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JUSTICE IN JEOPARDY: ACCOUNTABILITY FOR THE DARFUR ATROCITIES

More than two decades of civil war in Sudan have led to the death of over two million people. Since 2003 alone, when violence erupted in Sudan's western region of Darfur, hundreds of thousands of people have died and another two million individuals have been displaced.¹ There is much debate on whether the mass atrocities in Darfur, which include widespread murder and rape, should be characterised – as the United States government has described them² – as 'genocide'.³

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¹ This paper will not attempt to describe or analyse the ongoing atrocities in Darfur. There are many thorough and insightful accounts, including: Alex De Waal, *Famine That Kills: Darfur, Sudan* (rev. ed., 2004); Francis M. Deng, *WAR OF VISIONS: CONFLICT OF IDENTITIES IN THE SUDAN* (1995); Julie Flint & Alex de Waal, *DARFUR: A SHORT HISTORY OF A LONG WAR* (2006); Douglas H. Johnson, *THE ROOT CAUSES OF SUDAN'S CIVIL WARS* (2003). See also: Sudan Information Gateway, United Nations System in Sudan (available at <<http://www.unsudanig.org/>>); Save Darfur (available at <<http://www.savedarfur.org/>>).

² On 23 July 2004, the United States Congress passed a joint United States House of Representatives-United States Senate resolution calling the atrocities in Darfur 'genocide'. In September 2004, both United States President George W. Bush and former United States Secretary of State Colin Powell characterised the Darfur atrocities as 'genocide.'

³ See: William A. Schabas, *Darfur and the 'Odious Scourge': The Commission of Inquiry's Findings on Genocide*, 18 LEIDEN J. INT'L L. 871 (2005); 'Report of the International Commission of Inquiry on Darfur to the United Nations Secretary-General' (available at <<http://www.ohchr.org/english/docs/darfurreport.doc>>); Gérard Prunier, *Darfur: The Ambiguous Genocide* (2005).

Whatever the appropriate term, human rights organisations have been monitoring the ongoing atrocities and lobbying the international community to take action, such as by bringing suspected perpetrators to justice.⁴

This article documents and assesses the controversy, compromise, and, ultimately, consensus within the United Nations Security Council that resulted in the Council's 31 March 2005 decision to adopt Resolution 1593, referring the situation in Darfur since 1 July 2002 to the Prosecutor of the International Criminal Court.⁵ This article considers why the United States government initially proposed the establishment of an alternative transitional justice option for addressing Darfur, in the form of an *ad hoc* hybrid tribunal to be established in Arusha, Tanzania, that would be jointly administered by the United Nations and the African Union and act as an extension of the International Criminal Tribunal for Rwanda. Second, given its opposition to the International Criminal Court, the article examines why the United States government ultimately abstained from voting on, rather than exercise its veto, on Security Council Resolution 1593, thus enabling the Darfur situation⁶ to be referred to the Court. Third,

⁴ See, e.g., Human Rights Watch, 'Targeting the Fur: Mass Killings in Darfur', 21 January 2005 (available at <<http://hrw.org/backgrounder/africa/darfur0105/>>); Human Rights Watch, "'If We Return, We Will Be Killed'": Consolidation of Ethnic Cleansing in Darfur, Sudan', November 2004 (available at <<http://hrw.org/backgrounder/africa/darfur1104/>>); Human Rights Watch, 'Darfur Destroyed: Ethnic Cleansing by Government and Militia Forces in Western Sudan', May 2004 (available at <<http://hrw.org/reports/2004/sudan0504/>>); International Crisis Group 'Darfur: The Failure to Protect', Africa Report Number 89, 8 March 2005 (available at <<http://www.crisisgroup.org/home/index.cfm?id=3314&l=1>>); International Crisis Group, 'Sudan: Now or Never in Darfur', Africa Report Number 80, 23 May 2004 (<<http://www.crisisgroup.org/home/index.cfm?id=2765&l=1>>); International Crisis Group, 'Darfur Rising: Sudan's New Crisis', Africa Report Number 76 (25 March 2004 (available at <<http://www.crisisgroup.org/home/index.cfm?id=2550&l=1>>)).

⁵ For a more general discussion of United Nations Security Council referrals to the International Criminal Court, see: Chris Gallavin, 'The Stupefaction of the Law of Genocide through the Strangling of the International Criminal Court's Jurisdiction,' paper presented Nottingham Law School, 2 September 2005. For a more general discussion of this particular United Nations Security Council referral to the International Criminal Court, see: Luigi Condorelli & Annalisa Ciampi, *Comments on the Security Council Referral of the Situation in Darfur to the International Criminal Court*, 3 J. INT'L CRIMINAL JUSTICE 590 (2005); Matthew Happold, *Darfur, the Security Council, and the International Criminal Court*, 55 INT'L AND COMPARATIVE LAW QUARTERLY 226–236 (2006).

⁶ To be consistent with United Nations Security Council Resolution 1593, this article refers to the conflict in Darfur as a 'situation'.

the article asks whether the advent of the International Criminal Court and the Security Council's referral of the Darfur situation necessarily preclude the pursuit of other transitional justice options in this case. Finally, the article questions the significance of the United Nations Security Council referral of the Darfur situation to the International Criminal Court, and the political and legal precedents this may set.

In exploring these questions, this article focuses on the role of the United States government because, for better or worse, its reaction to international crises often significantly shapes the global response due to the American preponderance of resources in the post-Cold War era. This article will argue that the precedent-setting Security Council Resolution 1593, on which the United States government abstained for a combination of reasons, some self-interested, offers as much hope as doubt for the promotion of justice and accountability in Darfur.

