

# Sudan, Resolution 1593, and International Criminal Justice

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## Abstract

The UN Security Council has recently referred the situation in Darfur, Sudan, to the International Criminal Court. This has been hailed as a breakthrough in international criminal justice. However, aspects of the referral resolution can be criticized from the point of view of their consistency with both the Rome Statute and the UN Charter. The limitations of the referral with respect to whom the Court may investigate also raise issues with respect to the rule of law. In addition, Sudan has accused the Security Council of acting in a neo-colonial fashion by referring the situation in Darfur to the Court. This article investigates these criticisms against the background of the international system in which international criminal law operates, and concludes that although the referral cannot be considered neo-colonial in nature, the referral can be criticized as selective and as an incomplete reaction to the crisis in Darfur. The referral remains, however, a positive step.

## Key words

International Criminal Court; rule of law; Security Council; Sudan

## I. INTRODUCTION

After Rwanda, it might be thought that the lessons of international criminal law had become inculcated: that the cycle of atrocity, cries of ‘never again’, occasional prosecution, and then the repetition of those atrocities elsewhere had been broken.<sup>1</sup> Justice might have won out over realpolitik. After all, the creation of the International Criminal Tribunal for the former Yugoslavia (ICTY) led to the creation of the International Criminal Tribunal for Rwanda (ICTR), and both together strongly influenced the creation of the International Criminal Court (ICC).<sup>2</sup> Many have considered, with some justification, that the ICC represents a decisive swing from politics to law in international affairs.<sup>3</sup> This is only partially true. It is unquestionable that the creation of

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1. On which see S. Chesterman, ‘Never Again . . . And Again: Law, Order and the Gender of War Crimes in Bosnia’, (1997) 22 *Yale Journal of International Law* 299.
2. See R. Cryer, ‘Human Rights and the Question of International Courts and Tribunals’, in M. C. Davis et al. (eds.), *International Intervention in the Post-Cold War World: Moral Responsibility and Power Politics* (2002), 60, at 62–7.
3. See, e.g., M. C. Bassiouni, ‘The Permanent International Criminal Court’, in P. Sands and M. Lattimer (eds.), *Justice for Crimes Against Humanity* (2003), 173, at 211. Bassiouni also notes, however, that ‘the ICC will not be a panacea for all ills’ (ibid.).

the ICC has a synergistic relationship with the increased importance enjoyed by international criminal law in the last decade or so. However, we should not simply see the ICC as the overcoming of politics. As Martti Koskeniemi has said, 'Institutions do not *replace* politics, but *enact* them.'<sup>4</sup> The ICC is, to a large extent, about enacting a politics of accountability. But politics are rarely black and white. The ICC is by no means free of politics and the swing towards accountability has by no means been unequivocal. Nor does it enjoy universal support.<sup>5</sup> In addition to explaining the action that has been taken by the UN Security Council in relation to Darfur, and its legal basis, this article will attempt to relate those actions to more general themes in international criminal justice. As we shall see, although the reaction to the crimes in Sudan is likely to have been different from that which would have occurred in, say, 1993,<sup>6</sup> a number of perennial problems related to international criminal law have arisen. But if the teeth of those problems have not been pulled, they have perhaps been blunted a little.

## 2. SUDAN: ITS HISTORY AND CONFLICTS<sup>7</sup>

Sudan is the largest state in Africa, covering 2.5 million sq km and bordering the Red Sea. It is not a state with a happy recent history. It is a place to which all the clichés of a state being blessed and cursed with natural resources are fully applicable. On its southern borders lie the Democratic Republic of Congo and Uganda, whose governments have referred situations to the ICC primarily because of actions in the north of their countries.<sup>8</sup> To Sudan's south-west lies the Central African Republic, which has also referred itself to the ICC.<sup>9</sup> To Sudan's east lie Eritrea and Ethiopia, both of which are attempting to recover from decades of conflict. The most stable of its neighbours are Chad, Egypt, Libya, and Kenya.

Sudan achieved independence from the United Kingdom in 1956. Since then conflicts traditionally considered to be between the north and south of the country,<sup>10</sup>

4. M. Koskeniemi, *The Gentle Civilizer of Nations: The Rise and Fall of International Law 1878–1960* (2001), 177 (emphasis in original).

5. The United States, for example, remains highly equivocal; see, e.g., D. Forsythe, 'The United States and International Criminal Justice', (2002) 24 *Human Rights Quarterly* 974. China and a number of states, particularly in the Middle East and Asia, remain similarly unconvinced of the desirability of the ICC.

6. As Payam Akhavan noted in relation to the creation of the ICTR, if the crimes in Rwanda had been committed prior to those in Yugoslavia, it is not clear that a tribunal would have been set up. P. Akhavan, 'The International Criminal Tribunal for Rwanda: The Politics and Pragmatics of Punishment', (1996) 90 *AJIL* 501, at 501.

7. A useful primer on Sudan and the conflict in Darfur may be found in the 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, 25 January 2005 (hereafter Report of the International Commission), paras. 40–72. The classic study of the area is A. de Waal, *Famine that Kills: Darfur, Sudan* (2005).

8. ICC Press Releases, 29 January 2004 (Uganda), 19 April 2004 (DRC). See C. Kress, 'Self-Referrals and "Waivers of Complementarity"', (2004) 2 *Journal of International Criminal Justice* 944; P. Gaeta, 'Is the Practice of "Self-Referrals" a Sound Start for the ICC?', (2004) 2 *Journal of International Criminal Justice* 949.

9. ICC Press Release, 7 Jan. 2005.

10. The real situation is somewhat more complex, as personnel from the north fight for the south, and vice versa. The conflict could also be considered one between the centre and periphery in Sudan; see, e.g., A. de Waal, *War in Sudan: An Analysis of Conflict* (1990). Since, however, the conflict in Darfur could also be described as a centre–periphery one, in order to distinguish the two conflicts, the conflict that began in 1983 and ended in 2005 will be described, admittedly not entirely accurately, as the north–south conflict.

which was unified by the United Kingdom only in 1947, have been fairly consistent, as have military coups and attempted coups. The discovery of oil in southern Sudan in the 1970s has only served to increase tensions, since revenues have been perceived to be unequally distributed by the government. The conflict between north and south was recently halted by the Comprehensive Peace Agreement of 7 January 2005 reached between the government and the Sudan People's Liberation Movement (SPLM). However, the conflict between north and south is by no means the only tension in Sudan. Inter-religious relations are weak, and other geographical regions feel they have been left out economically and politically. Inter-tribal tensions relating to resources and regional tensions generally in the west of Sudan led to a return to violence in 2003, when two local groups, the Sudan Liberation Movement (SLM) and the Justice and Equality Movement (JEM) rose up against the government, seeking greater political voice and development for the region. The name of the region is now sadly familiar throughout the world: Darfur.<sup>11</sup>

Early on in the Darfur conflict, the SLM and JEM achieved a number of victories against the government, which became concerned that it could not counter the SLM and JEM alone. Its response to these early SLM/JEM gains was accurately summarized by the acting UN High Commissioner of Human Rights, Bertrand Ramcharan:

The government of Sudan appears to have sponsored a militia composed of a loose collection of fighters, apparently of Arab background, mainly from Darfur, known as the 'Janjaweed'. In other words, and worryingly, what appears to have been an ethnically based rebellion has been met with an ethnically based response, building in large part on long-standing, but largely hitherto contained, tribal rivalries. In certain areas of Darfur, the Janjaweed have supported the regular armed forces in attacking and targeting civilian populations suspected of supporting the rebellion, while in other locations, it appears that the Janjaweed have played the primary role in such attacks with the military in support.<sup>12</sup>

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11. The Secretary-General has issued a large number of reports that deal with the situation in Darfur; see, e.g., Report of the Secretary-General on the Sudan Pursuant to Paragraph 15 of Security Council Resolution 1564 (2004) and paragraphs 6, 13, and 16 of Security Council Resolution 1556 (2004), 4 October 2004, UN Doc. S/2004/787; Report of the Secretary-General on the Sudan Pursuant to Paragraph 15 of Security Council Resolution 1564 (2004) and paragraphs 6, 13, and 16 of Security Council Resolution 1556 (2004), 2 November 2004, UN Doc. S/2004/881; Report of the Secretary-General on the Sudan Pursuant to Paragraph 15 of Security Council Resolution 1564 (2004) and paragraphs 6, 13, and 16 of Security Council Resolution 1556 (2004) and Paragraph 17 of Security Council Resolution 1574 (2004), 3 December 2004, UN Doc. S/2004/947; Report of the Secretary-General on the Sudan Pursuant to Paragraph 15 of Security Council Resolution 1564 (2004) and paragraphs 6, 13, and 16 of Security Council Resolution 1556 (2004) and Paragraph 17 of Security Council Resolution 1574 (2004), 7 January 2005, UN Doc. S/2005/10; Report of the Secretary-General on the Sudan Pursuant to Paragraph 15 of Security Council Resolution 1564 (2004) and paragraphs 6, 13, and 16 of Security Council Resolution 1556 (2004) and Paragraph 17 of Security Council Resolution 1574 (2004), 4 February 2005, UN Doc. S/2005/68; Report of the Secretary-General on the Sudan Pursuant to Paragraph 15 of Security Council Resolution 1564 (2004) and paragraphs 6, 13, and 16 of Security Council Resolution 1556 (2004) and Paragraph 17 of Security Council Resolution 1574 (2004), 4 March 2005, UN Doc. S/2005/140; Report of the Secretary-General on the Sudan Pursuant to Paragraph 15 of Security Council Resolution 1564 (2004) and paragraphs 6, 13, and 16 of Security Council Resolution 1556 (2004) and Paragraph 17 of Security Council Resolution 1574 (2004) 12 April 2005, UN Doc. S/2005/240.
  12. Report of the United Nations High Commissioner for Human Rights and Follow-Up to the World Conference on Human Rights: Situation of Human Rights in the Darfur Region of the Sudan, 7 May 2004, UN Doc. E/CN.4/2005/3, para. 6.

The government has consistently denied responsibility for the Janjaweed, although most, if not all, observers do not find their denials convincing.<sup>13</sup> The government of Sudan accepts that violations of human rights and humanitarian law have occurred, but has asserted 'that such violations represented individual excesses rather than state policy, and that they were the natural, or inevitable, consequences of an armed conflict which would end with the end of conflict'.<sup>14</sup>

Ceasefires signed in 2004 have not served to end the conflict, which has led to the death of at least 50,000 people (although the death toll may be approaching 200,000), 1.65 million internally displaced persons, and 2,000,000 refugees crossing the border into Chad.<sup>15</sup> The fighting has been characterized by indiscriminate attacks on civilians (including air attacks on villages), rape, looting, destruction of property, torture (including partial skinnings), forced displacement by government or Janjaweed forces, and, to a far lesser extent, looting, attacks on civilians, and the use of child soldiers by rebel forces.<sup>16</sup> The level of forced displacement has led to a number of organizations declaring (probably rightly) that 'ethnic cleansing' has taken place in Darfur,<sup>17</sup> while the US Congress, perhaps mindful of the criticism the United States received over its refusal to characterize the events in Rwanda as genocide in a timely fashion, has stated that genocide is occurring there.<sup>18</sup> Whether the specific intent required for genocide on the part of the government as a whole could be made out is controversial, but at the very least the actions amount to war crimes and crimes against humanity on the part of the government, while the rebels can plausibly be accused of war crimes.<sup>19</sup>

### 3. THE SECURITY COUNCIL REACTION

The activity of the United Nations, in particular the Security Council, in response to the crisis in Darfur has followed a fairly familiar pattern. This pattern was set by its actions in relation to the former Yugoslavia, and entrenched somewhat with Security Council resolutions on Rwanda. This pattern begins with expressions of concern or condemnation, then further details of the actions are sought, then a commission of investigation is created and prosecutions are ensured (in those instances by the

13. See, e.g., Report of the Independent Expert on the Situation of Human Rights in the Sudan: Emmanuel Akwei Addo, 28 February 2005, E/CN.4/2005/11, paras. 33–35; Human Rights Watch, *Darfur Destroyed: Ethnic Cleansing by Government and Militia Forces in Western Sudan* (2004), 42–9; International Crisis Group, 'Darfur: The Failure to Protect', Africa Report No. 89, 2 March 2005, at 7.

