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MAYHEM IN DARFUR:
THE ACCOUNTABILITY, PEACE AND IMMUNITY DEBATE

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Introduction

Justice is a term with a wide 'penumbra of uncertainty.' Borrowing the words of Plato and others, Kirk captured the definition of Justice in just one phrase, *suum cuique*, which means *to each his own*.[1] Despite the recurring controversy over the meaning and normative content of the notion of justice, modern human rights enterprise posits the idea as articulating at least four obligations in the context of atrocity crimes, i.e., the duty to prosecute, disclosure of the truth, the right of victims to reparation and guarantees of non-repetition.[2]

There is, *inter alia,* the discourse regarding what objective we can achieve through prosecution and how effective it can ensure the contemporary conception of accountability. This article examines the utility of prosecutorial justice as a comprehensive tool for combating gross violations of human rights and serious breaches of humanitarian law without ignoring other interrelated imperatives of justice. It seeks to posit the debate between peace and justice and tries to make a critical analysis of whether the concern for justice truly jeopardizes the effort for peace in the particular context of Darfur.

The article further looks into the prospect of prosecution of those accused of perpetrating the most serious crimes of concern and examines the significance of ICC prosecution to the people of Darfur. By analyzing relevant international precedents and new developments in international criminal law, this article examines the state of the law relating to a sitting head of state immunity. It assesses whether the ICC indictment of President Omar Hassan Al-Bashir is politically motivated or a legally justified action against impunity.

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[1] Russell Kirk, The Meaning of Justice, Heritage Lecture #457, March 4, 1993, available at <http://www.heritage.org/Research/PoliticalPhilosophy/HL457.cfm>, accessed 2 November, 2007. In the legal discipline, while the concept of criminal justice is predominant, restorative or transitional justice is evolving as an alternative and/or complementary to criminal justice. Criminal justice or retributive justice requires the investigation, prosecution and punishment of perpetrators while transitional justice seeks to redress human rights abuses on the basis of some principled compromises in transitional countries.

[2] See the Updated Set of Principles for the Protection and Promotion of Human Rights through Action to Combat Impunity; Econ. and Social Council, E/CN.4/2005/102/Add.1,8February2005, Principle 1-38.

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1. Understanding the Debate between the Interest of Peace and Justice: Which Justice and for Whom?

The end of the atrocious conflict that claimed the life of more than a million people in Southern Sudan marked the intensification of another conflict on the western part of the Country, the Darfur state.[3] According to former UN Humanitarian Chief, the mayhem in Darfur has claimed the lives of over 200,000 persons and displaced over 2.5 million people from their livelihood since the end of 2005.[4] The Government of Sudan (hereinafter the GOS), holds that this figure is way too high.[5] Since then, Darfur has emerged into the international spotlight as an exceptionally dramatic scene of a humanitarian catastrophe.

Despite mounting pressures against the international community to attend to the agony and excruciating physical and psychological trauma sustained by the Darfuris, their effort is considered far below expectations.[6] The UN Commission of Inquiry on Darfur (hereinafter the UNCI) established pursuant to Security Council Resolution 1564 determined that war crimes and crimes against humanity have been committed in Darfur.[7] Following the report of the Commission, the Security Council (hereinafter the Council) has demonstrated its resolve to bring to justice all those responsible for the mayhem while the GOS have dismissed the ICC as a western political instrument. The debate over whether the ICC has a just mandate and jurisdictional competence over the situation in Darfur has remained a matter of greater controversy. However, the raging debate doesn't seem to change the vernaculars of

[3] North American Institute for Conflict Resolution, available at <http://www.crtraining.org/library/projects/sudan/>, accessed 15 December, 2008.

[4] United Nations High Commissioner for Refugees, As at March, 2006, there are 200,000 refugees in Chad and more than 1.7 million IDPs with in Darfur; See also Sudanese government estimate of death at 9,000, available at <http://en.wikipedia.org/wiki/Darfur_conflict>, accessed 15 December,2007.BBC News, available at http://news.bbc.co.uk/2/hi/africa/5347988.stm, last updated on 15 September 2006.