I. UNITED NATIONS SECURITY COUNCIL REFERRAL OF THE DARFUR SITUATION TO THE INTERNATIONAL CRIMINAL COURT

On 31 March 2005, the United Nations Security Council, acting under Chapter VII of the United Nations Charter, adopted Resolution 1593, which referred 'the situation in Darfur since 1 July 2002 to the Prosecutor of the International Criminal Court'.⁷ Eleven states voted in favour of the resolution, none against, and four (Algeria, Brazil, China, and the United States) abstained. After the vote, acting United States Ambassador to the United Nations Anne Woods Patterson described the reasons for the United States government's abstention. First, the United States government believed that a superior transitional justice option would have been a hybrid tribunal⁸ located in Africa, which would incorporate local laws and procedures and employ staff from Africa and elsewhere. Second, the United States

⁷ UN Doc. S/RES/1593 (2005).

⁸ For more information on hybrid tribunals, see, e.g., Laura Dickinson, *The Promise of Hybrid Courts*, 97 AM. J. INT'L L. 295 (2003); Laura Dickinson, *Transitional Justice in Afghanistan: The Promise of Mixed Tribunals*, 31 DENVER J. INT'L L. & POLICY 23 (2002); Ethel Higonnet, *Restructuring Hybrid Courts: Local Empowerment and National Criminal Justice Reform*, Yale Law School Student Scholarship Series, Paper 6, 1 March 2005; Susanne Katzenstein, *Hybrid Tribunals: The Search for Justice in East Timor*, 16 HARVARD HUMAN RIGHTS J. 245 (2005); INTERNATIONALIZED CRIMINAL COURTS: SIERRA LEONE, EAST TIMOR, KOSOVO, AND CAMBODIA (Romano, Cesare P. R., Andre Nollkaemper, & Jann Kleffner, eds., 2004).

government held the view that the International Criminal Court did not have jurisdiction over nationals of non-party States. Patterson also reiterated the United States government's general objections to the International Criminal Court – for example, that this tribunal does not have sufficient safeguards to protect against politically motivated prosecutions or frivolous cases. Despite these concerns, the United States government did not vote against the resolution because, as Patterson explained, it recognised a need for the international community to cooperate in order to end impunity in Sudan and because it was confident that the wording of the resolution protected United States nationals and members of the armed services of other non-States Parties to the Rome Statute (except Sudan) from the International Criminal Court's jurisdiction.⁹

The appearance of a near-consensus on the judicial response to the Darfur atrocities is only the latest chapter of the story. The Security Council decision to refer the case to the International Criminal Court was reached only after significant disagreement and consideration of alternative proposals. Because Sudan is not a State Party to the Rome Statute,¹⁰ and the conflict is not of an international nature concerning a State Party, the International Criminal Court could only have jurisdiction over the Darfur situation if the United Nations Security Council, acting under Chapter VII of the Charter of the United Nations, referred the matter to the International Criminal Court.¹¹ In early 2005, the United States government stated its opposition to such a referral. Instead, as early as 21 January 2005, the United States government proposed that the international community establish an *ad hoc* tribunal in Arusha, Tanzania – the site of the International Criminal Tribunal for Rwanda – which would have jurisdiction over Darfur.¹²

⁹ 'Security Council Refers Situation in Darfur, Sudan, to Prosecutor of International Criminal Court', United Nations Press Release SC/8351 (31 March 2005) (available at <<http://www.un.org/News/Press/docs/2005/sc8351.doc.htm>>).

¹⁰ Sudan signed the Rome Statute of the International Criminal Court on 8 September 2000, but has not ratified it.

¹¹ See: Rome Statute of the International Criminal Court, UN Doc. A/CONF.183/9, arts. 12–15.

¹² For more information on the United States government proposal, see, e.g., Warren Hoge, *U.S. Lobbies U.N. on Darfur and International Court*, NEW YORK TIMES, 29 January 2005, p. A8; Nicholas Krlev, *United States Balks at Global Court Use for Darfur*, WASHINGTON TIMES, 22 January 2005, p. A1; 'Daily Press Briefing, Richard Boucher, Spokesman, Washington, DC, January 21, 2005', United States Department of State (available at <<http://www.state.gov/r/pa/prs/dpb/2005/41047.htm>>).

The United States government proposed that the United Nations and the African Union jointly administer this new tribunal. Anticipating objections from United Nations Security Council members and others about the costs of establishing and operating such a tribunal, the United States government offered to cover all such monetary expenses, estimated to range from US\$40 to \$150 million per year.¹³ The United States government envisioned this *ad hoc* tribunal as an expansion of or tied to the International Criminal Tribunal for Rwanda; the United States government did not indicate that the tribunal should be completely separate.¹⁴ Critics asserted that this alternative transitional justice institution would be slower, more expensive, less legitimate, and less effective than the already-established International Criminal Court. Of course, these criticisms may be premature, as the International Criminal Court is not yet fully functional and has yet to try any cases. Nonetheless, in response to its proposal, some commentators accused the United States government, which itself had characterised the crimes as ‘genocide’, of promoting a purely self-interested position that neglected atrocities in Sudan and would delay justice in Darfur.¹⁵ Consequently, instead of distributing the costs of pursuing transitional justice throughout the international system, the United States government’s optimal preference for the creation of a local, hybrid tribunal greatly drove up costs to itself – financially, politically, and logistically.