14. Report of the High Commissioner, *supra* note 12, para. 46.

15. Report of the International Commission, *supra* note 7, para. 226.

16. *Ibid.*, paras. 73–488.

17. Human Rights Watch, *supra* note 13, at 39–42; Human Rights Watch, *If We Return, We Will be Killed: Consolidation of Ethnic Cleansing in Darfur, Sudan* (2004).

18. House Concurrent Resolution 467, Senate Concurrent Resolution 133, 22 July 2004.

19. Report of the International Commission, *supra* note 7, paras. 73–564. For comment on the report see C. Byron, 'Commentary on the International Commission of Inquiry on Darfur to the United Nations Secretary-General', (2005) 6 *Human Rights Law Review* 35; de Waal, *supra* note 7, at xviii–xix, thinks that 'genocidal intent can be shown'.

creation of ad hoc tribunals).<sup>20</sup> As with the Yugoslavia and Rwanda actions, the Security Council began quietly in April 2004, although this time with a presidential statement to the press (interestingly not a formal statement of the president) which expressed ‘deep concern about the massive humanitarian crisis’ in Darfur.<sup>21</sup> This was criticized by one non-governmental organization (NGO), Human Rights Watch, for not going far enough.<sup>22</sup>

The Security Council re-entered the fray in June 2004 with Security Council Resolution 1547, which condemned ‘all acts of violence and violations of human rights and international humanitarian law by all parties’.<sup>23</sup> This was reiterated in Resolution 1556 of 30 July 2004, which, despite condemning violence by all parties, mentioned the Janjaweed specifically and condemned ‘especially those [crimes] with an ethnic dimension’. It also contained the first reference to criminal responsibility for such offences by ‘welcoming the commitment by the government of Sudan to investigate the atrocities and prosecute those responsible’.<sup>24</sup> This resolution was adopted under Chapter VII of the UN Charter, by determining that the situation in Sudan was a threat to international peace and security. This determination allowed the Security Council to make express binding demands on the parties to the conflict. Operative paragraph 6 of the resolution dealt with issues of criminal responsibility, demanding that the government disarm the Janjaweed and ‘bring to justice Janjaweed leaders and their associates who have incited and carried out human rights and international humanitarian law violations and other atrocities’. To show that the Council was serious about requiring such persons to be brought to justice, the Council asked the Secretary-General to report every month on the fulfilment of the obligations contained in that paragraph, ‘and express[ed] its intention to consider further actions, including measures as provided for in Article 41 [of the Charter] . . . in the event of non-compliance’.

### 3.1. The international commission

The pressure was increased in September 2004 by Resolution 1564, which reiterated the demand for the disarming and arrest of those responsible for atrocities, this time naming not only the Janjaweed militias but also ‘popular defence forces’, and requiring, again under Chapter VII, that the government pass to the African Union’s Mission in Sudan documentation on who had been arrested. Again, action under Article 41 of the Charter was threatened. Concerns that Sudan had not lived up to its obligations and that it was unlikely to do so led to one of the most important steps being taken, again one that echoed the Council’s action in relation to Yugoslavia

20. See J. C. O’Brien, ‘The International Tribunal for Violations of International Humanitarian Law in the Former Yugoslavia’, (1993) 87 AJIL 639, at 639–42.

21. UN Press Release SC/8050, 2 April 2004. On the difference see S. Talmon, ‘The Statements by the President of the Security Council’, (2003) 2 *Chinese Journal of International Law* 419, at 427–30.

22. Human Rights Watch, *supra* note 13, at 53.

23. 11 June 2004, UN Doc. S/RES/1547.

24. 30 July 2004, UN Doc. S/RES/1556.

and Rwanda. This was to set up a commission of investigation.<sup>25</sup> The commission's mandate was

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 ensure that those responsible are held accountable.<sup>26</sup>

The commission was set up in October 2004, when the Secretary-General appointed as its members Antonio Cassese, a past president of the ICTY, Mohamed Fayek, the secretary-general of the Arab Organization for Human Rights and a former Egyptian Foreign Minister, Hilana Jilani, the secretary-general of the Human Rights Commission of Pakistan, Dumisa Ntsebeza, a former member of the South African Truth and Reconciliation Commission, and Therese Stringer-Scott, a member of the South African 'Goldstone Commission' and diplomat. The commission visited Sudan in November 2004 and January 2005, when it met the Sudanese government, rebel forces, and NGOs. Some of the commission's members also visited the African Union in Addis Ababa to obtain further information. The commission operated as both fact-finder and appraiser, applying the law to the facts they found.<sup>27</sup>

The commission returned to the Secretary-General on 25 January 2005 with a 176-page report that showed the results of its investigations and made a number of determinations. The most important findings were that acts amounting to war crimes and crimes against humanity had occurred in Darfur. As mentioned above, however, it determined that although some individuals may have acted with genocidal intent, the government had not followed a genocidal policy in Darfur.<sup>28</sup> Having investigated the possibilities for bringing those responsible for international crimes to justice, the commission recommended that the Security Council refer the situation in Darfur to the ICC, under Article 13(b) of the Rome Statute,<sup>29</sup> in which such a referral is specifically contemplated. Article 13(b) gives the ICC jurisdiction, when '[a] situation in which one or more of such crimes appears to have been committed is referred to the Prosecutor by the Security Council acting under Chapter VII of the Charter of the United Nations', wherever it may be located. That provision was included in the Rome Statute specifically to allow the Security Council to mandate the ICC to act rather than set up new ad hoc tribunals itself.

The reasons given by the commission in recommending a referral to the ICC were many. First, the commission based its recommendation on the understanding that the offences threatened international peace and security. Second, the commission averred that, since high-ranking state officials were suspected of committing offences, it would be difficult or impossible to investigate them in Sudan, thus 'resort to the ICC, the only true institution of international criminal justice, would ensure

25. On Yugoslavia see SC Resolution 780, UN Doc. S/RES/780. On Rwanda see SC Resolution 935, UN Doc. S/RES/935.

26. UN Doc. S/RES/1564.

27. This summary is based on Report of the International Commission, *supra* note 7, paras. 12–25.

28. *Ibid.*, paras. 489–522.

29. *Ibid.*, paras. 569–572. The Commission also suggested setting up a compensation commission (*ibid.*, paras. 570, 591–603).

that justice be done', in particular because holding trials away from the *locus delicti* 'might ensure a neutral atmosphere and prevent the trials from stirring up political, ideological or other passions'. Third, the commission felt that the authority of the ICC and the Security Council might persuade high-level offenders to submit to trial. Their other reasons were of a more procedural nature, being that the ICC 'is the best suited organ' to ensure a fair trial, that it can be activated without delay, and that its proceedings 'would not necessarily involve a significant financial burden for the international community'.<sup>30</sup>

The first reason does not quite prove the point the commission seeks to make, since the vast majority of international crimes involve threats to international peace and security, and the Rome Statute shows that even for such crimes as these the primary forum for prosecution is still intended to be domestic courts. Some might also doubt reasons two and three, on the basis that they adopt a rather optimistic view of the situation and actors in Sudan. On the other hand, the experience of the ICTY does give cause for hope on these points; a number of high-level offenders have surrendered to the ICTY and early protests against surrenders had largely fizzled out by the time Slobodan Milošević was sent to The Hague. Equally, no two situations are identical, and protests in Sudan at the referral to the ICC,<sup>31</sup> alongside the fact that there are overlaps between the issues and actors involved in the north–south/centre–periphery conflict, and the (arguably centre–periphery) conflict in Darfur, militate against any rush to optimism on these issues.

The commission did look at other possibilities for bringing people to justice. The first of these was to use the national courts of Sudan. National courts, in particular as laid down by the Rome Statute, should be the courts of first resort for prosecution.<sup>32</sup> However, as the commission noted, the failure by both rebels and the government to take any meaningful steps to prosecute individuals and the state of the Sudanese justice system meant that 'the Sudanese courts are unable and unwilling to prosecute and try the alleged offenders'.<sup>33</sup> The choice of the terms 'unable and unwilling', and perhaps their order, is very unlikely to be accidental, referring as they do to the two situations when the ICC can trump domestic jurisdictions pursuant to Article 17 of the Rome Statute.

The other three options involved some international element to prosecution; none, however, was considered advisable for Sudan. The first was a US suggestion: the creation of an ad hoc international criminal tribunal along the lines of the ICTY and the ICTR. This was because the United States would rather pay for such an institution than grant any legitimacy to the ICC (it must be remembered that the decision on the forum for trial of international crimes can be as political as the decision to turn to prosecution itself). The commission took the view that such a tribunal, if the

30. *Ibid.*, para. 572.

31. See, e.g., BBC News, 'UN Sets Darfur Trials in Motion', 5 April 2005, available at <http://news.bbc.co.uk/1/hi/world/africa/4411497.stm>.

32. See M. Arsanjani, 'The Rome Statute for an International Criminal Court', (1999) 93 AJIL 22, 24–5.

33. Report of the International Commission, *supra* note 7, para. 568.

ICTY and ICTR are any guides, would be expensive and slow to prosecute.<sup>34</sup> This is almost certainly true, although it is interesting to see a commission headed by the first president of one of those bodies admitting their shortcomings so candidly.