[5] MSNBC News, Death toll of 200,000 Disputed in Darfur, Former U.N. chief says his estimate in 2006 is too low, Sudan says too high, 28 March 2008, available at <http://www.msnbc.msn.com/id/23848444/>, accessed on 21st of December, 2008.

[6] *See* UNSC Resolution 1674, (28 April, 2006), UN DOC S/RES/1674. [It declares that the Council "*Reaffirms* the provisions of paragraphs 138 and 139 of the 2005 World Summit Outcome Document that professes to recognize the responsibility of the international community to protect populations from genocide, war crimes, ethnic cleansing and crimes against humanity". Attempts at unified effort against the Sudan have been aborted by the political cynicism around the Security Council.

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international law that the Security Council is a political body with a unique set of powers legally authorized to refer situations to the ICC.

Basic questions capture our attention: what objective can we achieve through prosecution and how effective is it in ensuring contemporary conception of accountability? How can we assess the relative advantages of prosecutorial justice vis-à-vis transitional justice in light of the common good of the public? If punishment is seen as constituting the centerpiece of accountability, should it be seen as a backward looking exercise in retribution or an effort to restore peace and confidence in the rule of law? To what extent is responsibility for repression appropriate to the individual victims, as opposed to the state, the regime and the international community? To what extent should understandings of criminal responsibility be projected forward? Who should be held to account, and, for what offense and by whom? How do we allocate responsibility between responsible civilian leaders placed thousands of miles away from the crime scene and ordinary soldiers and militias who actually perpetrated the atrocities? Does prosecution guarantee reconciliation between the Darfuris stripped of all essence of life? The sections below address these issues without, however, claiming to offer conclusive answers.

1.1- Why Prosecute Perpetrators? Prosecution as a Matter of Principle

Under criminal law, prosecution is viewed as an instrument of maintaining law and order through repression. However, since the notion of individual criminal responsibility for atrocities such as Darfur presents a unique set of circumstances peculiar to international justice, the conventional understanding of prosecutorial justice is simply unsuited. The stakes are too high and the interests too enormous to be effectively rectified with ordinary criminal law machineries. And on the other hand, international prosecution is a recent phenomenon, and it mainly traces its roots to the two International Criminal Tribunals established by the Allied Powers following the downfall of the Axis Powers. While some regarded the Nuremberg Trials as fora of victors' justice, many believed that the trials ushered into a new era of international individual criminal accountability.[8]

[7] UNSC, Res 1564, (18 September,2004), UN DOC S/RES/1564 establishing the United Nations Commission of Inquiry on Darfur ; Report of the International Commission of Inquiry on Darfur to the United Nations Secretary-General pursuant to Security Council Resolution 1564 of 18 September 2004,Geneva, 25 January 2005, Executive Summary,p-5, available a <http://www.un.org/News/dh/sudan/com_inq_darfur.pdf>, accessed 14 October, 2007[hereinafter UNCI].

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For some scholars, prosecution is a matter of principle. They reflect on the dynamics of prosecution and its efficacy in establishing accountability to advance the general good of humanity. Professor Diane F. Orentlicher underscored the multifaceted purpose of prosecution. In her view, prosecution is an "effective insurance against future repression," [9] it deters perpetrators and can "inoculate the public against future temptations to be complicit" in those acts.[10] She maintains that prosecution strengthens the rule of law and advances transition into democracy.[11]

Orentlicher also reflects on the consequences of inaction by states for gross violations of human rights which she referred to as "atrocious crimes."[12] She contends that "a complete failure of enforcement vitiates the authority of law itself, sapping its power to deter proscribed conduct."[13] Starkly putting the case for prosecution and accountability is Joseph Galloway, a military columnist for McClatchy newspaper who contended that: "Moderation in the Pursuit of Justice is No Virtue."[14] Writing on the questionable practices of the Bush Administration on their "global war on terror", Galloway emphatically argued that impunity to those responsible for crimes will be "a huge mistake that will come back to haunt them-and all the rest of us".[15]