¹³ For estimates on the low side of this range see, e.g.: Punyasena, Wasana (Deputy Convenor, AMICC), and Jon Washburn (Convenor, AMICC) (3 February 2005). “Message on Darfur.” E-mail to the author. For estimates on the high side of this range, see, e.g., Samantha Power, *Court of First Resort*, NEW YORK TIMES, 10 February 2005, p. A23.

¹⁴ For example, United States Department of State spokesperson Richard Boucher stated on 21 January 2005 that the United States government was considering expanding the International Criminal Tribunal for Rwanda to include jurisdiction over the atrocities in Darfur, as well as other options. See: ‘Daily Press Briefing, Richard Boucher, Spokesman, Washington, DC, January 21, 2005’, United States Department of State (available at <<http://www.state.gov/r/pa/prs/dpb/2005/41047.htm>>).

¹⁵ For criticisms of the United States government proposal, see, e.g., Human Rights Watch, ‘U.S. Proposal for a Darfur Tribunal: Not an Effective Option to Ensure Justice’, 15 February 2005 (available at <<http://hrw.org/english/docs/2005/02/15/sudan10179.htm>>); Nicholas Kristof, *Why Should We Shield the Killers?*, NEW YORK TIMES, 2 February 2005, p. A21; Samantha Power, *Court of First Resort*, NEW YORK TIMES, 10 February 2005, p. A23; *For the Triumph of Evil*, WASHINGTON POST, 29 January 2005, p. A24.

The direct monetary expense of permitting the United Nations Security Council to refer the case to the International Criminal Court would have literally been nothing for the United States government. Because the United States is not a State Party to the Rome Statute, the United States government is not obligated to contribute funding to the International Criminal Court, a point reiterated in United Nations Security Council Resolution 1593. Yet the United States government was prepared to spend US\$40 to \$150 million per year on an *ad hoc* tribunal in Arusha. The United States government must therefore have initially calculated that indirect financial costs and other disadvantages of permitting the United Nations Security Council to refer the Darfur situation to the International Criminal Court would have been even greater. As calculated by the United States government, those costs included ‘legitimizing [*sic*] the ICC’,¹⁶ creating a precedent of pursuing transitional justice issues through the International Criminal Court instead of through, for example, the United States government’s preferred method of *ad hoc* tribunals established by the United Nations Security Council acting under Chapter VII of the Charter of the United Nations (as was done for the former Yugoslavia and Rwanda),¹⁷ and creating a precedent of referring to the International Criminal Court cases concerning non-States Parties to the Rome Statute, which could include the United States. Furthermore, if the United States government had vetoed United Nations Security Council Resolution 1593, international pressure on the United States government to intervene – perhaps militarily – in Sudan might have increased. At least by abstaining during this vote, the United States government could credibly deny that it was ‘doing nothing’ or obstructing action, even if the International Criminal Court referral was not the United States government’s optimal transitional justice option. Ultimately deciding to abstain, the United States government apparently determined that

¹⁶ According to United States Ambassador for War Crimes Issues Pierre-Richard Prosper, as quoted in Warren Hoge, *U.S. Lobbies U.N. on Darfur and International Court*, NEW YORK TIMES, 29 January 2005, p. A8.

¹⁷ ‘Fact Sheet, Bureau of Political–Military Affairs, Washington, DC, August 2, 2002, The International Criminal Court’, United States Department of State, 2 August 2002 (available at <<http://www.state.gov/t/pm/rls/fs/2002/23426.htm>>); ‘Fact Sheet, Bureau of Political–Military Affairs, Washington, DC, July 30, 2003, Frequently Asked Questions About the U.S. Government’s Policy Regarding the ICC (International Criminal Court)’, United States Department of State, 30 July 2003, (available at <<http://www.state.gov/t/pm/rls/fs/23428.htm>>).

the direct and indirect costs of cooperation did not exceed the costs of non-cooperation.

II. ALTERNATIVE TRANSITIONAL JUSTICE OPTIONS FOR DARFUR

On 1 June 2005, the first Prosecutor of the International Criminal Court, Luis Moreno Ocampo, officially opened the International Criminal Court's investigation into the situation in Darfur.¹⁸ At the end of that month, Ocampo addressed the United Nations Security Council on his activities pursuant to United Nations Security Council Resolution 1593. He stated that he had received 'a sealed envelope from the United Nations Secretary General containing the conclusions reached by the [International] Commission [of Inquiry on Darfur] as to persons potentially bearing criminal responsibility for crimes in Darfur' but added that he 'does not consider this list of names to be binding'.¹⁹ The International Criminal Court is now considering which suspected atrocity perpetrators from Darfur to prosecute, and when and where to do so.

Contrary to popular belief, the advent of the International Criminal Court and referral of the Darfur situation to it do not preclude the pursuit of other transitional justice options with respect to Darfur. In fact, there are at least four reasons to believe that additional alternatives may be utilised.

First, the International Criminal Court's own jurisdiction limits the number of cases that the court can try concerning the Darfur situation. As they relate to Darfur, the International Criminal Court's subject matter and temporal jurisdictions at the very least are restrictive factors. The jurisdiction *ratione materiae* of the International Criminal Court is limited to genocide, war crimes, crimes against humanity, and the still-undefined crime of aggression.²⁰ The

¹⁸ 'The Prosecutor of the ICC Opens Investigation in Darfur', International Criminal Court, Press Release OTP/LSU/066-05, 6 June 2005 (available <<http://www.icc-cpi.int/press/pressreleases/107.html>>).