The next option was to expand the roles of one of the existing ad hoc tribunals. The commission rejected this for the same reasons, adding that the tribunals were already ‘overstretched, for they are working very hard to implement the “completion strategy” elaborated and approved by the Security Council’ under US pressure.<sup>35</sup> The commission also noted that attempting to get one of the tribunals to change its priorities at this stage would cause confusion.<sup>36</sup> This is almost certainly correct; the completion strategies are controversial enough as it is,<sup>37</sup> and to require one or the other of the ad hoc tribunals to change its focus at this time would be difficult. To take but a small example, the whole question of how, or if, the composition of the translation units could be altered or expanded to deal with a profusion of relevant languages would be hugely difficult. Over and above the multitudinous administrative issues that would arise if this option were to be chosen, the length of time needed to investigate the Darfur situation and then to prosecute would certainly conflict with the completion strategy which required that all investigations by the tribunals be completed by the end of 2004 and that all first-instance trials be over by 2008.<sup>38</sup>

The final option rejected by the commission was the possibility of setting up a mixed court, along the lines of those in East Timor or Sierra Leone,<sup>39</sup> thus involving both international and Sudanese judges. The commission decided that this would be inappropriate, partly on the basis of the experience of the Special Court for Sierra Leone, which, ‘with its voluntary contributions, is hardly coping with the demands of justice there’.<sup>40</sup> The sources of funding for the Special Court were controversial from the start,<sup>41</sup> and its small budget has unquestionably hobbled it in terms of adopting a broad-based programme of accountability. Creating another new court would also be a lengthy process, since it would necessitate negotiating an agreement with the government of Sudan.<sup>42</sup> The commission also noted that

34. *Ibid.*, para. 574. For earlier comments on the prohibitive costs of new international criminal tribunals see D. J. Scheffer, ‘International Judicial Intervention’, (1996) 102 *Foreign Policy* 34, at 49. Michael Scharf took the view that one of the underlying causes of ‘tribunal fatigue’ is the cost: M. P. Scharf, ‘The Politics of Establishing an International Criminal Court’, (1995) 6 *Duke Journal of Comparative and International Law* 167, 170. The Commission took a similar view (*ibid.*).

35. Report of the International Commission, *supra* note 7, para. 575.

36. *Ibid.*

37. See, e.g., D. Raab, ‘Evaluating the ICTY and Its Completion Strategy’, (2005) 3 *Journal of International Criminal Justice* 82; L. Côté, ‘Reflections on the Exercise of Prosecutorial Discretion in International Criminal Law’, (2005) 3 *Journal of International Criminal Justice* 162, 185–6.

38. Security Council Resolution 1503 UN Doc. S/RES/1503, 28 Aug. 2003.

39. On which see C. Romano, A. Nollkaemper, and J. K. Kleffner (eds.), *Internationalized Criminal Courts* (2004).

40. Report of the International Commission, *supra* note 7, para. 578.

41. See R. Cryer, ‘A Special Court for Sierra Leone?’, (2001) 50 *International and Comparative Law Quarterly* 435, at 438–9.

42. Report of the International Commission, *supra* note 7, para. 578. Although the commission is diplomatic enough not to be explicit about this, it is almost certain that it had in mind the possibility of bad faith on the part of the government of Sudan, recalling the interminable political problems that bedevilled negotiations between the UN and Cambodia for mixed tribunals. See D. K. Donovan, ‘Joint UN–Cambodia Efforts to Establish a Khmer Rouge Tribunal’, (2003) 44 *Harvard International Law Journal* 551.

owing to the political situation in Sudan, it would be dangerous for national judges to sit in judgement on high government officials. Also, Sudanese criminal law and procedure is incompatible with human rights law, therefore the mixed-jurisdiction model would be inappropriate.<sup>43</sup> This again is correct; the UN ought not to involve itself with trials that are not up to international standards.<sup>44</sup>

What is interesting about the commission's discussion of these options is what they show about building a body of empirical knowledge on how to prosecute international crimes and the pitfalls of the various mechanisms for ensuring accountability. To some extent the ICTY and the ICTR, and certainly the mixed courts, were experiments in international criminal justice.<sup>45</sup> When they were set up it was by no means clear what the advantages and disadvantages of each option were. It is too early to come to a final conclusion on the efficacy of the tribunals, but the evidence is now becoming clearer, showing the positive and negative aspects of the various forums for trial. This perhaps shows that international criminal law is becoming a mature discipline, responding to Koskenniemi's criticism of institution building that it is too often based on supposition or derivation from vague general principles – such as 'democracy' or 'civilization' – rather than empirical research.<sup>46</sup> This, in itself, represents a positive development.

### 3.2. Resolution 1593

The Security Council, over the hard-negotiated abstentions from the veto of the US and China, and the abstentions (for very different reasons) of Algeria and Brazil, finally decided at the end of March 2005 in Resolution 1593 to refer the situation in Darfur to the ICC.<sup>47</sup> This was achieved by operative paragraph 1 of the Resolution, which stated that the Security Council '*Decides to refer the situation in Darfur since 1 July 2002 to the Prosecutor of the International Criminal Court*' (italics in original). The referral was welcomed by many as a victory for international criminal justice.<sup>48</sup> When the Rome Statute included provisions dealing with Security Council referrals, most commentators probably took the view that, given the antipathy to the Court of at least two members of the Security Council (the United States and China),

43. Report of the International Commission, *supra* note 7, paras. 579–80.

44. See R. Cryer, 'Post-Conflict Justice, A Matter of Judgment, Practice or Principle?', in N. D. White and D. Klaasen (eds.), *The UN, Human Rights and Post-Conflict Situations* (2005), 267, at 288.

45. See S. Linton, 'Cambodia, East Timor, Sierra Leone: Experiments in International Criminal Justice', (2001) 12 *Criminal Law Forum* 185.

46. Koskenniemi, *supra* note 4, at 178.

47. 31 March 2005, UN Doc. S/RES/1593. The Resolution thus passed 10–0–4.

48. See, e.g., UN Press Release SG/SM/9797/AFR/1132, 'Secretary-General Welcomes Adoption of Security Council Resolution Referring Situation in Darfur, Sudan, to International Criminal Court Prosecutor'. See also the press releases from the Darfur Consortium, 'A New Hope for Justice in Sudan'; Parliamentarians for Global Action, 'Darfur: International Parliamentary Group Welcomes United Nations Security Council Resolution 1593 and Urges All States to Fully Cooperate with the International Criminal Court'; Arab Coalition for the International Criminal Court, 'Arab Coalition for the International Criminal Court Welcomes Security Council Resolution 1593 on Crimes Committed in Darfur'; International Center for Transitional Justice, 'Security Council Referral to ICC Offers Hope for Darfur Victims'; Human Rights First, 'UN Takes Steps to End Human Rights Crisis in Darfur, But Immediate Action Is Required: US Deserves Credit for Leadership Role on Darfur'; Amnesty International, 'Sudan: Historic Referral to ICC Tarnished by Exemptions'; Human Rights Watch, 'UN Security Council Refers Darfur to the ICC'; Citizens for Global Solutions, 'US Puts Principles Over Politics'. All available at <http://www.iccnw.org>.

the Security Council was highly unlikely to refer any situations to the ICC<sup>49</sup> and, indeed, that nearly happened. The United States was extremely unwilling to pass the matter to the ICC. Its opposition was emphatically stated by its representative at the Security Council when Resolution 1593 was adopted:

Although we abstained on this Security Council Resolution referral to the ICC, we have not dropped, and indeed continue to maintain our long-standing and firm objections and concerns regarding the ICC. We believe that the Rome Statute is flawed and does not have sufficient protections from the possibility of politicized prosecutions. We reiterate our fundamental objection to the Rome Statute's assertions that the ICC has jurisdiction over the nationals, including government officials, of States that have not become parties to the Rome Statute.<sup>50</sup>

Legally, the United States' views are easily refutable.<sup>51</sup> However, the legal arguments are the superstructure of the United States' political opposition,<sup>52</sup> and given the US position in international affairs it is able to make its opposition felt as well as known. As a quid pro quo for its abstention, the United States insisted on three things, the first being that no funding would be forthcoming from the UN for the costs of the investigations in Darfur. We will return to the lawfulness of this presently. From a pragmatic point of view, however, Canada has stepped in with a US\$500,000 voluntary contribution to the ICC to assist it with its investigations in Darfur.<sup>53</sup>

The second demand made by the United States was that the resolution make reference to the (controversial) bilateral immunity agreements that it has made with a number of countries.<sup>54</sup> As a result the preamble of Resolution 1593 stated that it was 'taking note of the existence of agreements referred to in Article 98(2) of the Rome Statute'. The United States expressed appreciation that Resolution 1593 noted those agreements,<sup>55</sup> which was probably because that country considers that the resolution thus entrenches and provides some legitimacy for such agreements. The fact that the preamble provides as it does might be taken to imply that such

49. See, e.g., B. Broomhall, *International Justice and the International Criminal Court: Between Sovereignty and the Rule of Law* (2003), 79.

50. UN Doc. S/PV.5158, at 3 (Mrs Patterson). Those fearing politicization might note, from the other end, that Patterson declared her satisfaction that 'we expect that, by having the Security Council refer the situation on Darfur to the ICC, firm political oversight of the process will be exercised' (*ibid.*).

51. On the US position see D. J. Scheffer, 'The United States and the International Criminal Court', (1999) 93 AJIL 12; R. Wedgwood, 'The International Criminal Court: An American View' (1999) 10 EJIL 93. In refutation see, *inter alia*, G. Hafner, K. Boon, A. Rübesame, and J. Houtson, 'A Response to the American View as Presented by Ruth Wedgwood', (1999) 10 EJIL 108; B. S. Brown, 'U.S. Objections to the Statute of the International Criminal Court: A Brief Response', (1999) 31 *New York University Journal of International Law & Politics* 855; M. Leigh, 'The United States and the Statute of Rome', (2001) 95 AJIL 124.

52. See D. Forsythe, 'The United States and International Criminal Justice', (2002) 24 *Human Rights Quarterly* 974, at 974.

53. Canada Foreign Affairs, 'Canada Contributes \$500000 to International Criminal Court for Darfur Investigations', Press Release, 4 April 2005, No. 58. Voluntary Contributions are permitted under Art. 116 of the Rome Statute. At a general level such contributions do raise spectres of possible political influence. See, e.g., *Prosecutor v. Norman*, Decision on the Preliminary Motion Based on Lack of Jurisdiction (Judicial Independence) SCSL-2004-14-AR72(E) 13 March 2004. As the Special Court for Sierra Leone noted, however, the provision of funding does not, per se, equate to partiality; *ibid.*, paras 24-43. In this particular instance, the Canadian donation appears to have been on idealistic grounds. No Canadian nationals have been even remotely connected to the crimes in Darfur that have been referred to the ICC.

54. On which see R. Cryer, *Prosecuting International Crimes: Selectivity and the International Criminal Law Regime* (2005), 154-5.

55. UN Doc. S/PV.5158, at 4 (Mrs Patterson).

agreements are consistent with the Rome Statute. However, two other members of the Council attempted to limit the impact of this statement. Ellen Margrethe Løj, Denmark's permanent representative, noted that 'As regards the formulation regarding the existence of the agreements referred to in Article 98 paragraph 2 of the Rome Statute, Denmark would like to stress that the reference is purely factual; it is merely referring to the existence of such agreements. Thus the reference in no way impinges on the integrity of the Rome Statute.'<sup>56</sup> Brazil went further, with its permanent representative, Ronaldo Mota Sardenberg, explaining his state's abstention on Resolution 1593 on the basis that the preamble referred to such agreements, and 'My delegation has difficulty in supporting a reference that not only does not favour the fight against impunity but also stresses a provision whose application is a controversial issue.'<sup>57</sup>

This was an important issue, but not one of massive practical importance in relation to the situation in Darfur. The same might be said in relation to the final compromise required by the United States: the inclusion of operative paragraph 6. That paragraph

*Decides* that nationals, current or former officials or personnel from a contributing State outside Sudan which is not a party to the Rome Statute of the International Criminal Court shall be subject to the exclusive jurisdiction of that contributing State for all alleged acts or omissions arising out of or related to operations in Sudan established or authorized by the Council or the African Union, unless such exclusive jurisdiction has been expressly waived by that State.