Indeed, Orentlicher's and Galloway's arguments are logical, coherent, and at par with traditional norms of international law and general conceptions of

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.[8] Judgment of Nuremburg Tribunal, Nuremberg (1946), 41Am.J.Int.L. 172(1974) in Henry J. Steiner and Philip Alston, *International Human Rights in Context: Law, politics and Morals*,(2ed.)(Oxford University Press, 2000),p-115-121. The jurisprudence of these tribunals provided a momentum to the the normative content of crimes against humanity and war crimes. Also, the flourishing *ad hoc* international criminal tribunals and the emergence of the ICC elevated this acts to an unprecedented level; *See* Ian Brownlie, Principles of Public International Law, (4th ed.), p-562; Charter of the International Military Tribunal for the Far East, available at <http://www.yale.edu/lawweb/avalon/imtfech.htm>.

[9] Diane F. Orentlicher, Settling Accounts: The Duty to Prosecute Human Rights Violations of a Prior Regime, 100Yale L. J, 2537, 2542.

[10] *Id.*

[11] *Id.*

[12] *Id.*

[13] *Id.*

[14] Nat Hentoff, Obama's First 100 Days: After Ending American Torture, Will We Prosecutes those who ordered other War Crimes? Capital Newspaper, Vol.11, No. 521, & December 7, 2008,p-2.

[15] *Id.* He wrote: "what signal does it send to Mr. Bush's gang of unindicted co-conspirators, who have unwrapped a pandora's boxful of other offenses-from perverting the administration of justice, to illegally eavesdropping on the phone conversation and emails of ordinary Americans…to lying under oath to congressional oversight committees? Etc . . . Unless the newly empowered Democrats

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criminal law. However, others argue that these contentions have failed to sufficiently engage the practical realities of emerging democracies zealously awaiting peace and cannot afford to forgo opportunities for peace while pursuing complex and lengthy prosecutions.[16] While their arguments fully embrace the reality of certain societies, it falls short of conceiving underpinning mindsets and history of fragile post-conflict societies; societies under continuing conflict accompanied by brutality and constant state of fear—as in Darfur. They of course, dismiss these contentions as a "lesser evil" argument and strongly accentuate moral and ethical complications that ensue from their opponent's argument.[17]

1.2- Challenges to Prosecution: Is Prosecutorial Justice Adequate?

What is in the interest of justice? Ending a vicious cycle of violent crimes and preventing further loss of life or accountability? What if these ends are mutually exclusive phenomenon than being mutually reinforcing imperatives? That is the contention of this section.

Neither the experience of the Nuremburg Tribunal nor the recent *ad hoc* international tribunals resolve the impending questions of how transitional societies could come to terms with their horrifying past. The immediate good of the people in the conflict creates the urgency to first put an end to continuing atrocities without too much emphasis on accountability and reclaiming conventional morality. On the other hand, a comprehensive approach to the human rights problem demands a proper accounting of the past and the revitalization of conventional morality intolerant to impunity.

Those who resent prosecution in atrocity crimes argue for a "value-oriented approach to law; that recognizes the intersection of law and legal values" to strike an equilibrium between prosecution and other alternatives to prosecution, that taken together, serves the common good of the society.[18] They maintain that a 'social construction' approach to law, not a strict 'positivist approach', helps craft the "best route to a better future"[19] by collectively envisioning and determining "the people we want to be and the com-

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in the White House and on Capitol Hill hang a few coyotes on some fences in Washington DC., they are making a huge mistake that will come back to haunt them-and all the rest of us, too".

[16] *See generally* Charles Villa-Vicencio, *infra* note 18.

[17] *Id* at 2544.

[18] John Dugard, in Charles Villa-Vicencio, 'Why Perpetrators Should Not Always Be Prosecuted: Where the International Criminal Court and Truth Commissions Meet' 49 Emory L. J 205,207(2000).