¹⁹ 'Report of the Prosecutor of the International Criminal Court, Mr. Luis Moreno Ocampo, to the Security Council Pursuant to UNSCR 1593 (2005)', 29 June 2005 (available at <http://www.icc-cpi.int/library/cases/International_Criminal_Court_Darfur_United_Nations_Security_Council_Report_29-06-05_EN.pdf>).

²⁰ Rome Statute of the International Criminal Court, UN Doc. A/CONF.183/9, arts. 5–8.

jurisdiction *ratione temporis* of the International Criminal Court, as reaffirmed in United Nations Security Council Resolution 1593, is limited to crimes committed after the International Criminal Court came into force on 1 July 2002.²¹ Crimes falling outside the International Criminal Court's subject matter jurisdiction and/or committed before 1 July 2002 must therefore be addressed via alternative transitional justice options.

Second, the International Criminal Court will be limited by its own resources in the number of cases – and the number of defendants in those cases – that it can try within the Darfur situation. If more atrocities have been or are committed in Darfur than the International Criminal Court can investigate and prosecute, then either States Parties to the Rome Statute will have to increase the International Criminal Court's resources or those cases and suspected perpetrators will have to be addressed through alternative means.

Third, and related to the previous point, the total number of cases and suspected perpetrators that the International Criminal Court tries will be limited by the International Criminal Court Prosecutor's own discretion, not only because of the International Criminal Court's limited capabilities, but also due to political decisions that he may make not to try certain individuals. As Ocampo has stated, the International Criminal Court will try only a dozen or so 'big fish' of an atrocity, a policy consistent with that of other war crimes tribunals.²² This guiding principle will leave all other suspected perpetrators of those atrocities to be addressed through alternative means, if at all. In Rwanda more than 120,000 suspects²³ were put in pre-trial detention after the 1994 genocide²⁴ and are being processed through

²¹ *Ibid.*, art. 11.

²² Luis Moreno Ocampo, 'Remembering Rwanda: Justice for War Criminals and the Role of the International Criminal Court', paper presented at Rhodes House, University of Oxford, 27 June 2004.

²³ It is estimated by some Rwandan government officials that a total number of people several times that figure participated in the genocide. See: Philip Gourevitch, *We Wish to Inform You that Tomorrow We Will be Killed with our Families: Stories from Rwanda* 244–245 (1998).

²⁴ *Rwandan Prisoners Endure Long, Cramped Wait in Jail for Trial*, CNN.com, 15 September 1999 (available at <<http://www.cnn.com/WORLD/africa/9909/15/rwanda.prison/>>).

either local (*gacaca*²⁵) or federal judicial systems. Similarly, for the vast majority of the perpetrators and victims of the Darfur atrocities, justice will have to be pursued outside the International Criminal Court. Security Council Resolution 1593 seems to recognise this reality, as it emphasises the ‘need to promote healing and reconciliation and encourages in this respect the creation of institutions, involving all sectors of Sudanese society, such as truth and/or reconciliation commissions, in order to complement judicial processes and thereby reinforce the efforts to restore long-lasting peace, with African Union and international support as necessary’.²⁶

Finally, some states may decide to pursue justice for crimes that fall within the International Criminal Court’s jurisdiction. Furthermore, the Rome Statute’s ‘complementarity’ principle, which provides that the International Criminal Court will have jurisdiction only if a State ‘is unwilling or unable genuinely to carry out the investigation or prosecution’, may require the International Criminal Court to defer to these States because the International Criminal Court supplements, but does not claim primacy over, domestic proceedings.²⁷ These domestic proceedings could occur in several different ways. For example, as part of a compromise on the wording of what became Security Council Resolution 1593, the United States government obtained an exemption from the International Criminal Court’s jurisdiction for any national, official, or personnel from a

²⁵ *Gacaca*, which literally means ‘in the grass’ in Kinyarwanda, is the name of the traditional Rwandan communal justice and reconciliation process that is being used to address the majority of suspected participants in the 1994 Rwandan genocide. For more information on *gacaca*, see, e.g., ‘*Gacaca Justice: A Shared Responsibility*’, African Rights, January 2003; Phil Clark, *When the Killers Go Home: Local Justice in Rwanda*, DISSENT, Summer 2005, pp. 14–21; Phil Clark, ‘*Justice without Lawyers: The Gacaca Courts and Post-Genocide Justice and Reconciliation in Rwanda*’, Ph.D. dissertation, University of Oxford (2005); Allison Corey & Sandra F. Joireman, *Retributive Justice: The Gacaca Courts in Rwanda*, 103 AFRICAN AFFAIRS 73 (2004); Erin Daly, *Between Punitive Justice and Reconstructive Justice: the Gacaca Courts in Rwanda*, 34 NEW YORK U. J. INT’L L. & POLITICS 355 (2002); Peter Uvin, *The Gacaca Tribunals in Rwanda (Case Study)*, in RECONCILIATION AFTER VIOLENT CONFLICT: A HANDBOOK 116–121 (D. Bloomfield, T. Barnes & L. Huyse, eds., 2003); Aneta Wierzyńska, *Consolidating Democracy through Transitional Justice: Rwanda’s Gacaca Courts*, 79 NEW YORK U.L. REV. 1934 (2004).

²⁶ UN Doc. S/RES/1593 (2005).

