THE QUESTION IS ICC’S PROBITY

Amen Teferi  Oct 27, 2013

The issue of ICC is a topical agenda that is currently raging the public discourse. In the nature and nurture of this debate we came across both frivolous and prosaic judgments on one hand; a prudent and expert opinion on the other. Some acted the fool and behaved stupidly to condemn the position of African leaders towards ICC. After the African leaders have communicated their grudge and the unfair treatment they have received from the International Criminal Court through the current AU chairperson Hailemariam Desalegn, the issue has immediately changed into a ‘knock-down-drag-out affair’ among various groups and individuals. Some of them (International Medias included) have exhibited an obvious procivility of spin doctoring and sentimentalizing the issue, with the aim of putting down the position advanced by AU.

Allow me to ramble for a moment. In one of his poems, Matthew Arnold has portrayed the mid-Victorian generation as “Wandering between two worlds; the one dead and the other powerless to be born.” The situation of the current African generation is very different from that of the mid-Victorian generation represented by this great British poet. The current African generation is wandering, in fact, between two worlds. But it is a wander between the two worlds: the one is the dead colonial world and the other is a rather energetic world potent to give birth to a new era. And of course, it is not, like the former mid-Victorian generation powerless to be born. The new African world is to be born free from the shackles and chains of colonialism and dependency.

I would like to raise a question here: do attempts to promote justice for the atrocities that would fall under the jurisdiction of ICC outside ICC should be viewed as attempt to live without impunity? In fact, according to the ICC Prosecutor Prosecutor Luis Moreno Ocampo, ‘The 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.’
However, the position of the African states was improvised as a malign tendency driven by an interest to live without impunity; while the probity of ICC as an impartial international juridical is put to question. Now, at stake is not only the issue of impunity, but also the probity of ICC.

As I have noted above, the issue of ICC is a topical agenda that is raging the public discourse currently. I must admit that I have utterly failed to envisage that the ICC Issue would take on such a contentious to evoke a huge commotion in the public discourse. I really found it as a grave naivété and a deficiency of imagination to fail to foresee that the AU’s position would draw forth such a strong backlash. Hence, the realization this mistake has kindled a knee interest in me to know the history, function, organizational principles, or values etc of the ICC.

The pressing problem that took shape in me in the past few days has created a chance to ponder on matters related with the international criminal laws, and triggered an interest to see the track record of ICC. I have also asses the position of the Ethiopian government in relation with the adoption of the Rome Statute.

The core crimes covered by the Rome Statute are crimes like genocide, crime against humanity and criminal aggression. The Rome Statute aims to bring an end to impunity. The Statute creates the first ever-permanent International Criminal Court to hold individuals personally accountable for the most heinous international crimes. The Statute of the Court is a lengthy document that is divided into 9 parts and has a total number of 128 Articles; a large number of them in turn are sub-divided into sub-articles, paragraphs, and sub paragraphs.

THE GENESIS

On July 17, 1998, 120 States voted to adopt the Rome Statute of the International Criminal Court, which entered into force on July 1, 2002. While this is so, the Court’s success will largely depend upon the response of States. Ratification of its Statute is a precondition for the exercise of jurisdiction by the Court. Unlike the International Court of Justice, the Court has, at present, no relationship with the United Nations and, hence, the significance of cooperation of States to the Court’s success. Of the 122 members States of the ICC, 34 of them are African.
Ethiopia was one of the participants of the Rome Conference for the establishment of International Criminal Court, held at the main office of the Food and Agriculture Organization (FAO) from June 15 to July 18, 1998. She was also one of the active participants of the Conference and had made known her stand and position on some of the contentious issues that were raised by different state representatives. At the conclusion of the deliberations, Ethiopia, along with 20 countries, abstained from voting for the adoption of the Statute of the Court. She has also, since then not ratified the Statute, in spite of accepting, in principle, the need for the establishment of an international criminal court.

In the domain of international law, the criminal law was for a long time felt to be essentially a “preserve” of domestic jurisdiction. States are subjects of international law, and in turn, international laws are concerned with the acts of sovereign states alone. As states cannot be subject to criminal law, they cannot be held criminally responsible. Hence, an international criminal jurisdiction was inconceivable. Nonetheless, the need for an international criminal law and an international criminal court had been a longstanding aspiration of the international community. Soon after the First World War, it began attracting the attention of jurists and political leaders. Therefore, one can say ICC is the result of WWI.

It is to be recalled that at a peace conference in Paris in 1919 a commission was established. The commission that was established after the conclusion of the WWI and was entrusted with a power to identify the responsibility of the Authors of the war and the enforcement of penalties. This commission suggested the creation of an ad hoc international “high tribunal” to deal with four categories of war crimes. The Versailles treaty also had included provisions that advised the establishment of a “special tribunal” to try the former German Emperor.

The suggestion for the establishment of High or special tribunal has failed. However, it has never failed in setting into motion the interest and in stimulating the desire to establish an International Criminal Justice. In 1920, the commission of jurists met at Hague to prepare draft statute that would setup permanent court of International Justice. The commission has adopted a proposal recommending the creation of a separate High Court of International
Justice “competent to try crimes constituting a breach of international public order or against
the universal law of nations.”