[19] *Id.*

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munity we aim to have."[20] Others only partly agree with this assertion and call for deferral of prosecution only when existing political realities make prosecution unlikely; what Jose Zalaquett writing on the Chilean Truth Commission called: "Balancing Ethical Imperatives".[21]

Jose Zalaquett reveals two mutually exclusive but inextricably intertwined imperatives seen as defining characteristics of transitional societies — i.e., the protection of human rights in situations of armed conflict occasioned by violent crimes and the anxiety of elected governments in emerging democracies to prosecute past perpetrators.[22] Zalaquett distinguishes the 1945 model of prosecution that followed the Second World War [23] from the peculiarities of the Argentine situation where the democratically elected government has virtually failed to prosecute despite its genuine will to fight impunity of unspeakable atrocities committed in Argentina's Dirty War.[24] He, therefore, contends that "preventing the recurrence of such abuses and, to the extent possible, repairing the damage they have caused" should be the two overall goals of dealing with past human rights abuses.[25] For Jose Zalaquett, measures to redress past abuses should be pursued only to the extent compatible with the interest of peace and the continuity of incipient democracies.[26]

What is implied in his notion of "Ethical Imperatives" is the idea that if the threat of prosecuting powerful leaders and past perpetrators potentially jeopardizes the two crucial ends, transitional societies should be allowed to continue until the right moment arrives. However, he contends that perpetrators should be held to account when the time is right, quashing *de facto* impunity. Putting this account in its most stunning form, he said: "leaders should never forget that the lack of political pressure to put these issues on the agenda does not mean they are not boiling underground, waiting to erupt."[27]

In an attempt to propose a *modus operandi*, Charles Villa-Vicencio examines the purpose served by legal rules and the best approach towards that purpose. [28] However, protesting against the danger of advancing moral arguments under circumstances of brutal conflict, he questions whether the "duty to prosecute" is a legal absolute [29] and challenges the utility and practicality of this norm for mass atrocity crimes.[30] Since the "duty to prosecute" is an

[20] *Id.*

[21] Jose Zalaquett, Balancing Ethical Imperatives and Political Constraints: The Dilemma of New Democracies Confronting Past Human Rights Violations, 43Hastings L. J.1425.

[22] *Id* at 1427.

[23] *Id* at 1428.

[23] *Id* at 1428.

[24] *Id.*

[25] *Id.*

[26] *Id.*

[27] Jose Zalaquett; 'Why Deal with the Past?' in Alex Boraine et al, *Dealing With the Past* (eds.) (1997), 8, 15.

[28] Charles Villa-Vicencio, *supra* note 18 at 206.

[29] *Id.*

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unrealistic approach to the persistent and recurring sufferings of war-debilitated nations, Vicencio calls for the deconstruction of the "duty to prosecute" norm "to adjust to what is required in a particular situation to meet a given goal."[31]

Each conflict and transition is unique and demand unique responses. For example, Samuel P. Huntington distinguishes between three different categories of transitional societies, namely, transformation, replacement and transplacement;[32] each presenting unique set of problems in the search for justice.[33] According to him, most transitions in the 70's and 80's took the model of transplacement where the balance between spoilers and the government is such that the government, though unwilling to initiate real democratic transition, is nevertheless ready to be persuaded for negotiation.[34] He discusses the dilemma these democracies endure and brings into the light a choice of either to "prosecute and punish when circumstances allow or forgive and forget."[35] In conclusion, he blatantly advises societies under this form of transition "not to attempt to prosecute authoritarian officials"[36] for the cost is far greater than the "moral gains;" reducing the whole ideals of legitimacy and the rule of law into mere "moral gains."

1.3- Truth vis-à-vis Prosecution: Mutually Exclusive Objectives or Reciprocally Reinforcing Imperatives?

Neil J. Kritz and Naomi Roht-Arriaza reflected on a different dimension of the inadequacy of prosecution in addressing the enormity of the problem and the multitudes of competing interests that unfold in transitional societies. In their own words: "while meaningful accountability for past human rights abuses requires discovery of and reckoning with the truth, . . . proving their

[30] *Id* at 206-208.