²⁷ Rome Statute of the International Criminal Court, UN Doc. A/CONF.183/9, art. 17. This ‘complementarity’ principle is one of the major differences between the International Criminal Court and the *ad hoc* tribunals for the former Yugoslavia and Rwanda, both of which claim primacy over national legal systems.

State not party to the Rome Statute (other than Sudan) suspected of committing atrocities in Sudan. Some commentators have called this exemption, which was laid out in paragraph 6 of United Nations Security Council Resolution 1593, a ‘deferral within a referral’.²⁸ Patterson insisted that if any of its citizens violated international law, the United States government would hold them accountable,²⁹ which it could do through domestic legislation designed specifically for this purpose.³⁰ However, if the United States – or other non-party States besides Sudan – fail to bring to justice any of its citizens who might be involved in the Darfur atrocities, under this exemption the international community would have no recourse to do so through the International Criminal Court. In that case, these individuals may not be held responsible for their crimes.

Furthermore, Sudan itself is likely – and claims already to have begun – to investigate and prosecute some of its own citizens who are suspected of committing atrocities in Darfur. Sudan may do so through its domestic judiciary, a special court established for this singular purpose, or some combination thereof.³¹ In stating his government’s opposition to Security Council Resolution 1593, the Sudanese representative to the United Nations, Ambassador Elfaith Mohamed Ahmed Erwa, claimed that his government was organising trials and could ensure accountability.³² Indeed, in mid-June 2005, Sudan established a special domestic tribunal, chaired by Judge Mahmoud Mohamed Saeed Abkam, to address claims against individuals suspected of perpetrating atrocities in Darfur.³³ The

²⁸ See, e.g., Chris Gallavin, ‘The Stupefaction of the Law of Genocide through the Strangling of the International Criminal Court’s Jurisdiction,’ paper presented Nottingham Law School, 2 September 2005.

²⁹ ‘Security Council Refers Situation in Darfur, Sudan, to Prosecutor of International Criminal Court’, United Nations Press Release SC/8351, 31 March 2005 (available at <<http://www.un.org/News/Press/docs/2005/sc8351.doc.htm>>).

³⁰ See, e.g.: United States Code Title 18 (Crimes and Criminal Procedure), Part I (Crimes), Chapter 50A (Genocide), § 1091; Chapter 118 (War Crimes), § 2441; Chapter 113C (Torture) (available at <<http://www.gpoaccess.gov/uscode/>>).

³¹ See, e.g., Emily Wax, *In Exploring a Solution for Darfur, Sudan Opts for Local Justice*, WASHINGTON POST, 2 April 2005, p. A16.

³² ‘Security Council Refers Situation in Darfur, Sudan, to Prosecutor of International Criminal Court’, United Nations Press Release SC/8351, 31 March 2005 (available at <<http://www.un.org/News/Press/docs/2005/sc8351.doc.htm>>).

³³ See, e.g., *Sudan: National Court to Try Suspects of Darfur Crimes*, IRIN, 15 June 2005 (available at <<http://www.alertnet.org/thenews/newsdesk/IRIN/ad0fcd5d9599a5d2e3400d7fea056351.htm>>); Mohamed Ali Saeed, *Sudan’s Own Darfur Crimes Court Starts Work, Rebels Cry Foul*, Agence France-Presse, 14 June 2005 (available at <<http://www.reliefweb.int/rw/RWB.NSF/db900SID/EVIU-6DCHDX?OpenDocument>>).

Sudanese Minister of Justice, Ali Mohamed Osman Yassin, announced shortly thereafter that this tribunal would try 160 suspects and that those trials had already begun.³⁴

Some critics of this special court, such as Amnesty International, claim that the tribunal will not be fair, impartial, or independent. These critics also contend that the tribunal is 'doomed to failure' and is a deliberate attempt by the Sudanese government to undermine the jurisdiction of the International Criminal Court.³⁵ If the International Criminal Court considers the Sudanese government to be both willing and able genuinely to investigate and prosecute suspected atrocity perpetrators, however, it may defer to the Sudanese domestic judiciary and/or Sudan's special court for Darfur to try these cases. If the International Criminal Court does not believe that to be the case (as suggested by the Prosecutor's report of 29 June 2005³⁶), tension will be likely to develop between the international community and Sudan, which the United Nations Security Council directed to 'fully cooperate' with the International Criminal Court. If Sudan is uncooperative, as Sudan's president, Omar al-Bashir, has pledged to be,³⁷ Sudan will be in breach of Security Council Resolution 1593 and the International Criminal Court may therefore be limited in its ability to, *inter alia*, apprehend and transport suspects, acquire and preserve evidence, and recruit and protect witnesses. Since Security Council Resolution 1593 was authorised under – and is therefore subject to enforcement through – Chapter VII of the Charter of the United Nations, the Security Council has the option, as a last resort, of threatening or using force to bring Sudan into compliance with the resolution.³⁸

³⁴ See, e.g., *Justice Minister Says Sudan to Try Darfur Suspects*, Reuters, 30 June 2005 (available at <<http://www.alertnet.org/thenews/newsdesk/L30249394.htm>>); Mark Oliver, *Sudan Rejects ICC Extradition Calls*, Guardian Unlimited, 30 June 2005 (available at <<http://www.guardian.co.uk/sudan/story/0,14658,1518327,00.html>>).

³⁵ See, e.g., 'Sudan: National Court for Crimes in Darfur Lacks Credibility', Amnesty International press release, 13 June 2005 (available at <<http://t2news.amnesty.r3h.net/index/ENGAFR540592005>>).