The council of the then League of Nation did not received it well and failed to elicit any
resolution. However, latter, the Third Committee of Assembly of the League expressed the view
that “there is not yet any international penal law recognized by all nations.” Therefore, it would
be more practical to establish special chamber in the court of International Justice.

In any case, the idea was well received in non-official circles. The international Law Association
went on record, at the meeting in Buenos Aires in 1922, that it supports the creation of an
International Criminal Court and recommended the drafting of the proposed statute for it.

The draft was submitted to the Association in 1924 at Stockholm and was referred to a
committee and the Association adopted the statute at its conference in Vienna in 1926.
Nevertheless, following the WWII the victorious Allied powers have established an
International Military Tribunals. Under the auspices of these Tribunals, war trials took place at
Nuremberg and Tokyo. These trials have revealed unimaginable atrocities that deeply shock the
conscience of humanity, which winded the horizons of international criminal law and thereby
gave further impetus to the movement for a permanent criminal court. The UN takes the lead.

It was argued then, that in the course of the development of the international community,
there would be an increasing need of an international judicial organ for trial of certain crimes
under international law. Therefore, UN General Assembly invited international law commission
to study the “desirability and possibility” of establishing such a judicial organ in practicable as “a
criminal chamber of international court of Justice.”

On 11 December 1946, the General Assembly adopted Resolution 95 (I) affirming “the
principles of international law recognized by the charter of the Nuremberg Tribunal and the
judgment of the Tribunal” and calling upon its committee on the codification of International
law recognized by the Charter of the Nuremberg Tribunal and the judgment of the Tribunal”
and calling upon its Committee on the codification of international law “to treat as a matter of
primary importance” plans for the codification of offences against the peace and security of mankind or an international criminal code.

This was followed, on December 9, 1948, by the “Convention on the Prevention and Punishment of the Crime of Genocide” whose draft was proposed by the UN Secretariat, envisaged as one alternative an ad hoc tribunal for the repression of that crime. However, this suggestion was again disapproved. However, more than 50 years after the Genocide Convention came into force; a permanent International Criminal Court (ICC) with the ability to try an individual for the crime of genocide has been created.

Article VI of the 1948 Genocide Convention (Convention on the Prevention and Punishment of Genocide) provides that persons charged with genocide shall be tried ‘by a competent tribunal of the State in the territory of which the act was committed or by such international penal tribunal, as may have jurisdiction.’

Therefore, ICC carries with it great promise for international justice and has the potential to play a pivotal role in strengthening, refining and developing of international criminal law in general and the law of genocide in particular. But it also faces enormous challenges. The challenges are not only related with how ICC exercises its jurisdiction over the most serious crimes of concern to the international community, but also can it manage to exercise its jurisdiction with impartiality being insulated from pressures and influences exerted from various political forces.

ETHIOPIA AND ROME STATUTE

Tewodros Dawit (a lawyer) had discussed, in 2009, the topic that is now becoming a raging debate- the ICC and African leaders. Considering the general legal regimes of Ethiopia Tewodros concluded that Ethiopia favors the principle of Universal Jurisdiction. Thus, he noted the application of universal jurisdiction is consistent with the ultimate goal of Rome Statute. In light of this fact, he noted, “it would have been but the next step to champion the cause for the establishment of an international criminal court.” However, Ethiopia has chosen not to vote for the Rome Statute and it had not ratified it.
Ethiopia was one of the first countries to recognize the threat posed to international peace and security by crimes like genocide and include it as a crime against international law in her own penal Code. It was also one of the first countries to recognize the importance of cooperation and assistance among states if crimes against humanity are to be deterred and thus embrace the concept of universal jurisdiction.

In addition, and even more important, it was one of the nineteen countries to adhere to “The Agreement For the Prosecution and Punishment of Major War Criminals of The European Axis” prior to the Nuremberg Trial. The present Ethiopia’s Constitution too gives a special place to the “Universal Declaration of Human Rights” and states, in no uncertain terms, that its human rights provisions are to be interpreted in light of the Declaration and other international conventions to which it is a party. It is thus apparent that, from here on, to champion the cause for the establishment of an international criminal court would have been but the next step.

As the above facts make it clear, Ethiopia has good qualifications for membership of the ICC, were qualifications necessary for eligibility. Ethiopia’s laws are for the large part compatible with the statute and those that need revision or addition, would not be substantial enough as to require such a prolonged abstention. Therefore, the only appealing reason is the one relating to the fear that the prosecutor enjoys side powers under the Statute. As it unfolds now, Ethiopia’s fears and concerns are legitimate. At present, it is difficult to deny that such things are not happening. In the real world of today, state decisions are seldom guided by altruistic motives alone, if at all. Certain provisions of the Statute too are a reflection of this concern. These provisions were originally intended to minimize the possibility of the happenings of political manipulations.

Ethiopia has eschewed the adoption of the Rome Statute. Along with 20 countries Ethiopia abstained from voting for the adoption of the statue of the court. Though Ethiopia had in principle, accepted the need for the establishment of an international criminal court, it has abstained from ratifying the statute presenting its concern for her decision. There are of course certain impediments hindering or justifying the delay of Ethiopia’s accession to the statute. The
major reason for Ethiopia to abstain from being member to the ICC can be said her pressing concern over the independence and impartiality of the Court.