Quite serious questions may be raised, and were raised, about this on the basis of its compliance with basic principles of the rule of law, to which we shall return. Before that, however, it is advisable to look in some depth at the lawfulness of the resolution. The actions of the Security Council in relation to the ICC have already proved controversial,<sup>58</sup> and Resolution 1593 is no exception. Lawfulness ought to precede legitimacy in debate, not least on the basis that the lawful or otherwise nature of an action has an important effect on its legitimacy.<sup>59</sup>

#### 4. THE UN CHARTER, THE ROME STATUTE AND RESOLUTION 1593

As we saw above, it is unquestionable that the Security Council may lawfully refer a situation to the ICC under Article 13(b) of the Rome Statute. The better view is also

56. *Ibid.*, at 6 (Ms Løj).

57. *Ibid.*, at 11 (Mr Sanderberg).

58. See, e.g., C. Stahn, 'The Ambiguities of Resolution 1422', (2003) 14 *EJIL* 85; M. Weller, 'Undoing the Global Constitution: UN Security Council Action on the International Criminal Court', (2002) 78 *International Affairs* 693; D. McGoldrick, 'Political and Legal Responses to the ICC', in D. McGoldrick, P. Rowe, and E. Donnelly (eds.), *The Permanent International Criminal Court: Legal and Policy Issues* (2003), 389, at 415–22; N. Jain, 'A Separate Law for Peacekeepers: The Clash Between the Security Council and the International Criminal Court', (2005) 16 *EJIL* 239. See also R. Cryer and N. D. White, 'The Security Council and the International Criminal Court: Who's Feeling Threatened?', (2002) 8 *International Peacekeeping: The Yearbook of International Peace Operations* 143.

59. For an excellent critique of claims that activity is 'illegal but legitimate' see B. Roth, 'Bending the Law, Breaking It, or Developing It? The United States and the Humanitarian Use of Force in the Post-Cold-War Era', in G. Nolte and M. Byers (eds.), *United States Hegemony and the Foundations of International Law* (2003), 232, at 250–6.

(although some might question this) that such a referral represented the best option for the Security Council. However, as we shall see, the Council cannot simply use the ICC as it sees fit. The Council is bound by the UN Charter, and the ICC, as an independent judicial body, must act according to its Statute, not simply in the way in which the Council would like it to.

#### 4.1. Financing the referral

An issue that has had an important, if perhaps overlooked, role in international criminal law is that of finance.<sup>60</sup> The requirement in Resolution 1593 that no funding for the investigation into the Darfur situation shall come from the UN has a perilous relationship with Article 115 of the Rome Statute,<sup>61</sup> which provides that

The expenses of the Court and the Assembly of States Parties, including its Bureau and subsidiary bodies, as provided for in the budget decided by the Assembly of States Parties, shall be provided by the following sources:

...

(b) Funds provided by the United Nations, subject to the approval of the General Assembly, in particular in relation to the expenses incurred due to referrals by the Security Council.

There is little doubt that the intention of this provision was to ensure that the UN paid for referrals that it made to the ICC. Otherwise the UN would be able to allocate its costs to the ICC, and thus indirectly to the Rome Statute's states parties. One need not be a member of the law and economics movement to see that this aspect of Resolution 1593 is problematic. As William Schabas has noted in the context of Article 115, 'special mention is made of expenses that may be incurred in the case of Security Council referrals, for which it seems only natural that the United Nations must be responsible'.<sup>62</sup> It is true that the UN is not formally bound by the Rome Statute, since it is not a party, but the point that the UN should not be able to redirect the costs of the activities of its organs (in this case the Security Council) remains.

The problems with this aspect of Resolution 1593 go a little deeper. There are UN constitutional matters at issue here. The General Assembly, not the Security Council, has authority over UN budgetary matters. By virtue of Article 17 of the UN Charter,<sup>63</sup> exclusive authority over budgetary matters is reserved to the General Assembly, the only area in which the General Assembly has mandatory powers over the membership of the UN. It is questionable whether the Security Council

60. In the not underwritten world of international criminal law, there is still considerable room for studies of the impact of economic considerations on decision-making in the area. Two particular areas that spring to mind are how trading partners of states whose officials are suspected of international crimes and voluntary contributors to the coffers of international criminal tribunals influence decisions on whether to prosecute.

61. See M. Halff and D. Tolbert, 'Article 115', in O. Triffterer (ed.), *Commentary on the Rome Statute for the International Criminal Court* (1999), 1221, at 1227–8.

62. W. A. Schabas, *An Introduction to the International Criminal Court* (2001), 159. See similarly L. Condorelli and S. Villalpando, 'Referral and Deferral by the Security Council', in A. Cassese, P. Gaeta, and J. R. W. D. Jones (eds.), *The Rome Statute of the International Criminal Court: A Commentary* (2002), 627, at 643–4.

63. On which see W. Koschorrek, 'Article 17', in B. Simma (ed.), *The Charter of the United Nations: A Commentary* (2003), 332. On UN funding more generally see E. J. Cárdenas, 'UN Funding: Some Reflections', (2000) 11 EJIL 67.

can pre-empt the General Assembly's competence in this way by demanding that the Assembly not provide any money for the expenses related to a referral. The Negotiated Agreement between the International Criminal Court and the United Nations makes it clear that the decision on the provision of funding to the ICC under Article 115 is the General Assembly's.<sup>64</sup>

On the last occasion when the Security Council attempted to fetter the General Assembly's discretion, when the Council purported to determine in Resolution 827<sup>65</sup> that the ICTY be funded from the general, rather than the peacekeeping, budget of the UN, a row ensued in which the Council came off second best.<sup>66</sup> It may legitimately be inferred from both the Charter and this event that the Security Council is not able to pre-empt the judgment of the General Assembly on budgetary measures, whether under Chapter VII or not. It may be, however, that Resolution 1593 will not become as divisive an issue in the Assembly as Resolution 827. After all, Resolution 1593, unlike Resolution 827, does not impose any additional financial burdens on the UN overall or necessitate General Assembly action. Also Canada's kind decision to make a grant to at least some of the costs the ICC will incur in relation to the Darfur referral may make the situation in practice more palatable for the ICC.<sup>67</sup> Whether the ICC ought to concede the principle that the Security Council can use it as a free good is another question.

Equally, the General Assembly is jealous of its competence in financial matters. As the *Certain Expenses* opinion showed, finance at the UN is a matter of high, as well as low, politics.<sup>68</sup> Resolution 1593 was accompanied by a rather provocative statement from the US acting permanent representative, Anne Patterson, that

We are pleased that the resolution recognizes that none of the expenses incurred in connection with the referral will be borne by the United Nations . . . This principle is extremely important and we want to be clear that any effort to retrench on that principle by this or other organizations to which we contribute could result in our withholding funding or taking other action in response.<sup>69</sup>

It is difficult to read this as anything other than a veiled threat to the General Assembly: should it decide to provide funding to the ICC, Resolution 1593 notwithstanding, the United States may return to the refusal to pay its UN dues that caused such difficulty for the UN in the 1990s.<sup>70</sup> Such a result would be deeply unwelcome. On the other hand, to allow the Security Council to dictate questions of funding would represent a considerable transfer of authority to the Security Council outside any Charter authority, and possibly give rise to the question of whether the Security

64. Art. 13 of the Agreement reads, 'The United Nations and the Court agree that the conditions under which any funds may be provided to the Court by a decision of the General Assembly of the United Nations pursuant to Article 115 shall be subject of separate arrangements'. Negotiated Relationship Agreement Between the International Criminal Court and the United Nations. The point is not the separate agreements (which do not yet exist), but the agreement that financing is the Assembly's business.

65. 25 May 1993, UN Doc. S/RES/827.

66. On this see V. Morris and M. P. Scharf, *The International Criminal Tribunal for Rwanda* (1998), 677–8.

67. It is a matter of speculation whether Canada had made its willingness to contribute to the cost of the investigations known prior to the passage of Resolution 1593.

68. *Certain Expenses of the United Nations* Opinion, [1962] ICJ Rep. 151.

69. UN Doc. S/PV.5158, at 4 (Mrs Patterson).

70. On which see J. F. Murphy, *The United States and the Rule of Law in International Affairs* (2004), ch. 3.

Council and General Assembly could be seen as equally primary organs of the UN in anything other than name.

#### 4.2. Operative paragraph 6

The most controversial aspect of the referral in 1593 was operative paragraph 6.<sup>71</sup> This paragraph granted exclusive jurisdiction to contributing states not party to the Rome Statute in relation to their 'nationals, current or former officials or personnel' unless they were Sudanese. However, it is not entirely clear what the basis of the jurisdictional limitation in operative paragraph 6 is. Given the ambiguity, it is worth looking at past examples where the Security Council has demanded exclusive jurisdiction.

The Security Council expressly required exclusive jurisdiction for peacekeepers and related personnel in relation to the Special Court of Sierra Leone and under Security Council Resolution 1497. When the Statute of the Special Court for Sierra Leone was being drafted, the president of the Security Council wrote to the UN Secretary-General insisting on provisions that kept primary jurisdiction in those states who had sent peacekeepers or related persons to Sierra Leone with Sierra Leonean consent, whether or not there was a status of forces agreement for the personnel.<sup>72</sup> The Special Court was only to be able to exercise jurisdiction over those people if the home jurisdiction was unwilling or unable to do so, and the Security Council adopted a positive resolution permitting the Court to act in those instances.<sup>73</sup> This position might be defended on the basis that the agreement bound only Sierra Leone and it consented to this waiver of its jurisdiction.

The same cannot be said with respect to Resolution 1497.<sup>74</sup> Resolution 1497 related to the setting up in 2003 of a multinational force to support the ceasefire in Liberia. Operative paragraph 7 of Resolution 1497, included at the insistence of the United States, is clearly an inspiration for its counterpart in Resolution 1593. Operative paragraph 7

*Decides* that current or former officials or personnel from a contributing State, which is not a party to the Rome Statute of the International Criminal Court, shall be subject to the exclusive jurisdiction of the contributing State for all alleged acts or omissions arising out of or related to the Multinational Force . . . unless such exclusive jurisdiction has been expressly waived by that contributing State.

During the passage of that resolution, a number of states expressed doubt about the compatibility of operative paragraph 7 with the Rome Statute and general international law. The two states that were clearest about their opposition to operative paragraph 7 were Germany and France.<sup>75</sup> Germany expressed its concerns that

71. Its legitimacy is dealt with below, at note 104 et seq. and accompanying text.

72. Letter from the President of the Security Council to the Secretary-General, 22 December 2000, UN Doc. S/2000/1234. The requirement was adopted in Statute of the Special Court of Sierra Leone, Art. 1(b).

73. Statute of the Special Court of Sierra Leone, Art. 1(c).

74. 1 August 2003, UN Doc. S/RES/1497.