³⁶ 'Report of the Prosecutor of the International Criminal Court, Mr. Luis Moreno Ocampo, to the Security Council Pursuant to UNSCR 1593 (2005)', 29 June 2005 (available at <http://www.icc-cpi.int/library/cases/ICC_Darfur_UNSC_Report_29-06-05_EN.pdf>).

³⁷ On 4 April 2005, Sudanese President Omar al-Bashir took a public oath, swearing 'thrice in the name of Almighty God that I shall never hand any Sudanese national to a foreign court'. See: Warren Hoge, *International War-Crimes Prosecutor Gets List of 51 Sudan Suspects*, NEW YORK TIMES, 6 April 2005, p. A6.

³⁸ See: Charter of the United Nations, arts. 41–42.

These and other attempts to promote justice for the Darfur atrocities outside the International Criminal Court need not be viewed as attempts to thwart the International Criminal Court, although, of course, they could be, especially given that some States, such as the United States and Sudan, generally oppose the International Criminal Court. In fact, according to Prosecutor Ocampo, '[t]he number of cases that reach the Court should not be a measure of its efficiency. On the contrary, the absence of trials before this Court, as a consequence of the regular functioning of national institutions, would be a major success.'³⁹ Rather than simply trying as many cases as possible, then, a chief goal of the International Criminal Court appears to be encouraging and assisting States themselves to be willing and able to carry out genuine investigations and prosecutions of suspected atrocity perpetrators. The International Criminal Court would presumably also help prevent such heinous crimes by threatening to punish their perpetrators – a deterrent effect that is arguably stronger than that fostered by *ad hoc* tribunals established after the atrocities they adjudicate, such as the International Criminal Tribunal for Rwanda.

III. PRECEDENTS ESTABLISHED BY UNITED NATIONS SECURITY COUNCIL RESOLUTION 1593

The United Nations Security Council referral of the Darfur situation to the International Criminal Court and Sudan's declared initiative, whether genuine or not, to hold suspected Darfur atrocity perpetrators accountable are significant developments in international justice. The Darfur referral, the United Nations Security Council's first, affirmed the power and legitimacy of the United Nations Security Council to use its Chapter VII powers to refer cases to the International Criminal Court for prosecution of alleged perpetrators of atrocities.

That the first situation to be referred by the United Nations Security Council to the International Criminal Court did not concern a State Party to the Rome Statute and that the United States government did not veto that initiative are particularly significant facts. Some commentators have suggested that the United States government is hypocritical in insisting that Americans be shielded

³⁹ 'Statement by Mr. Luis Moreno-Ocampo, Ceremony for the Solemn Undertaking of the Chief Prosecutor', The Hague, 16 June 2003.

from the International Criminal Court (because the United States government is not a State Party to the Rome Statute), while simultaneously allowing the International Criminal Court to try citizens of other non-party States (in this case, Sudan).⁴⁰ United States government opposition to an international war crimes tribunal's having jurisdiction over Americans also provides ammunition to other states, including Sudan and Iraq,⁴¹ which oppose the involvement of the International Criminal Court or any other international court in crimes allegedly committed within their borders and/or by their citizens. Of course, this is not a new situation. The United States government played a leading role in designing and establishing other international war crimes tribunals, including the International Military Tribunal for Germany at Nuremberg (the 'Nuremberg Tribunal'), the International Military Tribunal for the Far East at Tokyo (the 'Tokyo Tribunal'), the United Nations International Criminal Tribunal for the former Yugoslavia (the ICTY), and the International Criminal Tribunal for Rwanda, each of which prevented American citizens and those of its allies from being tried for alleged atrocities, leading commentators to criticize these courts as 'victors' justice' or as otherwise being biased.⁴²

Taken to its logical extreme, the possibility of bringing cases to the International Criminal Court through Security Council referrals means that the International Criminal Court could try individuals

⁴⁰ See, e.g., 'Daily Press Briefing', Richard Boucher, United States Department of State, 1 April 2005 (available at <<http://www.state.gov/r/pa/prs/dpb/2005/44132.htm>>). The relevant question posed to the United States Department of State spokesperson was: 'Can you explain why it is that the U.S. Government believes that citizens of Sudan, which signed the Rome Statute, but has not ratified it and therefore is not a state party to it, should be subject to its jurisdiction, when the crux of the American argument is that U.S. citizens should not be subject to its jurisdiction because the United States is not a state party to it ... [W]hy should not Sudan continue to argue what is essentially your position, that because they're not a state party their citizens shouldn't be subject?'.

⁴¹ On 10 December 2003, the Iraqi Coalition Provisional Authority established the Iraqi Special Tribunal. This tribunal is an Iraqi-led domestic court dedicated to trying any Iraqi national or resident accused of committing genocide, crimes against humanity, or war crimes, or of violating certain stipulated Iraqi laws, including those that proscribe attempts to 'manipulate the judiciary', 'the wastage of national resources', 'the squandering of public assets and funds', 'the abuse of position' and 'the pursuit of policies that may lead to the threat of war or the use of the armed forces against an Arab country' (available at <<http://www.iraqspecialtribunal.org/>>).