Hence, though Ethiopia was an active participant in the deliberation process on the draft Rome Statute that has led to the birthing of ICC, it decided to take a prudent course of action by postponing its membership registration to the organization. I think, the current turn of events could clearly affirm the wisdom of her decision.

Now, ICC is alleged to be impartial, unfair, and is accused of acting in manner that would jeopardize its constituent values and principles. The detractors of the Court are judiciously criticizing it for displaying double standard in its performance, which would again trigger questions that would defeat its causes.

African leaders made it clear that ICC and SC have repeatedly shown signs of complete disregard for concerns African States. Recently, at 15th extraordinary session, held in Addis last week, the current Chairperson Hailemariam Desalegn, has noted that African States are perplexed by the short track-record of ICC in the last eight years. ICC has crisply demonstrated its nature. To the dismay of many African Heads of States, it made requests, which ICC has always been declined. Not only it has putdown the request made by AU, but it has also shown disrespect as it failed even to acknowledge the receipt of the letter. As it is getting unbearable, AU decided to try another course of action.

Now, ICC is engulfed by many serious questions, and the most common concern of detractors who have strongly opposed the stance of African States regarding ICC is whether ICC is an independent international judicial organ that could serve justice and deliver an impartial service to the international community free of any prejudice, and guarded against political pressures.

Behind the establishment of ICC, there is an assumption of universal consensus regarding the interpretation of facts and evidences that could constitute genocide, crime against humanity and war crimes. However, there is no universally agreed definition about the elements that could constitute genocide, crime against humanity and war crimes.
Following the declared position of the AU, some people have argued that being non state-party to the Rome Statute would encourage impunity. One of the most important issues in this regard is a state that is not party to the Rome Statute is not insulated from being subjected to the criminal investigation of the Court. As the current practice shows us countries that are not party to the Rome statues can be referred to the ICC. For instance, Sudan is not state party to the statute of the court. However, the UNSC has established International commission of inquiry on Darfur to investigate the situation in Darfur.

**THE UN SECURITY COUNCIL AND ICC**

Up on the recommendation of the commission the Sudan was referred to the prosecutor of the court by the resolution of the Security Council No. 1593 of 2005. The resolution requested the prosecutor to investigate the situation in Darfur since 1 July 2002.

We can assume that being member to the ICC may lay some extra obligation on the State-Party; but States that are not member of the ICC are subjected to the investigation and prosecution of the ICC. This is only possible through UN Security Council. As long as the members of the UNSC found it worthy or politically rewarding, ICC can be authorized to undertake investigation. As we have seen the UNSC has established International commission of inquiry on Darfur to investigate the situation in Darfur.

The Security Council (SC) can refer cases that would be investigated and/or prosecuted by International Criminal Court (ICC); it could also be a third party or self-referral cases. Based on the provision of the Rome Statute cases can be referred to ICC to the Security Council (SC). It is in the interests of the Court to secure a strong mandate before commencing an investigation and/or prosecution. Therefore, the SC referrals will provide the Court with significant surety and mandate. Likewise, self-referrals by States will provide the Court with a powerful and cooperative partner. In dealing with such referrals the ICC prosecutor, and consequently the judicial arm of the Court, must always be on guard against pressure to conform to the wishes of the referring body. The ICC prosecutor may act *ex proprio motu* i.e. of his own motion. The Prosecutor or the Court may trigger a case on its own initiative and without any application by
concerned parties. Of course, pursuant to Article 17 of the Rome Statute, the ICC prosecutor and consequently the judicial arm of the Court would intervene if and only if the concerned state-party is ‘unwilling and unable’ to investigate and/or prosecute the perpetrator of the crimes that fall under the jurisdiction of the Court.

The prosecutor, however, should use hierarchy of referrals available with a view of surpassing the limitations to create practical opportunity to act truly independently of referring parties. Critics say the best way possible to obtain a more secure mandate is to handle cases by way of self-referral or SC referral. In addition, in fact, the Court is said to have a manifest preference for state self-referrals. At any rate, while the cases of the Republic of Uganda and the Democratic Republic of the Congo were self-referral, the Darfur case was the SC referral.

Scholars also identified pros and cons attached with Security Council’s referral to the International Criminal Court (ICC). The Court’s credibility is so intrinsically related to its ability to secure state cooperation, but states self-referral could render the risk of political manipulation great. Therefore, scholars advise and suggest that third party referrals should be, in all likelihood, avoided and under such circumstances, the Prosecutor should manage to go in a similar way to his proprio motu authority.

However, the relationship between the SC and the Court has resulted in significant controversy. In the 1994 draft statute, the SC had a controlling interest in the operation of the Office of the Prosecutor (OTP). Draft Article 23 established that the SC, acting under Chapter VII, was able to trigger the investigatory mechanisms of the Court. Paragraph (2) of the draft article provided for jurisdiction over the crime of aggression, however, the Court could only exercise jurisdiction over the crime subsequent to the SC determining that an act of aggression had taken place.