75. Although Mexico noted its concerns in relation to 'principles of international law', its statement concentrated primarily on Mexican constitutional law. UN Doc. S/PV.4803, 2–3 (Mr Aguilar Zinser). Chile expressed its concern that 'by making exceptions, we might impede the harmonious development of international law', UN Doc. S/PV.4803, at 6 (Mr Muñoz).

operative paragraph 7 would prohibit the use of passive personality or universal jurisdiction.<sup>76</sup> It also appears that Germany was uncomfortable with the relationship between operative paragraph 7 and the Rome Statute, mentioning it alongside its fears about national jurisdiction.<sup>77</sup> France's comments were the clearest, explaining that 'We do not believe that the scope of the jurisdictional immunity thus created is compatible with the Rome Statute of the International Criminal Court.'<sup>78</sup>

None of the critics of the Resolution explained precisely why they considered operative paragraph 7 inconsistent with the Rome Statute, but the most likely reason is that although the Rome Statute gives the Security Council the right to request the Prosecutor to defer investigations into a situation for a period of a year pursuant to Article 16,<sup>79</sup> operative paragraph 7 seeks to have a permanent effect. The drafters of the Rome Statute were unwilling to grant the Security Council the authority permanently to limit the ICC's action in one fell swoop. Whether the Security Council has the right to do so outside the provisions of the Rome Statute is doubtful, to say the least.<sup>80</sup>

#### 4.2.1. *The nature of operative paragraph 6*

There are three possible ways of interpreting operative paragraph 6 which are referable, at least to some extent, to provisions of the Rome Statute. The first would be to see Resolution 1593 as the Security Council referring the situation in Darfur to the ICC under Article 13(b) of the Rome Statute, but simultaneously issuing a (binding) request to the ICC under Article 16 that the Prosecutor not investigate nationals of non-party states outside Sudan. Article 16 of the Rome Statute provides that

No investigation or prosecution may be commenced or proceeded with under this Statute for a period of 12 months after the Security Council, in a resolution adopted under Chapter VII of the Charter of the United Nations, has requested the Court to that effect; that request may be renewed by the Council under the same conditions.

In favour of this interpretation the preamble of Resolution 1593 may be prayed in aid. Preambular paragraph 2 of Resolution 1593 specifically recalls Article 16 of the Rome Statute. A highly charitable reading of this, therefore, would be that operative paragraph 6 is simply a request under Article 16, which would expire on 30 March 2006, after which the Prosecutor could investigate the personnel mentioned in that paragraph.

76. UN Doc. S/PV.4803, 4 (Mr Plueger). France may have agreed, noting alongside its concerns about the Rome Statute that it did not believe that operative paragraph 7 was compatible with 'principles of international law' without further explanation, UN Doc. S/PV.4803, at 7 (Mr Duclos).

77. *Ibid.*

78. *Ibid.*, at 7 (Mr Duclos).

79. See generally L. Yee, 'The International Criminal Court and the Security Council: Articles 13(b) and 16', in R. S. Lee (ed.), *The International Criminal Court: The Making of the Rome Statute* (1999), 149; M. Bergsmo and J. Pejić, 'Article 16', in Triffterer, *supra* note 61, at 373.

80. See *infra* notes 95–9 and accompanying text. See also Cryer and White, *supra* note 58, at 153–4. There is a possible hint that it might have such authority in F. Berman, 'The Relationship between the International Criminal Court and the Security Council', in H. A. M. von Hebel, J. Lammers, and J. Schukking (eds.), *Reflections on the International Criminal Court* (1999), 173, at 176–8.

The second way of seeing operative paragraph 6 is that it reflects the Security Council's wish to refer the situation in Darfur to the ICC *except* insofar as it regards personnel of non-state parties. In favour of this interpretation is the wording of operative paragraph 6 itself, which does not request the prosecutor to defer investigations for a year, as per Article 16 of the Rome Statute, but declares that those personnel are in the exclusive jurisdiction of their sending state. We will return to this interpretation at some length later.

The third way of seeing operative paragraph 6 is that it is an application of bilateral non-surrender agreements to the situation. In other words, because of preambular paragraph 4's taking note of such agreements, and the exclusion of jurisdiction being limited to non-states parties,<sup>81</sup> Resolution 1593 simply recognizes those agreements. This is the least convincing of the ways of seeing Resolution 1593 alongside the Rome Statute. As mentioned above, the resolution merely takes note of the agreements. Also, it refers to all non-parties to the Rome Statute, not simply to those with non-surrender agreements. Finally, as the Rome Statute makes clear, even where lawful, the agreements do not exclude the jurisdiction of the ICC,<sup>82</sup> but preclude co-operation with the ICC where there is opposition of a party to such an agreement to the surrender of their national to the ICC. Operative paragraph 6 is framed in terms of an exclusion of jurisdiction, not a recognition of a right not to co-operate.

Either of the two more plausible ways of approaching operative paragraph 6 canvassed above involve legal problems for different, albeit cognate, reasons. To see Resolution 1593 as being an Article 13(b) referral, combined with a request under Article 16 of the Rome Statute not to investigate peacekeepers who are non-party nationals, is not necessarily in accordance with Article 16. It could be argued that the Security Council can only prevent the ICC dealing with a 'situation' under Article 16, rather than individuals, or groups of individuals. However, Article 16 does not refer to a situation, but to an 'investigation' or 'prosecution'. Probably the former, and certainly the latter, term clearly implies that the Security Council can request deferral of particular investigations or prosecutions.<sup>83</sup> Therefore it might be thought that the Security Council was simply exercising this power. However, there are problems with this view.

The first difficulty is the clearest; the language of the Resolution simply does not support this interpretation. As mentioned above, operative paragraph 6 is not framed in terms of Article 16. Where the Security Council has previously purported

81. Agreements between states parties to not surrender may not be acceptable under the Rome Statute, and anyway, the ICC could order the surrender of the person from his or her home jurisdiction in such a situation.

82. Art. 27 of the Rome Statute makes it very clear that the question of personal or State immunities are irrelevant when a person is before the ICC. The somewhat Delphic, and controversial, judgment in the *Yerodia* case was prepared to accept that immunities do not apply before international courts. *Case Concerning the Arrest Warrant of 11 April 2000 (Democratic Republic of Congo v. Belgium)*, ICJ General List 121, para. 60. On the decision see S. Wirth, 'Immunity for Core Crimes? The ICJ's Judgment in the *Congo v. Belgium* Case', (2002) 13 EJIL 877; C. Wickremasinghe, 'Arrest Warrant of 11 April 2000 (*Democratic Republic of the Congo v. Belgium*)', Preliminary Objections and Merits, Judgment of 14 February 2002', (2003) 52 *International and Comparative Law Quarterly* 775.

83. See, e.g., Bergsmo and Pejčić, *supra* note 79, at 378–9; Condorelli and Villalpando, *supra* note 62, at 647.

to rely on Article 16, such as in Resolutions 1422 and 1487, it has expressly said so in the relevant operative paragraph. Resolution 1593 does not. The only possible support for such an interpretation is the preambular reference to Article 16, yet this is undermined by the wording of operative paragraph 6. Not only does that paragraph not refer to Article 16, but it frames itself in terms of a limitation of the jurisdiction of the Court. The language of Resolution 1593 is far closer to the controversial Resolution 1497 than to the (in other ways equally controversial) Resolution 1422.

Still, it is not impossible that the Security Council could rely on Article 16 without expressly referring to it.<sup>84</sup> The question is whether the intention of the Council can be shown to have been to rely on that Article.<sup>85</sup> None of the statements in the Security Council invoked Article 16 of the Rome Statute. Almost all the comments that dealt with the matter questioned the consistency of Resolution 1593 with the Rome Statute.

Even if this were not the case, operative paragraph 6 is not consistent with Article 16 of the Rome Statute. Article 16 requires the ICC to defer to a request for a temporally limited period. It is quite clear that there is no such temporal limitation envisaged in Resolution 1593, which contains no 'sunset clause' for operative paragraph 6. Further than this, Luigi Condorelli and Santiago Villalpando suggest that there are further conditions to a Security Council request under Article 16. These are that there is a threat to international peace and security, as required by Article 39 of the UN Charter, and that the Council has demonstrated that the deferral is a means of maintaining or restoring international peace and security.<sup>86</sup> On the first point, the Security Council determined that the situation in Darfur amounted to a threat to international peace and security, and there is no reason to question that determination.<sup>87</sup> More questions could be asked about the second determination, that the immunity granted was demonstrably in the interests of international peace and security. Considerable doubts may be expressed about whether such a demonstration took place. Equally, this may be a matter which is simply within the broad discretionary competence of the Council to determine what is in the interests of international peace and security.

Let us now turn to the other possible interpretation of Resolution 1593, that it amounts to a referral to the ICC under Article 13(b), but the situation referred is the situation in Darfur minus the activities of peacekeepers and related personnel. There are considerable problems with this interpretation, both from the legal and principled point of view. The primary difficulty in seeing operative paragraph 6 as being consistent with the Rome Statute comes from the concept of a 'situation'.

84. A resolution that requested the Prosecutor to defer investigations in a particular situation, but not expressly invoking Art. 16, should not, for that reason alone, be considered not to be valid. Equally, when important issues are at stake, it is not acceptable to infer a great deal from ambiguous passages in such resolutions; see V. Lowe, 'The Iraq Crisis: What Now?', (2003) 52 *International and Comparative Law Quarterly* 859, at 866. This ought not to be taken as claiming that the issue of immunity of peacekeepers is as important as going to war. It is not.

85. On the question of the intention of the Security Council see N. D. White, 'The Will and Authority of the United Nations after Iraq', (2004) 17 *Leiden Journal of International Law* 645.

86. Condorelli and Villalpando, *supra* note 62, at 646–7; see similarly (on the first point at least) Cryer and White, *supra* note 58, at 155–8.

87. See, e.g., Security Council Resolutions 1556 and 1564, referred to above.

There are two views about the scope of a 'situation' in the Rome Statute. They are that a 'situation' is appropriately limited solely by temporal or geographical considerations, and that the referral of a situation may also include limitations *ratione personae*. The most prominent proponent of the latter view of the concept of a 'situation' is the former head of the US delegation to Rome, David Scheffer. In a piece intended to win over US critics of the ICC, Scheffer averred that

The power of the Security Council to refer situations enables the Council to shape the ICC's jurisdiction . . . such referral can be tailored to minimise the exposure to ICC jurisdiction of military forces deployed to confront the threat. The Chapter VII resolution would define the parameters of the Court's investigations in the particular situation.<sup>88</sup>

This view is unpersuasive.<sup>89</sup> The text of Article 13(b), in particular when read alongside Article 16, makes it clear that a situation may not be limited *ratione personae*. Article 13(b) reads, in relevant part, 'a situation in which one or more of such crimes appears to have been committed'. The original ILC draft Statute for an International Criminal Court provided that the Council could refer 'matters' to the Court, to avoid the impression that the Security Council could refer individual cases.<sup>90</sup> The final version of Article 13(b) refers to 'situations' rather than 'matters', as the former term was more general than the latter.<sup>91</sup> The terminology of 'situations' is clearly distinct from 'prosecution', which was used in Article 16, where the Council was given the authority to intervene in more specific cases.<sup>92</sup> If the Council can only refer situations, rather than 'investigations', 'prosecutions', and, a fortiori, 'cases', then it cannot limit the referral, even by excluding a small group.