⁴² See, e.g., Richard H. Minear, *VICTORS' JUSTICE: THE TOKYO WAR CRIMES TRIAL* (1971).

from any State that did not block such a referral – a capability that is limited to the five veto-wielding members of the Council (the United States, the United Kingdom, France, China and Russia) – and any other state that could successfully lobby against a referral. The United States government's ultimate decision tacitly to agree to such referrals, combined with its unwillingness to let the International Criminal Court try its own or its allies' citizens, may in the future put it in a controversial and embarrassing position. If other Security Council members attempt to refer a case to the International Criminal Court concerning the United States government or one of its allies, the United States government may decide to use its veto power to obstruct the investigation and prosecution of particular suspected atrocity perpetrators. Nonetheless, as Patterson noted, Security Council Resolution 1593 did include a 'precedent-setting' statement declaring that non-party States would not be subject to investigation or prosecution by the International Criminal Court without those States' consent or a referral by the United Nations Security Council,⁴³ a guarantee originally made in the Rome Statute itself.⁴⁴ Furthermore, as legal scholar Jack Goldsmith has observed, the United States government may be able to use this resolution as a precedent to work through the Security Council to promote international justice without having to shoulder the burdens of doing so.⁴⁵ In asserting political control over the International Criminal Court by successfully lobbying for the inclusion of the aforementioned exemption in Resolution 1593, the United States government may thus have made the best out of a situation it did not desire.

However, promoting the United States government's interests in this way may also damage the International Criminal Court specifically and international justice generally. In the future, the other four veto-wielding members of the United Nations Security Council may mimic the United States government in this respect. And, as has been proposed,⁴⁶

⁴³ 'Security Council Refers Situation in Darfur, Sudan, to Prosecutor of International Criminal Court', United Nations Press Release SC/8351 (31 March 2005) (available at <<http://www.un.org/News/Press/docs/2005/sc8351.doc.htm>>).

⁴⁴ Rome Statute of the International Criminal Court, UN Doc. A/CONF.183/9, Part II (Jurisdiction, Admissibility and Applicable Law)

⁴⁵ Jack Goldsmith, *Support War Crimes Trials for Darfur*, WASHINGTON POST, 24 January 2005, p. A15.

⁴⁶ See, e.g., 'In Larger Freedom: Towards Development, Security and Human Rights for All' UN Doc. A/59/2005 (available at <<http://daccessdds.un.org/doc/UNDOC/GEN/N05/270/78/PDF/N0527078.pdf?OpenElement>>), paras. 167–170.

if the permanent membership of the United Nations Security Council expands to include, for example, Japan, Germany, Brazil, South Africa, and/or India, those additional States might also seize their prerogative within the Security Council to try to shield their own citizens from the International Criminal Court's jurisdiction while attempting to promote justice for certain atrocities in which they may have been involved.

The United States government's policy shift from lobbying for an *ad hoc* hybrid tribunal for Darfur to abstaining during the vote on Security Council Resolution 1593 also sets an important political precedent. The United States government, especially under the current Bush administration, does not often publicly reverse itself on any issue. That the United States government first resisted and then acquiesced to the international community's efforts to address the Darfur situation through the International Criminal Court may indicate that the Bush administration has become more supportive of international cooperation, at least on transitional justice issues.

The Darfur situation presents another important issue concerning United States foreign policy: the United States government's use of the word 'genocide' to describe certain atrocities. By referring to the Darfur situation as such, the United States government raised domestic and international expectations that it would respond in some way, as it would be morally, politically, and – because the United States is a party to the 1948 Convention on the Prevention and Punishment of the Crime of Genocide – legally compelled to act.⁴⁷ Consequently, by forcefully and repeatedly employing the term 'genocide,' regardless of whether the Darfur atrocities actually are, the United States government created a situation in which the international community could pressure it to respond to the Darfur atrocities by supporting, *inter alia*, some sort of prompt and effective justice mechanism. As a result, the international community essentially forced the United States government to accept the Security Council referral of the Darfur situation to the International Criminal Court. If the United States government is not satisfied with how this referral proceeds, or if it otherwise disapproves of future referrals, it may resist calling atrocities 'genocide' in order not to limit its options and not to allow other states to pressure it to support their preferred justice

⁴⁷ See, e.g., Jared A. Cohen & Zachary D. Kaufman, *A Genocide by Any Other Name: Debating Genocide in Rwanda and Sudan*, BROWARD TIMES, 15 July 2005, p. 6; Katherine Southwick, *Srebrenica as Genocide? The Krstic Decision and the Language of the Unspeakable*, 8 YALE HUMAN RIGHTS & DEVELOPMENT L.J. 188, 224 (2005).

mechanisms. If such a situation occurs, the victims of genocide may continue to suffer from the neglect caused by power politics.

The Security Council referral of the Darfur situation to the International Criminal Court also presents one of the first test cases of the manner in which the International Criminal Court will interpret the Rome Statute's criteria for whether a state is genuinely willing and able to try suspected atrocity perpetrators who otherwise fall under the International Criminal Court's jurisdiction.⁴⁸ This case may present an ambiguous situation in which the United Nations Security Council and the International Criminal Court disagree over whether Sudan and other relevant States are fully cooperating with Resolution 1593, and thus establish a precedent of what would occur in that case, specifically whether the evaluation of the International Criminal Court or the United Nations Security Council would take precedence, how, and why.