Additionally, paragraph (3) stated that the ICC was prohibited from commencing a prosecution when the particular situation was, at that time, before the SC as a matter involving a threat or breach of the peace, or an act of aggression, under Chapter VII of the Charter. When commenting on the inclusion of paragraph (3) the International Law Commission stated that it was ‘an acknowledgement of the priority given by Article 12 of the Charter, as well as for the need for co-ordination between the Court and the Council in such cases’.
The finally agreed system of SC referral is manifest in the ability of the Council to refer situations to the Court under Article 13(b) of the Statute. The Court and SC relationship potentially widens the scope of the Court’s jurisdiction, as the provisions of Article 12 do not limit SC referrals. This article provides that for a State Party referral or *proprio motu* investigation to be valid, the crime must have been committed by a State Party national or within the territory of a State Party. While not expressly limited to such a restriction, SC referrals are nonetheless similarly limited to a ‘situation’ and not an individual.

Furthermore, article 16 of the Rome Statute details the final element of the Court and Council relationship. The article vests the SC with the ability to defer the Court’s jurisdiction for a renewable period of 12 months. Hence, pursuant to Article 16 the SC when acting under Chapter VII of the United Nations Charter should make such a request. State referrals are provided for under Article 13 of the Statute and are elaborated upon in Articles 12 and 14. While not expressly provided for self-referrals by State Parties were, at the very least, unexpected, Article 13(a) provides for a State Party referral in accordance with Article 14.

**SECURING CO-OPERATION**

In any case, the Court’s success will depend upon the prosecutor’s ability to build strong relationships with states. Effective Court and State co-operation is therefore vital. Unfortunately, the political will to assist the Court will not always be present, particularly where State authorities represent the main suspects in an investigation. Under such circumstances, the Court may be confronted with an almost impossible situation. With little resources and a highly critical opposition, the Office of The Prosecutor (OTP) must ensure successful prosecutions (convictions) within an environment where State co-operation may be, at best, problematic. In such an environment the prosecutor will, in all likelihood, seek to instigate investigations only in those situations that present him with the most favorable conditions.

As the primary responsibility for the maintenance of international peace and security rests with the SC, any referral by the Council will present the ICC with the strongest mandate upon which to base an investigation. This will be so for either of two reasons. First, for a situation to involve
the SC it must be of significant international significance. Therefore, any SC referral is likely to be symbolic of a wider call for action. Second, irrespective of whether support for juridical action is present within the wider international community, a SC referral represents a promise of cooperation. A SC referral will therefore give a prosecutor access to a level of political will that may be absent from a State Party referral or where the prosecutors exercises their *proprio motu* authority.

The unusual phenomenon of self-referrals will provide the ICC prosecutor with the next level of surety. While broad State cooperation is important, it is the cooperation of the state within which the alleged atrocity occurred that is vital. Of the three situations noted above and are currently the subject of the ICC’s investigative interest, two are a result of self-referrals.

Self-referrals present states with a unique opportunity. First, it sends a strong signal to the global community that the self-referring state is open and willing to co-operate with an institution representing the rule of law. Second, it represents a willingness to be investigated themselves. This second point may, however, be a little optimistic. States who recognize the inevitability of an ICC investigation may opt for a self-referral in the hope that they may, more easily, control the Court and its conduct within their territory. Irrespective of the motivation of such States it is contended that self-referrals present the OTP with a strong and reassuring mandate.

Finally, state referrals of situations that perhaps fall within the interest but not the territory of the referring State is likely to provide the Court with a less secure basis of legitimacy. Co-operation from the territorial State under investigation cannot be assured with any confidence when the basis of such an investigation is a referral of an unfriendly neighbor.

While the prosecutor’s *proprio motu* authority may, for some states, represent the opportunity for tyranny and arbitrary decision making through a lack of accountability the weak mandate it provides means that it is unlikely to be relied upon by the OTP. Where a lack of political will within the international community means that no SC referral is forthcoming, the state in question is unwilling to refer itself, and any neighboring State Parties fail to make a referral to the prosecutor, the application of the prosecutor’s inherent jurisdiction is hardly likely to
engender the significant state cooperation required. The thought of exposing the Court to the realities of conducting a largely unsupported investigation will act as a strong deterrent to ‘going it alone’.

As the challenge for the Prosecutor will be to ensure the success of the Court by, for example, ensuring convictions while maintaining the integrity of prosecutorial independence, such a lack of mandate and state cooperation will inevitably place the Prosecutor’s *proprio motu* authority in a very unattractive light.

The Prosecutor’s *Proprio Motu* authority, *inter alia*, has evoked such an apprehension among countries, which were participants of the Rome deliberation. At the Rome Conference, the question of the prosecutor’s *proprio motu* authority was discussed as an issue closely related to the doctrines of *complementarity* and state sovereignty. When the prosecutor is acting under his *proprio motu* powers, and if he is satisfied that there are sufficient grounds to mount an investigation, the prosecutor is to seek authorization for the commencement of an investigation from the Pre-Trial Chamber of the ICC.

