db900SID/MMQD-6AXTNM?OpenDocument> (14 April 2005).
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20 Ibid.
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22 See Report of the International Commission of Inquiry for Darfur to the United Nations at paragraph 60.
23 This is a local Arabic colloquialism which, loosely translated, means 'devils on horseback' and has been used by locals to describe Arab militiamen and the Security Council in Resolution 1564. See Report of the International Commission of Inquiry for Darfur to the United Nations at paragraph 100.
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25 Ibid. Also, in a video interview given to Human Rights Watch, an alleged top militia leader, Musa Hilal, said that the Sudanese government "backed and directed Janjaweed activities in northern Darfur". Although Hilal denied that he was a leader of the militia and that any of his followers had committed atrocities, various eyewitness accounts contradict his assertions. Human Rights Watch also claim to be in possession of government documents that evidence Khartoum's official support of Hilal. See Darfur: Militia leader implicates Khartoum: Janjaweed Chief says Sudan government backed attacks, Human Rights Watch, 2005, <http://hrw.org/english/docs/2005/03/02/darfur10228.htm > (2 March 2005).
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44 Ibid.
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48 Ibid.
49 See Report of the International Commission of Inquiry for Darfur to the United Nations at paragraphs 20–24.
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52 *Prosecutor v Tadi* (IT-94-1), ICTY, pp 98-145.
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