The Darfur referral will also be important in determining how the International Criminal Court would handle a potentially uncooperative state, what measures, if any, the United Nations Security Council would pursue to enforce its own resolution referring a case to the International Criminal Court, and how effective those initiatives would be. If the Security Council invokes its Chapter VII powers to coerce Sudan or another relevant State to cooperate with its first referral to the International Criminal Court, it would establish a significant political and legal precedent on the threat or use of force in international relations. Failure of the United Nations Security Council to enforce Resolution 1593 could severely undermine its credibility in being an effective body, particularly in relation to transitional justice issues. Critics of the United Nations Security Council point out its many past failures to enforce its own resolutions.⁴⁹ Resolution 1593 may therefore further undermine the strength and relevance of the Security Council and prompt additional calls for reforming or abandoning it as the central institution for maintaining

⁴⁸ For a list of the relevant criteria, see Rome Statute of the International Criminal Court, UN Doc. A/CONF.183/9, Part 2 (Jurisdiction, Admissibility and Applicable Law), art. 17(2), (3). For a consideration of another case, relating to Uganda, in which the International Criminal Court is currently interpreting these criteria, see, e.g., Katherine Southwick, *Investigating War in Northern Uganda: Dilemmas for the International Criminal Court*, 1 YALE JOURNAL OF INTERNATIONAL AFFAIRS 105 (2005); Katherine Southwick, *When Peace and Justice Clash ...*, INTERNATIONAL HERALD TRIBUNE, 14 October 2005, p. 6.

⁴⁹ See, e.g., Michael J. Glennon, *Why the Security Council Failed*, 82(3) FOREIGN AFFAIRS 16 (May/June 2003).

international peace and security. All of this will depend on whether the Council is willing to back up its rhetoric with decisive action, which has not always been the case. If the International Criminal Court does not promote justice and accountability for the Darfur atrocities, alternative transitional justice mechanisms will provide the only hope for doing so. The international community therefore should be just as concerned about and supportive of these mechanisms as it is of the International Criminal Court.

If, as discussed above, the International Criminal Court tries some suspected Darfur atrocity perpetrators while other transitional justice institutions also address crimes committed in Sudan, then a precedent will be set for how the International Criminal Court functions alongside alternative transitional justice mechanisms. This situation would concern potential problems of, *inter alia*, double jeopardy, sharing evidence, and overlapping witnesses. These issues concern not only alternative prosecutorial transitional justice institutions, such as domestic courts within Sudan, but also non-prosecutorial transitional justice mechanisms. If, for example, as suggested in Security Council Resolution 1593, Sudan establishes a truth and reconciliation commission to address the Darfur atrocities, then the International Criminal Court will need to institute precedent-setting policies on how to prosecute alongside amnesty provisions for individuals it may want to indict or have testify. In this respect, the International Criminal Court may look for guidance to the experience concerning atrocities in Sierra Leone, for which a hybrid war crimes tribunal has operated alongside a domestic truth and reconciliation commission, and to how several potential conflicts of interest or policy between these two institutions have been resolved.⁵⁰

Finally, although the Darfur referral may represent an important precedent for the future of international justice, it comes after a long period of the world's indifference about and failure to address the Darfur atrocities. This episode, then, reinforces the precedent that the

⁵⁰ See, e.g., William A. Schabas, *A Synergistic Relationship: The Sierra Leone Truth and Reconciliation Commission and the Special Court for Sierra Leone*, in *TRUTH COMMISSIONS AND COURTS: THE TENSION BETWEEN CRIMINAL JUSTICE AND THE SEARCH FOR TRUTH 3*; (William A. Schabas & Shane Darcy, eds., 2004); William A. Schabas, *Conjoined Twins of Transitional Justice? The Sierra Leone Truth and Reconciliation Commission and the Special Court*, 2 *J. INT'L CRIMINAL JUSTICE* 1082 (2004); 'Human Rights Watch Policy Paper on the Interrelationship between the Sierra Leone Special Court and Truth and Reconciliation Commission', 18 April 2002 (available at <<http://www.hrw.org/press/2002/04/sierraleoneTRC0418.htm>>).

international community responds too late, if at all, to atrocities, including genocide.

IV. CONCLUSION

The Darfur referral presents the opportunity to identify, try, and punish suspected atrocity perpetrators, to document the history of, and responsibility for, the Darfur atrocities, to deter future atrocities,⁵¹ and to promote reconciliation among the people of Sudan. On the other hand, this referral may lead to significant disagreements among Sudan, the International Criminal Court, and the United Nations Security Council about whether Sudan is cooperating and, if not, what can and should occur to remedy that problem. If the International Criminal Court and the United Nations Security Council are not successful in persuading Sudan to cooperate, the Court and the Council will be discredited, the victims of the Darfur atrocities will continue to suffer, and future perpetrators of atrocities in other non-party States will be undeterred.

As long as genocides and other atrocities continue, the international community will be forced to decide whether and how to deal with perpetrators and states that attempt to shield them from prosecution. This article has explored some of those decisions, including the inherent benefits, drawbacks, and challenges of various options.⁵² If the international community, including the United States government, does not act more promptly and effectively to promote justice and accountability in Darfur and elsewhere, our demands for – and promises of – ‘Never Again!’ will continue to fail again and again.

⁵¹ For a skeptical consideration of how prosecution, at least through international criminal tribunals, deters atrocities, see: Jack Snyder & Leslie Vinjamuri, *Trials and Errors: Principle and Pragmatism in Strategies of International Justice*, 28 *INTERNATIONAL SECURITY* 5, 20–25 (2003/04).

⁵² For a discussion of the benefits, drawbacks, and challenges of other transitional justice options, see: Zachary D. Kaufman, *The Future of Transitional Justice*, 1 *St. ANTONY'S INT'L REV.* 58 (2005).