Within request for authorization submitted, the Pre-Trial Chamber will review the evidential before the prosecutor and will consider matters of jurisdiction and admissibility along with evidential material presented by the prosecutor in reaching a decision on whether to authorize an investigation.

If authorization is granted, the prosecutor must first notify those States to which the information reveals a primary responsibility to investigate. Such States have one month to notify the prosecutor of an investigation, past or present, of the alleged offenders and/or situation referred. If such notification is forthcoming then the prosecutor is prohibited from instigating an investigation, pursuant to the doctrine of *complementarity*.

By recognizing the Court’s need to secure state cooperation and the fact that SC referrals are likely to provide the Court with the strongest mandate, a number of unfortunate implications become apparent. Security Council referrals potentially place a significant burden upon the
OTP. While providing a strong, enforceable mandate for the Court, SC referrals also act potentially to limit the ambit of prosecutorial discretion.

It is important to underline here that the ICC is not a tool of the SC. Neither is the Court an organ of the UN. Therefore, the SC cannot legitimately extend or limit the jurisdiction of the Court beyond that which is provided for by the Rome Statute. Given these facts, no contravention of Article 103 of the UN Charter would arise if the ICC were to fail to adhere to a provision of a SC referral that attempted to extend or limit the jurisdiction of the Court beyond that which the Rome Statute provides.

Article 103 of the Charter provides; 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.

Not only does this provision apply to ‘Members’ of the UN, of which the ICC is not, but scholars suggested that Article 103 does not empower the SC with an unlimited authority to use any organization as a tool in any way it sees fit. The ICC is not a state and is therefore not a member of the UN. Undoubtedly, decisions of the SC will affect the work of the ICC but only to the extent provided for by the provisions of the Rome Statute, or the extent to which SC resolutions may pragmatically bare upon the work of the ICC. As an international organization, it could be argued that the ICC is inferior to the international personality enjoyed by States. Therefore, the ICC ought not to avoid obligations imposed by the SC that would be undoubtedly binding upon Member States particularly in the area of maintaining international peace and security.

It is equally interesting note the complex situation of the Prosecutor when he faced with a manipulating SC referral. In this regard, I would like to discuss the “Security Council Resolution (1593)” that referred the Darfur situation to ICC. We know that the horrific atrocities that have occurred in the Darfur region of Sudan have been the subject of significant international attention. As a result of these atrocities and the alleged culpability of the Sudanese Government, a commission of enquiry on Darfur were established at the request of the SC. Subsequent to the submission of the Commission’s report the SC referred the Darfur situation to the ICC.
The SC retains the ability to establish *ad hoc* tribunals such as the International Criminal Tribunals for the former Yugoslavia and Rwanda (ICTY and ICTR). To allow the SC ostensibly to use the ICC as an *ad hoc* facility would leave the jurisdiction of the Court unworkable. If the SC had such an authority there could be no limits placed upon the SC’s ability to amend the Rome Statute. Two objections to this proposition are immediately apparent. First, the complexity of the Rome Statute and the accompanying Rules of Procedure and Evidence and Elements of Crimes means that substantial reworking of the Court’s jurisdiction may be required in the case of each SC referral. This could give rise to an impossible situation in which the ICC becomes a substantively and administratively different beast from one investigation to the next. Second, such a controlling interest by the SC was specifically proposed and rejected by the negotiating states at the Rome Conference of 1998.

Additionally, consideration was also given to the possibility of the ICC being an organ of the UN. This was likewise rejected in favor of an independent treaty basis for the Court. By way of observation, it may also be noted that there was discussion within the SC of establishing a separate, *ad hoc*, tribunal to investigate Darfur. Although ultimately rejected due to cost and delay it does indicate that there was concern that the jurisdiction of the ICC was not fit for the purpose.

Despite the objections of the USA, which represented the principal motivating state behind such a suggestion, if there had been universal recognition that the SC could manipulate the jurisdiction of the Court as it saw fit, then the suggestion of an *ad hoc* tribunal may not have been forthcoming.

Additionally, although paragraph 6 of resolution 1593 may be interpreted as an attempt to control the jurisdiction of the Court, it may still be interpreted as an attempt by the SC to work within the boundaries of the SC and ICC relationship as delineated by the Rome Statute. The resolution does not reveal any express acknowledgment that the ICC is subject to the unilateral will of the SC pursuant to Article 103 of the Charter. Whether the Court has the ability to disregard any resolution of the SC that may purport to extend the jurisdiction of the Court beyond that provided for by the Rome Statute is likely to be a moot point.
The traditionally loose nature of SC resolutions combined with the referral and deferral provisions of the Rome Statute, provide the ICC with a liberal margin of interpretative flexibility. Only in the event of a SC resolution, so pointed that the Court was unable to use the deferral provision of Article 16 or the limiting affect of Articles 12, 17 and 19 would the issue of the ICC’s incompatibility with Article 103 of the Charter arise.

I suggest that this would be an extremely rare event indeed. Under most circumstances, if the Court were to adopt a policy not to publicly classify elements of a resolution, then the inherent flexibility within the Statute would act to avoid a SC/ICC crisis. Even if the ICC Prosecutor were to accept the limiting elements of a SC referral then he could invoke the pragmatic constraints associated with the very limited resources available to the OTP to constrict the application of the offending provision. If the SC had such an authority there could be no limits placed upon the SC’s ability to amend the Rome Statute. Two objections to this proposition are immediately apparent.