The fact that a situation may not be limited *ratione personae* also appears to have been the position adopted by the Prosecutor. When Uganda first sought to refer itself to the ICC under Article 13(a) of the Rome Statute, the referral was for the situation 'concerning the Lord's Resistance Army' in northern Uganda.<sup>93</sup> The Prosecutor, nonetheless, has opened an investigation into northern Uganda more generally.<sup>94</sup> Article 13(a), like 13(b), refers to 'situations', and there is no reason to believe that 'situations' was not intended to mean the same thing in both Article 13(a) and Article 13(b).

The final way of seeing Resolution 1593 does not involve reference to the Rome Statute. This is to take the language of operative paragraph 6 as creating exclusive jurisdiction, thus ousting the jurisdiction of states and the ICC, or, perhaps, just the

88. D. J. Scheffer, 'Staying the Course With the International Criminal Court', (2001-2) 35 *Cornell International Law Journal* 47, at 90.

89. See also Dan Sarooshi, 'The Peace and Justice Paradox: The International Criminal Court and the UN Security Council', in McGoldrick et al., *supra* note 58, 95-8.

90. Draft Statute of the International Criminal Court, in Report of the International Law Commission on the Work of its Forty-Sixth Session, UN Doc. A/49/10, Art. 23. See V. Gowlland-Debbas, 'The Relationship between the Security Council and the Projected International Criminal Court', (1998) 3 *Journal of Armed Conflict Law* 97, at 102-3.

91. See S. A. Williams, 'Article 13', in Triffterer, *supra* note 61, at 343, 349. The drafting history thus confounds the suggestion that the Council could refer a specific case by Condorelli and Villalpando, *supra* note 62, at 632-3. The Council could refer the situation, but not the case per se.

92. Although the Council is also entitled to intervene more broadly into an 'investigation', the point remains.

93. ICC Press Release, 29 January 2004.

94. ICC Press Release, 29 July 2004.

ICC.<sup>95</sup> Not only would accepting Resolution 1593 as limiting the jurisdiction of the Court involve, as we shall see, an alteration of the concept of 'situation' in Article 13(b), but it would also require the ICC to ignore Article 1 of the Rome Statute, which reads, 'The jurisdiction and functioning of the Court shall be governed by the provisions of this Statute.' There is simply no evidence that there is a general right of the Security Council to require an international person to alter or avoid its international legal obligations not referable to Article 103 of the UN Charter.<sup>96</sup> Whether the Security Council can exclude state jurisdiction under Article 103 is controversial, as Resolution 1497 showed. Irrespective of whether or not it may alter state rights, or a treaty between member states or between the UN and a member state,<sup>97</sup> the Security Council does not have the authority to alter the Rome Statute. The ICC is a separate international person to its members and is not a party to the UN Charter; therefore it is not bound by the trumping provision contained in Article 103 of the Charter.<sup>98</sup>

The case for the proposition that the Council cannot alter the Rome Statute is bolstered by the relationship agreement, which was signed by representatives of the ICC and the UN and entered into force in October 2004. In Article 2(1) of the agreement the UN 'recognises the Court as an independent permanent judicial institution which . . . has international legal personality'. In Article 2(2) 'the Court recognises the responsibilities of the United Nations under the Charter'. Article 2(3) declares, as the last of the principles in the Article, 'The United Nations and the Court respect each other's status and mandate.' Despite the recognition of the UN's responsibilities under the Charter, it seems hardly compatible with recognition of the ICC as an independent body with a separate international legal personality and respect for its mandate to attempt to alter its foundational document.<sup>99</sup>

As can be seen, quite serious questions may be raised about the lawfulness of parts of Resolution 1593. The question thus arises of whether a person referred

95. Ms Løj, the Danish representative, said that the Danish interpretation was that Resolution 1593 'does not affect the universal jurisdiction of member States in areas such as war crimes', UN Doc. S/PV.5158, at 6.

96. Art. 103 of the Charter reads, 'In the event of a conflict between the obligations of the Members of the United Nations under the present Charter and their obligations under any other international agreement, their obligations under the present Charter shall prevail.' The Court, not a member of the UN, however, is obliged by Art. 21 of the Rome Statute to apply 'in the first place, the Statute, Elements of Crimes and its Rules of Procedure and Evidence', and 'applicable treaties' only 'in the second place . . . [and] . . . where appropriate'. Considerable doubt may be expressed about whether the UN Charter could be said to be an 'applicable treaty'.

97. A somewhat controversial proposition that was accepted, without real discussion by the Appeals Chamber of the Special Court for Sierra Leone in *Prosecutor v. Fofana*, Decision on Preliminary Motion on Lack of Jurisdiction Materiae: Illegal Delegation of Powers by the UN, Case No. SCSL 2004-14-AR72(E), 25 May 2004, paras. 55-6; see also the Separate Opinion of Judge Robertson, para. 6.

98. Statements that the Security Council could not rewrite the Rome Statute were also characteristic of the debate on Security Council Resolution 1422; see Cryer and White, *supra* note 58, at 151, 153-4. See also Sarooshi, 'Peace and Justice', *supra* note 89, at 95-8.

99. The Special Court for Sierra Leone, in *Prosecutor v. Fofana*, Decision on Preliminary Motion on Lack of Jurisdiction Materiae: Illegal Delegation of Powers by the UN, Case No. SCSL 2004-14-AR72(E), 25 May 2004, para. 28, took the view that the Security Council could alter a treaty entered into with a state, owing to Art. 103 of the UN Charter. Irrespective of whether or not this is correct, it cannot apply with respect to an independent international person which is not bound by Art. 103 of the Charter, as it is not a party to the Charter. The same would apply to any possible issues of compatibility of Resolution 1593 with Art. 19 of the same agreement.

to in operative paragraph 6 could be prosecuted. A reasonable argument could be made that as the ICC is not bound by Article 103, and it is unlikely that operative paragraph 6 is consistent with either Article 13(b) or 16, that such a person could be prosecuted. The nationality state of such a suspect, however, would be likely to argue that the offending aspects of Resolution 1593 are not severable from the resolution as a whole and therefore the entire reference is void if the exemption is unlawful.<sup>100</sup> It seems unlikely that the Court would accept such an argument if it deprived the ICC of jurisdiction generally. After all, the Rome Statute sets out what it may do in the event that the Security Council refers a matter; that other aspects do not conform to its Statute would be likely to be held by the ICC to be a matter of supreme immateriality. The UN Secretary-General and the ICC have so far treated the reference as *prima facie* valid under Article 13(b).<sup>101</sup>

In practice, it is extremely unlikely that any cases will be brought against personnel referred to in operative paragraph 6. There are no credible allegations against such personnel which come remotely close to those alleged against the parties to the Sudan conflict. Given this, it might be wondered why operative paragraph 6 was so important for the United States in particular.<sup>102</sup> The answer lies not in the likelihood of such charges being brought, but in the establishment of a precedent for 'immunity' from the ICC, and the normalization of such immunities. Patterson made this quite clear in the Security Council chamber:

The language providing protection for the United States and other contributing States is precedent setting as it clearly acknowledges the concerns of States not party to the Rome Statute and recognises that persons from those States should not be vulnerable to investigation or prosecution by the ICC, absent consent by those States or a referral by the Security Council. We believe that, in the future, absent consent of the State involved, any investigations or prosecutions of nationals of non-party States should come only pursuant to a decision by the Security Council . . . Protection from the jurisdiction of the Court should not be viewed as unusual.<sup>103</sup>

The question of exempting people from the jurisdiction of the ICC, irrespective of its legality, also raises other important questions of the compliance of the operation of the international criminal law system with basic standards of the rule of law. In particular because the United States has taken the view that it is establishing a precedent in relation to immunity from the jurisdiction of the ICC, and the concerns expressed by a number of other states, it is worth looking at the rule of law issues raised by Resolution 1593.

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100. The position with respect to perhaps the closest analogue, declarations under Art. 36(2) of the ICJ Statute containing invalid reservations, is not clear; see, e.g., J. Collier and V. Lowe, *The Settlement of Disputes in International Law: Institutions and Procedures* (1997), 143–5.

101. See Letter from the Secretary-General to the Prosecutor of the International Criminal Court, 1 April 2005, and *Situation in Darfur*, Decision Assigning the Situation in Darfur, Sudan, to Pre-Trial Chamber I, ICC-2/05, 21 April 2005.

102. The same might be said in relation to Resolution 1422; see R. Lavelle, 'A Vicious Storm in a Teacup: The Action by the United Nations Security Council to Narrow the Jurisdiction of the International Criminal Court', (2003) 14 *Criminal Law Forum* 195.

103. UN Doc. S/PV.5158, at 3 (Mrs Patterson).

## 5. RESOLUTION 1593 AND THE RULE OF LAW<sup>104</sup>

The rule of law is a foundational value in legal systems,<sup>105</sup> and it is also one which is consistently referred to in international criminal law, from Robert Jackson's seminal opening speech at the Nuremberg International Military Tribunal<sup>106</sup> to more recent UN efforts, such as the Expert Seminar on Democracy and the Rule of Law.<sup>107</sup> It is true that the rule of law is not an entirely determinate idea, and it has been criticized, particularly by Marxists, for indeterminacy and, according to some, its mystificatory nature.<sup>108</sup> It is true that the rule of law is by no means fully determinate in all its forms, and the nature of the international system is not always fertile soil for its fulfilment.<sup>109</sup>

Nonetheless, there is broad consensus that, if nothing else, the rule of law requires that like cases are treated alike.<sup>110</sup> As to its mystificatory role, if it has one, this must be balanced against the considerable protective role the equal applicability of the law has for the weak.<sup>111</sup> Even critics of aspects of the rule of law, such as Martti Koskeniemi,<sup>112</sup> appear to grant the importance of the equal applicability of law.<sup>113</sup> Critics have also yet to provide a feasible alternative which grants the same level of protection to the weak.<sup>114</sup> Even if the rule of law does exhaust the grounds on which law may be critiqued (and it does not), any mystificatory effect can also be counterbalanced by using rule of law ideals as a form of immanent critique. Immanent critique is something to which international criminal law is particularly susceptible, given the suffusion of its rhetoric with references to the rule of law.<sup>115</sup>

### 5.1. The principle of equality

To begin with the matter of the referral itself: the argument can be made that allowing the Security Council a role in referring situations to the ICC implicates rule of law issues. The idea underlying Article 13(b) was to render the creation of further ad hoc tribunals like the ICTY and the ICTR unnecessary, since the ICC could be used instead.<sup>116</sup> The creation of those tribunals had been criticized on the basis that they

104. This section builds on themes originally considered in Cryer, *supra* note 54, ch. 4, which was completed prior to the Security Council action on Darfur.

105. On the rule of law generally see B. Z. Tamanaha, *On the Rule of Law: History, Politics, Theory* (2004).

106. 1 *Trial of Major War Criminals, Nuremberg*, at 81.

107. See Expert Seminar on Democracy and the Rule of Law, Geneva, 28 February–2 March 2005, Conclusions and Recommendations, paras. 20–4, available at <http://www.ohchr.org/english/issues/democracy/docs/newconclusions1.pdf>

108. See, e.g., C. Miéville, *Between Equal Rights: A Marxist Theory of International Law* (2005), 314–18.

109. See, e.g., Broomhall, *supra* note 49, ch. 4.

110. See, e.g., L. L. Fuller, *The Morality of Law* (1969), ch. 3; H. L. A. Hart, *The Concept of Law* (1994), 160. Tamanaha, *supra* note 105, at 66, 93–4, 119–22.