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THE US AND ICC

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could manipulate the jurisdiction of the Court as it saw fit, then the suggestion of an ad hoc tribunal may not have been forthcoming. The Report of the Commission of Inquiry on Darfur A further difficulty surrounds SC resolution 1593, not in the words used in the resolution, but in the possible effect of the Report of the Commission of Inquiry which gave rise to its passing. I have previously discussed much of the substantive detail of the Report and do not propose to provide such an overview again here.

Suffice to say, the Commission concluded that, ‘[b]ased on a thorough analysis of the information gathered in the course of its investigations, the Commission established that the Government of the Sudan and the Janjaweed are responsible for serious violations of international human rights and humanitarian law amounting to crimes under international law’.

The Commission further noted that, ‘[t]he measures taken so far by the Government to address the crisis have been both grossly inadequate and ineffective, which has contributed to the climate of almost total impunity for human rights violations in Darfur’.

In recognition of the difficulty in establishing the necessary elements of the crime of genocide, the Commission went so far as to say that genocide could not be established. The difficulty such a conclusion presents relates to the influence it may have upon the ICC investigation. Having received a strong and influential mandate from the SC the OTP may be inclined to confirm those findings upon which a SC referral may be based. Considering that the Court will be under significant pressure to ensure successful convictions and the fact that the US, Russia and China have failed to ratify the Rome Statute the future existence of the Court may be in the balance. From this perspective, prosecutorial discretion in the ICC is potentially limited.

While under pressure to produce tangible results the ICC prosecutor has stood firm in his Darfur investigation. He has ensured transparent decision making through regularly reporting to the SC and clearly indicating that he sees himself bound by the provisions of the Rome Statute. Such resistance to the implicit pressure associated with the referral by the SC will perhaps be difficult to maintain.
Proprio motu authority vesting with the ICC Prosecutor caused considerable controversy at the Rome Conference of 1998. One could go so far as to say that this authority is ultimately responsible for the failure of the US and China to ratify the Rome Statute. However, far from being the Court’s Achilles Heel, this prosecutorial authority will inevitably be sidelined as it provides the OTP with a weak mandate upon which to instigate an investigation and consequent prosecution. Third party State referrals will likewise fail to fulfill the pragmatic requirements of the Prosecutor who must conduct investigations with minimal resources. Only in the case of State self-referrals or SC referrals will the Prosecutor be assured of the necessary state cooperation required.

However, SC referrals represent a double-edged sword. While providing significant surety as to the successful instigation and completion of an investigation the pressure to conform to the political will of the SC will be great. Such political will, is likely to be manifest expressly by the SC through any referring resolution, or implicitly through the determinations of SC investigatory bodies or political statements of member states. While the ICC Prosecutor has, so far, taken a clear and transparent stance on how the OTP will deal with SC referrals this will be difficult to maintain. The pragmatic complexities associated with a poorly resourced prosecutions office may be exacerbated by claims that the SC can dictate the ambit of the ICC’s jurisdiction.

**SUDAN AND ICC**

Up on the recommendation of the Commission the Sudan was referred to the prosecutor of the court by the resolution of the Security Council No. 1593 of 2005. International Commission of Inquiry on Darfur was established by resolution of the United Nations Security Council. In fact, the Council was responding to a request from the government of the USA, which said it was acting in accordance with Article VIII of the 1948 Convention for the Prevention and Punishment of the Crime of Genocide, apparently the first such application of the provision since its adoption.

This Commission worked efficiently, and presented its report within three months. ‘The Commission concludes that the Government of Sudan has not pursued a policy of genocide.’ As
some commentators have it, this is ‘probably the key sentence’ in the January 2005 report of the International Commission of Inquiry on Sudan. However, many human rights activists were disappointed by the conclusion that genocide had not been committed, and some went so far as to treat the Commission report as some kind of whitewash or even betrayal. Yet the Commission said that although it would not use the stigma of genocide, terrible atrocities suitably described as crimes against humanity had certainly been committed.

The conclusion that no genocidal policy has been pursued and implemented in Darfur by the Government authorities, directly or through the militias under their control, should not be taken as in any way detracting from, or belittling, the gravity of the crimes perpetrated in that region. As stated above genocide is not necessarily the most serious international crime. Depending upon the circumstances, such international offences as crimes against humanity or large-scale war crimes may be no less serious and heinous than genocide. This is exactly what happened in Darfur, where massive atrocities were perpetrated on a very large scale, and have so far gone unpunished.

The Commission blamed Sudan for the same category of crimes that was the basis of the conviction of Nazi war criminals at Nuremberg, and that was first used, in 1915, to describe the persecution of the Armenians by the Ottoman regime. Indeed, the Commission’s analysis very helpfully reminds us that genocide and crimes against humanity are cognates, and that a finding that there was no genocide, in a technical sense, in no way absolves tyrants of their responsibility for atrocities.

The Commission called for prosecution of crimes against humanity by the International Criminal Court. As Sudan is not a party to the Rome Statute, the Security Council referral, in accordance with Article 13(b) of the Rome Statute of the International Criminal Court, was the appropriate mechanism to trigger the jurisdiction of the Court.

Several weeks after the report of the “International Commission of Inquiry on violations of international humanitarian law and human rights law in Darfur” was issued. The United Nations Security Council responded to the report by referring ‘the situation in Darfur since 1 July 2002’ to the International Criminal Court. In December 2005, Prosecutor Luis Moreno Ocampo
reported to the Security Council that he had “identified particularly grave events, involving, for example, high numbers of killings, mass rapes and other forms of extremely serious gender violence and other crimes within the jurisdiction of the Court.”

There is much debate on whether the mass atrocities in Darfur, which include widespread murder and rape, should be characterized – as the US Government has described them – as ‘genocide.’ Whatever the appropriate term to designate the atrocity identified in Sudan may be, human rights organizations have been monitoring the ongoing atrocities and lobbying the international community to take action, such as by bringing suspected perpetrators to justice.

March 31, 2005 UNSC had adopted the Resolution (UNSCR) 1593, through which the SC referred the situation in Darfur since 1 July 2002 to the Prosecutor of the International Criminal Court (ICC). This decision has triggered some important questions to ponder.

“First, why did the USG initially propose 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 (UN) and the African Union and act as an extension of the UN International Criminal Tribunal for Rwanda?

Second, given its opposition to the ICC, why did the USG ultimately abstain from voting on – rather than veto – UNSCR 1593, thus enabling the Darfur situation to be referred by the UNSC to the ICC? Third, do the advent of the ICC and the UNSC’s referral of the Darfur situation to it necessarily preclude the pursuit of other transitional justice options in this case? Finally, what is the significance of the UNSC referral of the Darfur situation to the ICC, and what political and legal precedents does it set?

In exploring these questions, we can focus on the role of the US government. For better or worse, US reaction to international crises often significantly shapes the global response due to the US’s preponderance of resources in the post-Cold War era. This chapter will argue that the precedent-setting UNSCR 1593, on which the US government abstained for a combination of reasons. This offers as much hope as doubt for the promotion of justice and accountability in Darfur.
UNSC Referral of the Darfur Situation to the ICC on 31 March 2005, the UNSC, acting under Chapter VII of the UN Charter, adopted UNSCR 1593, which referred ‘the situation in Darfur since 1 July 2002 to the Prosecutor of the International Criminal Court.’ Eleven states voted in favor of the resolution, none against, and four (Algeria, Brazil, China, and the US) abstained.

After the vote, acting US Ambassador to the UN described the reasons for the US government’s abstention. First, the US government believed that a superior transitional justice option would have been a hybrid tribunal located in Africa, which would incorporate local laws and procedures and employ staff from Africa and elsewhere.

Second, the US government held the view that the ICC did not have jurisdiction over nationals of non-States Parties to the Rome Statute. The Ambassador also reiterated the US government’s general objections to the ICC – for example, that this tribunal does not have sufficient safeguards to protect against politically motivated prosecutions or frivolous cases. Despite these concerns, the US government did not vote against the resolution. This is because, as the Ambassador explained, it recognized 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 US nationals and members of the armed services of other non-States Parties to the Rome Statute (except Sudan) from the ICC’s jurisdiction.

The appearance of a near-consensus on the judicial response to the Darfur atrocities is only the latest chapter of the story. The UNSC decision to refer the case to the ICC was reached only after significant disagreement and consideration of alternative proposals. Because Sudan is not a State Party to the Rome Statute, and the conflict is not of an international nature concerning a State Party, the ICC would only have jurisdiction over the Darfur situation if the UNSC, acting under Chapter VII of the UN Charter, referred the matter to the ICC.

In early 2005, the US government stated its opposition to such a referral. Instead, as early as 21 January 2005, the US government proposed that the international community establish an *ad hoc* tribunal in Arusha, Tanzania – the site of the ICTR – which would have jurisdiction over Darfur.
The US government proposed that the UN and the African Union jointly administer this new tribunal. Anticipating objections from UNSC members and others about the financial costs of establishing and operating such a tribunal, the US government offered to cover all such monetary expenses, estimated to range from US$40 to $150 million per year.

The US government claimed to be considering designing this *ad hoc* tribunal as an expansion of or tied to the ICTR; the US government did not indicate that the tribunal should be completely separate. Critics asserted that this alternative transitional justice institution would be slower, more expensive, less legitimate, and less effective than the already established ICC. Of course, these criticisms may be premature, as the ICC is not yet fully functional and has yet to try any cases. Nonetheless, in response to its proposal, some commentators accused the US government, which itself had characterized the crimes as ‘genocide,’ of promoting a purely self-interested position that neglected atrocities in Sudan and would delay justice in Darfur.

Consequently, instead of distributing the costs of pursuing transitional justice throughout the international system, the US government’s optimal preference for the creation of a local, hybrid tribunal greatly drove up costs to itself – financially, politically, and logistically. The direct monetary expense of permitting the UNSC to refer the case to the ICC would have literally been nothing for the US government. Because the US is not a State Party to the Rome Statute, the US government is not obligated to contribute funding to the ICC, a point reiterated in UNSCR 1593.