111. See, e.g., E. P. Thompson, *Whigs and Hunters: The Origins of the Black Act* (1975), 262–3; Tamanaha, *supra* note 105, at 75.

112. Koskeniemi, *supra* note 4.

113. As much would appear to flow from *ibid.*, at 496–509. This includes some of the most vituperative critics of international criminal law from the left; see M. Mandel, *How America Gets Away with Murder: Illegal Wars, Collateral Damage and Crimes Against Humanity* (2004), 207–53.

114. Tamanaha, *supra* note 105, at 85.

115. See Cryer, *supra* note 54, at 197–8.

116. See, e.g., Williams, *supra* note 91, at 345.

were examples of selective justice.<sup>117</sup> As they were set up to deal with particular circumstances, critics have noted that other situations may not receive Council attention.<sup>118</sup> Indeed, situations which directly involve the interests or nationals of one of the permanent members, which could veto any Council resolution, are particularly unlikely to be dealt with.

The same criticism may be applied to Article 13(b).<sup>119</sup> For example, the Security Council is almost certain not to refer the situation in Chechnya to the ICC. The Sudanese permanent representative was not slow to pick up on this aspect to excoriate the Council for passing the situation in Darfur to the ICC: 'While the Council is keen on holding my country to account and to urge it to hold trials and achieve security and stability and overnight, in a territory whose area approximates that of Iraq, we find that very same Council continuing to use the policy of double standards.'<sup>120</sup> Although the Sudanese government could hardly be considered an objective observer on this matter, and the appropriate reaction is not to refuse to prosecute, but to prosecute equally,<sup>121</sup> ad hoc reactions by the Security Council can be open to this type of criticism.<sup>122</sup>

It might be thought that this could be obviated by granting universal jurisdiction to the ICC, thus rendering every situation in the world subject to the *proprio motu* powers of the Prosecutor.<sup>123</sup> Although this proved politically impossible at Rome,<sup>124</sup> even if the ICC had been granted universal jurisdiction it would not in any event have overcome the problem. In addition to jurisdiction, the ICC needs co-operation, and even if the ICC were to be given universal jurisdiction, basic principles of treaty law (i.e. the *pacta tertiis* principle) mean that the Rome Statute could not have imposed on non-parties a duty to co-operate.<sup>125</sup> Only the Security Council has the power to impose a duty to co-operate on non-party states, and if the Security Council were to choose to do this it would also be subject to the veto. Therefore, in practice, whether the ICC was given universal jurisdiction or not, the criticism of the selective nature of Security Council activity would still have relevance.<sup>126</sup> This serves as a sobering reminder that the international legal order is not one in which the rule of law is

117. See J. E. Alvarez, 'Crimes of Hate/Crimes of State: Lessons From Rwanda', (1999) 24 *Yale Journal of International Law* 365, at 452–6.

118. See, e.g., D. Harris, 'Problems and Progress in Establishing an International Criminal Court', (1998) 3 *Journal of Armed Conflict Law* 1, at 3.

119. See Williams, *supra* note 91, at 349. As, indeed, it has been, see *infra* note 134 and accompanying text.

120. S/PV.5158, p.12 (Mr Erwa).

121. See N. Boister, 'The ICJ in the *Belgian Arrest Warrant* Case: Arresting the Development of International Criminal Law', (2002) 7 *Journal of Conflict and Security Law* 293, at 314. The Appeals Chamber in the *Čelebići* case also noted that the remedy for a claim of selective enforcement of the law was not non-prosecution, *Prosecutor v. Delalić, Mucić, Delić and Landžo*, Judgment, IT-96–21–A, para. 618.

122. See, e.g., A. Bianchi, 'Ad-hocism and the Rule of Law', (2002) 13 *EJIL* 263.

123. Pursuant to Arts. 13(c) and 15 of the Rome Statute, see generally P. Kirsch and D. Robinson, 'Initiation of Proceedings by the Prosecutor', in Cassese, Gaeta, and Jones, *supra* note 62, at 657.

124. See H.-P. Kaul and C. Kress, 'Jurisdiction and Cooperation in the Statute of the International Criminal Court', (1999) 2 *Yearbook of International Humanitarian Law* 143.

125. 1969 Vienna Convention on the Law of Treaties, 1155 UNTS 331, Art. 34. See O. Bekou and R. Cryer, 'Introduction', in O. Bekou and R. Cryer (eds.), *The International Criminal Court* (2004), xi, at xvi. Operative paragraph 2 of Resolution 1593 notes that non-parties do not have duties under the Statute.

126. It ought to be noted in mitigation that the formal imposition of a duty is only one of the factors that has led to co-operation in relation to the ad hoc tribunals; see, e.g., R. Kerr, *The International Criminal Tribunal for the Former Yugoslavia: An Exercise in Law, Politics and Diplomacy* (2004), 128.

easy to realize.<sup>127</sup> On the other hand, this should not blind us to the extraordinary fact that owing to the surprising actions of the Security Council, prosecutions for extremely serious crimes are likely now to occur, when they were unlikely to have done so if the Security Council had no role in referring cases to the ICC.

Questions of the compliance of Resolution 1593 with rule of law *desiderata* do not end here, however. Operative paragraph 6 of Resolution 1593 raised more than a few eyebrows in the Security Council. The fact that the situation was referred, but that personnel from non-party states to the Rome Statute outside Sudan were said to be subject solely to the exclusive jurisdiction of their sending state, does raise further rule of law issues. The law is meant to apply to all equally – to grant exemptions based solely on nationality appears to be inconsistent with the principle of treating like cases alike. Such was the theme of a number of comments in the Security Council. For example the permanent representative of Algeria noted his ‘regret that, out of a concern for compromise at all costs and at whatever price, those defending the principle of universal justice have in fact ensured that, in this domain, the use of double standards . . . and a two track justice were most unexpectedly demonstrated’.<sup>128</sup>

Perhaps unsurprisingly, the Sudanese permanent representative was most critical of this aspect of the resolution: ‘To the claim made by some that this resolution sends a message to all the parties that no one will now enjoy impunity, I would add – in order to avoid hypocrisy – “Except if he belongs to a certain category of states.”’<sup>129</sup> Although it must be remembered that this is not, per se, an argument against prosecution, and that Sudan is not impartial here, the legitimacy of the referral is impaired by the a-priori exclusion of non-party state nationals from the jurisdiction of the ICC. As mentioned above, there are no reasons to believe that any non-party state nationals are among those most responsible for international crimes in Sudan, so the point is not that the jurisdiction of the ICC will be significantly limited in a practical fashion, but that the exclusion of some states’ nationals fails to respect the Prosecutor’s independence and makes it difficult to reconcile the resolution with the principle of equality before the law. Some states’ nationals, it would appear, are more equal than others.

The fundamental question in relation to this resolution is, however, whether it would be being too precious about principle to maintain that the system of international criminal justice would be better off if the referral had not been made. In other words, would it have been acceptable to have risked the possibility that no one be prosecuted for their actions in Sudan by taking a stand against the exceptionalist claims of operative paragraph 6 and the possible legitimizing effect of such exemptions (and immunity agreements in general)? This is an extremely difficult area, one which was perhaps most clearly dealt with by the Philippines in

127. See Broomhall, *supra* note 49, at 54.

128. Un Doc. S/PV.5158, at 5 (Mr Baali); see also Argentina, 7–8 (Mr Mayoral); Benin, 10 (Mr Adechi); Brazil, 11 (Mr Sardenberg).

129. *Ibid.*, at 12 (Mr Erwa).

the Security Council:

We . . . believe that the International Criminal Court (ICC) may be a casualty of resolution 1593. Operative paragraph 6 of the resolution is killing its credibility – softly perhaps, but killing it nevertheless. We may ask whether the Security Council has the prerogative to limit the mandate of the jurisdiction of the ICC under the Rome Statute once the exercise of jurisdiction has advanced. Operative paragraph 6 subtly subsumed the independence of the ICC into the political and diplomatic vagaries of the Security Council. Nevertheless, that eventuality may well be worth the sacrifice if impunity is, indeed, ended in Darfur, if human rights are, indeed, finally protected and promoted; and if, indeed, the rule of law there is upheld.<sup>130</sup>

Perhaps in this situation it is best to accept that perfect compliance with rule of law standards remains some way off, but that it is better to ensure that some international crimes are prosecuted than to risk no prosecutions by too strict an application of principle. Politics may remain a dirty business, but impunity is still being progressively limited by the referral of the situation to the ICC by the Security Council.

## 5.2. Neo-colonialism<sup>131</sup>

The debate over international criminal law has, over the past decade, also taken on aspects of the North–South conflict in international society as a whole. This has come through in a number of ways. First, the conflict between rich and poor states arose in Rome in relation to the substantive jurisdiction of the ICC. In the final version of the Rome Statute, provisions that would have included a comprehensive ban on chemical and biological weapons in the Statute were excluded, as a quid pro quo for a number of developing states dropping their insistence that the Rome Statute include a ban on nuclear weapons. The argument was that if developed states were able to exclude their weapons of mass destruction (nuclear weapons) from the ICC regime, then poor countries ought to be able to do the same (in relation to chemical and biological weapons).<sup>132</sup> Universal jurisdiction has also come under fire on this count, in particular in the *Yerodia* case, where both President Guillaume and (more angrily) Judge ad hoc Bula-Bula criticized assertions of universal jurisdiction on the basis that they were more likely to be made by powerful countries at the expense of weaker states.<sup>133</sup>

Against this background it is no surprise that Sudan claimed, in no uncertain terms, that the referral, and indeed the ICC itself, was another mechanism by which relationships of colonial dominance were perpetuated. The Sudanese permanent

130. *Ibid.*, at 6 (Mr Baja).

131. For a recent work asserting that international law is defined by the colonial encounter see A. Angie, *Sovereignty, Imperialism and the Making of International Law* (2005); for a work raising these issues in respect of international criminal law see P. J. C. Schimmelpennick van der Oije, 'A Surinam Crime Before a Dutch Court: Universal Jurisdiction or a Post-Colonial Injustice?', (2001) 14 *Leiden Journal of International Law* 455.

132. See H. von Hebel and D. Robinson, 'Crimes Within the Jurisdiction of the Court', in R. S. Lee, *supra* note 79, at 79, 113–16, esp. 116.