Yet the US government was prepared to spend US$40 to $150 million per year on an *ad hoc* tribunal in Arusha. The US government must therefore have initially calculated that indirect financial costs and other disadvantages of permitting the UNSC to refer the Darfur situation to the ICC would have been even greater.

As calculated by the US government, those costs included ‘legitimizing the ICC’; creating a precedent of pursuing transitional justice issues through the ICC instead of through the US government’s preferred method of *ad hoc* tribunals established by the UNSC. The Council acting under Chapter VII of the UN Charter has established *ad hoc* tribunals for the former Yugoslavia and Rwanda. Referring the Sudan’s case to ICC would create a precedent of referring to the ICC cases concerning non-States Parties to the Rome Statute, which could include the US.
Furthermore, if the US government had vetoed UNSCR 1593, international pressure on the US government to intervene – perhaps militarily – in Sudan might have increased. At least by abstaining during this vote, the US government could credibly deny that it was ‘doing nothing’ or obstructing action, even if the ICC referral was not the US government’s optimal transitional justice option. The ultimate decision the US government to abstain would apparently indicate that US has determined that the direct and indirect costs of cooperation did not exceed the costs of non-cooperation.

Critics such as Amnesty International claim that ICC will not be fair, impartial, or independent. These critics also contend that the tribunal is ‘doomed to failure.’ They also anticipated a deliberate attempt by the Sudanese Government to undermine the jurisdiction of the ICC.

According to the provision of ICC, if the Sudanese Government is willing and able genuinely to investigate and prosecute suspected atrocity perpetrators the court may defer the case to the Sudanese domestic judiciary and/or Sudan’s special court for Darfur to try these cases. However, if the ICC does not believe that to be the case (as suggested by the ICC Prosecutor’s report of 29 June 2005) it will decide to investigate the case.

The UNSC has directed to ‘fully cooperate’ with the ICC and Sudan’s president Omar al-Bashir has pledged to comply. If Sudan is uncooperative, it will be in breach of UNSCR 1593. Then tension will developed between the international community and Sudan. Since UNSCR 1593 was authorized under – and is therefore subject to enforcement through – Chapter VII of the UN Charter, the UNSC has the option, as a last resort, of threatening or using force to bring Sudan into compliance with the resolution.

National courts enjoy priority in the exercise of jurisdiction over the trial of crimes over which the International Criminal Court has jurisdiction over the trial of crimes over which the court has jurisdiction under Article 5 of the statute.

The UNSC referral of the Darfur situation to the ICC 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 UNSC’s first, affirmed the power
and legitimacy of the UNSC to use its Chapter VII powers to refer cases to the ICC for prosecution of alleged offenders of atrocities. That the first situation to be referred by the UNSC to the ICC did not concern a State Party to the Rome Statute and that the US government did not veto that initiative are particularly significant facts. Some commentators have suggested that the US government is hypocritical in insisting that Americans be shielded from the ICC (because the US government is not a State Party to the Rome Statute), while simultaneously allowing the ICC to try citizens of other non-States Parties to the Rome Statute as it does in the case of Sudan.

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; and to promote reconciliation among the people of Sudan. On the other hand, this referral may lead to significant disagreements among Sudan, the ICC, and the UNSC about whether Sudan is cooperating and, if not, what can and should occur to remedy that problem.

As they saw it expedient in taking issues purported by the first assumption i.e. the impartiality and independence of the court and the role of politics in the whole procedures of ICC. Now it is time to look briefly how ICC come in to being the controversial issue involved is the adoption of the Rome state and the subsequent establishment the organizational structure and functional of ICC.

Regarding Ethiopia the legal regime does not allow anyone to enjoy impunity. This is due to two main reasons. One, the Ethiopian penal code has clearly stipulated those crimes that are prescribed and prosecuted by ICC. Secondly, the Ethiopian constitution has provision that sanctioned all international covenants ratified by Ethiopia are considered as part and parcel of the national legal legumes.

Therefore, genocide perpetrators in Ethiopia cannot enjoy impunity by the absence of necessary legal provision. Nonetheless, lack of political commitment on the part of the party in power could create the chance of impunity and membership to ICC may reinforce the political commitment of the state. To that extent, adoption of the Rome Statute is advisable. However, Ethiopia has justifiable fear that had fostered its preservation. Concerns that have predisposed
USA, Russia, or China is also valid to Ethiopia. The current contentions issues has reveal and furnished practical lessons drawn from experience in the last ten years would be suffice to appreciate the matter involved with ICC and the formidable matters that awaits in its future venture. The one going heated debate would definitely create a procivility to reassess experience is the last decade and strong propensity to redefine and redefine legal provisions and procedures related with ICC. If it survives, ICC should take seriously poisonous criticism it is currently forced to sip and show commitment in discharging its house cleaning tasks.

In conclusion, I would like to say that attempts to promote justice for the Darfur atrocities outside the ICC should not be viewed as attempts to live without impunity and thwart the ICC. According to the ICC Prosecutor Luis Moreno Ocampo, “The 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.”