133. *Yerodia*, *supra* note 82, Separate Opinion of Judge ad hoc Bula-Bula, paras. 9–14; *ibid.*, Separate Opinion of President Guillaume, para. 15. See Cryer, *supra* note 54, 95–6.

representative asserted that the actions of the Council

exposed the fact that this criminal court was originally intended for developing and weak States, and that it is a tool for the exercise of the culture of superiority and to impose cultural superiority. It is a tool for those who believe that they have a monopoly on virtues in this world, rife with injustice and tyranny. . . . The Council even goes so far as to affirm that exceptions are only for major powers and that this Court is simply a stick used for weak States and that it is an extension of this Council of yours, which has always only adopted resolutions and sanctions against weak countries, while major Powers and those under their protection ride roughshod over the Resolutions of the Council, cynically disregard them and consider them a dead letter.<sup>134</sup>

We can see here that the criticism of selective enforcement of the law can also take on a further dimension. However, to go from the criticism that some states' nationals are exempt, to the position that seeking to ensure prosecution of international crimes is a means of imposing values and an exercise of cultural superiority, is an attempt to leap a chasm in two bounds. First, it is simply incorrect to assert that the prohibitions of international criminal law at issue in Sudan are the manifestation of parochial views on appropriate behaviour. Sudan is a party, for example, to the Geneva Conventions, and thus has expressly accepted Common Article 3 of those conventions, which prohibits attacks on those not taking part in hostilities and acts of inhumanity towards those persons. Crimes against humanity, genocide, and many war crimes are not only prohibited by customary international law, but are norms of *jus cogens*,<sup>135</sup> the proof of which requires evidence of acceptance by the international community of states as a whole.<sup>136</sup> The prohibitions of international criminal law constitute one area in which claims of cultural relativism have little purchase.<sup>137</sup> It might be noted that a good proportion of Sudan's neighbours have referred themselves to the ICC, showing support in the locality for international criminal law and the ICC. Also, Sudan has signed (albeit not ratified) the Rome Statute, and thus proffered some support for the law it contains.

However, Sudan may not have been asserting that the law itself was problematic. The statement appears to criticize more the fact that the ICC rather than the Sudanese criminal justice system is being used to prosecute offences. China offered some support for this position when it noted its preference for the Sudanese justice system to be used to prosecute offences rather than the ICC.<sup>138</sup> Two responses may be made to this argument. The first is that Resolution 1593 did not come about in a vacuum. As was noted earlier, Sudan had already agreed that events deserving prosecution had occurred, and undertook to begin prosecutions. Resolution 1593 was a response

134. UN Doc. S/PV.5158, at 12 (Mr Erwa).

135. I. Brownlie, *Principles of Public International Law* (2003), 488–9; L. N. Sadat, *The International Criminal Court and the Transformation of International Law: Justice for the New Millennium* (2002), at 108; M. C. Bassiouni, *Crimes Against Humanity In International Criminal Law* (1999), 210–17; L. May, *Crimes Against Humanity: A Normative Account* (2005), ch. 2.

136. Vienna Convention on the Law of Treaties, Art. 53. Many, although not all, war crimes can be so described; see B. S. Brown, 'The Evolving Concept of Universal Jurisdiction' (2001) 35 *New England Law Review* 383, at 393.

137. See S. Ratner and J. Abrams, *Accountability for Human Rights Atrocities in International Law: Beyond the Nuremberg Paradigm* (2001), 24–5.

138. UN Doc. S/PV.5158, 5 (Mr Wang).

to Sudan repeatedly failing to live up to the promises it made. As the International Commission of Inquiry noted, Sudan had by that time proved itself to be unable and unwilling to prosecute offences. So the movement for prosecution originated from Sudan itself.

The second response relates to the nature of the ICC. It must be remembered that unlike the ad hoc tribunals, the ICC does not have primary jurisdiction over offences subject to its jurisdiction. Owing to concerns about sovereignty, the ICC is complementary to national jurisdictions.<sup>139</sup> The ICC only steps in when a state is unwilling or unable to prosecute, and, by virtue of Article 18 of the Rome Statute, states have a chance to argue that they are genuinely willing or able to prosecute. Despite the fact that the Security Council has referred the situation in Darfur to the ICC, the principle of complementarity still applies. There have been suggestions that when the Security Council refers a situation to the ICC complementarity does not apply.<sup>140</sup> However, this is highly doubtful.<sup>141</sup> In the particular situation, moreover, the possibility of complementarity being displaced does not arise. There is no language in Resolution 1593 that could conceivably be interpreted as having this result. Indeed operative paragraph 4 of that resolution ‘encourages the Court, as appropriate and in accordance with the Rome Statute, to support international cooperation with domestic efforts to promote the rule of law, protect human rights and combat impunity in Darfur’, which would support precisely the opposite conclusion. The ICC Prosecutor has taken the view that the principle of complementarity applies to Security Council referrals, and has engaged in an analysis of the admissibility of cases from Darfur.<sup>142</sup>

The Prosecutor has taken the view that Sudanese action so far is not of a nature to require the ICC to defer to Sudan under the complementarity principle, but wished to ‘emphasise that this decision does not represent a determination on the Sudanese legal system, but is essentially a result of the absence of criminal proceedings relating to cases on which the OTP [Office of the Prosecutor] is likely to focus’.<sup>143</sup> The Prosecutor also noted that after his decision to initiate an investigation Sudan informed him of the setting up of a domestic special tribunal to prosecute some offences in Sudan, he explained that ‘the admissibility assessment is an on-going assessment that relates to the specific cases to be prosecuted by the Court . . . As part of the on-going admissibility assessment the OTP will follow the work of the tribunal to determine . . . whether any such proceedings meet the standards of genuineness as defined by article 17 of the Statute.’<sup>144</sup> So Sudan will still have a chance to show that it is willing and able to prosecute offences itself.<sup>145</sup> And if it can

139. See J. T. Holmes, ‘Complementarity: National Courts *versus* the ICC’, in Cassese, Gaeta and Jones, *supra* note 62, at 667.

140. See R. B. Phillips, ‘The International Criminal Court Statute: Jurisdiction and Admissibility’, (1999) 10 *Criminal Law Forum* 61, at 64–6, 84–5.

141. See, e.g., *Informal Expert Paper: The Principle of Complementarity in Practice*, prepared for the ICC Office of the Prosecutor, available at <http://www.icc-cpi.int/>, 21.

142. Report of the Prosecutor of the International Criminal Court, Mr Luis Moreno Ocampo, to the Security Council Pursuant to UNSCR 1593 (2005) (hereafter Ocampo Report), available at <http://www.icc-cpi.int>, 3–4.

143. *Ibid.*, at 4.

144. *Ibid.*

145. Pursuant to Art. 18.

prove this, then the ICC will have to defer to Sudan's prosecutions, subject to the right of oversight enshrined in Article 18(5) of the Rome Statute. In such a situation the ICC will have fulfilled its role, by ensuring that international crimes are fully and fairly prosecuted. It is only if Sudan continues to default on its own assurances that it would prosecute that the ICC will step in. The ICC can be seen to be the enforcer of undertakings entered into by Sudan. It may therefore be concluded that the criticism of Resolution 1593 on the basis that it is neo-colonial, rather than selective in some respects, is not well founded.

## 6. CONCLUSION

Resolution 1593 might be seen as strong action by the Security Council, and in many ways it was.<sup>146</sup> International criminal law and its enforcement seem to have been mainstreamed into the Security Council's response from an early stage. This certainly was not the sort of response to such actions before the 1990s, and the reaction to the situation in Sudan does reflect a large swing towards the politics of accountability. Before then the question, if it was even asked, was whether prosecutions ought to be initiated. Now the question is what the most appropriate mechanism for ensuring effective prosecution is. In addition, the fact that the United States could be persuaded to abstain from vetoing the resolution itself could be seen as a mild thawing in its attitude towards the ICC. The stridency of the comments made in the Security Council by the US permanent representative militates against any quick triumphalism on this point, however. The United States has not been won over to the cause of the ICC, although its abstention is a move away from the scathing anti-ICC rhetoric that has characterized the contributions of some members of the US government to the debate.<sup>147</sup> It is true that the US abstention did not come free. The price the US exacted for its abstention was language in Resolution 1593 that could be interpreted as legitimating US views on the acceptable scope of the Rome Statute, or even undermining the delicate compromise achieved at Rome. It is a matter of judgement whether the reference was worth the price.

Although considerable delight may be expressed about the fact that the Security Council has decided, in a relatively short time, to make use of the ICC, despite the concerns of some of its permanent members, this is not the end of the matter. An interesting question for the Security Council will be Sudanese co-operation. It has requested that the Prosecutor keep it informed on the implementation of Resolution 1593, but Sudan has already said that it will not co-operate with the ICC.<sup>148</sup> Whether the Security Council (or individual states including the United States) will be willing

146. For positive, albeit not hagiographic, assessments, see E. Keppler and Y. J. Revilla, 'Council Makes Historic Referral on Darfur to ICC', [April 2005] 29 *International Criminal Court Monitor* 1; S. Ford, 'Does the US Really Want Justice for Darfur?', [April 2005] 29 *International Criminal Court Monitor* 5.

147. See, e.g., J. R. Bolton, 'The Risks and Weaknesses of the International Criminal Court From an American Perspective', (2000–1) 41 *Virginia Journal of International Law* 186. Vituperative comment is not limited to members of the Bush administration, however; see J. Rabkin, 'Worlds Apart on International Justice', (2002) 15 *Leiden Journal of International Law* 835.

148. Although there have been exploratory meetings between the Office of the Prosecutor and officials of the Sudanese government; Ocampo Report, *supra* note 142, at 5.

or able to proffer the necessary carrots and apply the necessary sticks to ensure co-operation remains to be seen.

As noted above, the reaction to Darfur in some ways mirrors that in relation to the former Yugoslavia and Rwanda. Therefore it is not entirely surprising that some of the criticisms of the Security Council in relation to Yugoslavia are also applicable here. In Yugoslavia (and Rwanda), the Council was criticized for using international criminal law and the creation of international criminal tribunals 'mostly [as] a public relations ploy, namely to create an ad hoc tribunal to appear to be doing something about human rights violations . . . without major risk'.<sup>149</sup> The same may be said about Darfur. Sending the matter to the ICC does mean that the Security Council is doing something, but other ways of limiting the conflict in Darfur are not being pursued as rigorously as they ought to be. Although the referral of the situation to the ICC is welcome, the referral occurs against a background of the Security Council offering little support or assistance to the small, undermanned, under-equipped and probably under-mandated African Union peacekeeping force that is working against the odds to bring the conflict in Darfur to an end. The Security Council has expressed its support for the African Union mission,<sup>150</sup> and NATO has offered some material support,<sup>151</sup> but this is unlikely to prove sufficient to end the conflict. Therefore the referring of the matter to the ICC may be seen as stationing an ambulance at the bottom of a cliff, rather than erecting a fence at the top. Prevention is better than cure.

Although the referring of the situation in Darfur to the ICC is very welcome, the reference comes with a number of problematic caveats. Against a background of the still possibly selective enforcement of international criminal law (especially by the Security Council), the situation shows that no matter how far it has come, international criminal law still has a way to go before it represents a system that truly reflects rule of law principles. The development of international criminal law in the last decade and a half gives reason for hope, but no cause for quick conclusions about the inevitable forward march of international criminal law against the forces of realpolitik. As is so often the case, the evidence is mixed. But it would not be appropriate to end this piece on an entirely downbeat note. Underneath the problems lies a significant acceptance by a majority of the Security Council that the ICC is an institution that, in the quest for peace and justice, is a worthy companion.

149. D. Forsythe, *Human Rights in International Relations* (2000), 221, although one of the participants in the debates at the time denies this; see D. J. Scheffer, 'Three Memories of the Year of Origin, 1993', (2004) 2 *Journal of International Criminal Justice* 353, 353–7.

150. See, e.g., Security Council Resolution 1591, preambular paragraph 14.

151. See E. MacAskill, 'NATO on Alert to Provide Help in Darfur', *Guardian*, 19 May 2005.