[31] *Id.*

[32] Samuel P. Huntington, *infra* note 34, [emphasis added]. "[i]n transformation, those in power in the authoritarian regime take the lead and play the decisive role in ending that regime and changing it into a democratic system", "in replacement, reformers within the regime are weak or non existent. Democratization consequently results from the opposition gaining strength and the government loosing strength until it collapses or is overthrown". In transplacement, democratization is produced by the combined actions of government and opposition"

[33] Samuel P. Huntington, 'The Third Wave: Democratization in the Late Twentieth Century', in Neil J. Kirtz, *Transitional Justice: How Emerging Democracies Reckon With Former Regimes*, (ed.), V.I, United States Institute of Peace,1995, p-65-66.;*See* Ruti G. Teitel, *Transitional Justice*,(Oxford University Press),(2000) p-5, [where he debunks our conception of the term 'transition' itself].

[34] *Id.*

[35] *Id.*

[36] *Id.* [Emphasis added].

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occurrence requires a level of cooperation from both perpetrators and traumatized victims that is rarely forthcoming."[37]

If prosecution is to serve as an effective tool for establishing accountability, it should be able to address what Kritz and Naomi called a "tradeoff" between a full disclosure of the truth and the duty to prosecute norm.[38] If we cannot illicit the truth underlying the atrocities with all the accompanying details, prosecution is not truly serving the end of justice. Patrick Burgess takes the issue a little further and argued that "punishment will not by itself heal the past wounds, which are so commonly the cause of renewed hostilities and the occurrence of new violations."[39] Something of an insurmountable significance goes to the essence of these arguments. One is that the classical conception of accountability for mass atrocity has changed and it is no more limited to the retributive conception of "punishing perpetrators" at any cost. The quest for truth to provide consolation for victims, public acknowledgement and apology by responsible individuals, establishing a sound basis for reconciliation and democratic transition are among the new imperatives that prominently figures into modern conception of accountability. Secondly, if the classical conception of prosecution is not capable of addressing the modern conception of accountability, then there is a need to deconstruct conventional accountability with the view to reinvigorate a mechanism that responds to all competing imperatives of justice.

Accountability for atrocity crimes is not merely about punishing the perpetrator; it is also about the truth of why the victims have been brutally annihilated. It is about "knowledge and acknowledgment" and making it part of the nation's history. Alluding to the practice of the South African Truth Commission as one success story, Vicencio argues that victims, survivors, and perpetrators need to play a crucial role in the national building process.[40]

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[37] Neil J. Kritz and Naomi Roht-Arriaza, 'Taking Account of Accountability: Transitional Justice: How Emerging Democracies Reckon With Former Regimes, Impunity and Human Rights in International Law and Practice',(Book Review), 20-SPG Fletcher F. World Aff. 157 at 3; The rights of the victims to know the truth of what happened and why their loved ones are made to disappear. "There are questions to which the victim badly needs answers in the absence of which he will conjure up his won….they need to know why particularly his wife, father, daughter, to mention a few, were maimed or killed".

[38] *Id.*

[39] Patrick Burgess, 'A New Approach to Restorative Justice-East Timor's Community Reconciliation Process' in Naomi Roht-Arriaza &Javier Mariezcurrena, *Transitional Justice in the Twenty-First Century: Beyond Truth Versus Justice*, (eds.), (Cambridge University Press), (2006), p-176. He called for what he termed as a dynamic workable solution" that advances reconciliation. Accountability, he argued, can be essential in 'healing the past' but is neither a response to justice nor reconciliation.

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He argued that even if we assume that prosecution is the only instrument against impunity and is the best way to prove the supremacy of the law, the rule of law and the standard of proof makes it almost impossible to "obtain a guilty verdict" against powerful perpetrators.[41] Prosecution, therefore, not only squanders the limited resources of countries in transition, it also deviates from its intended purpose.[42]

While Vicencio asserts that countering "counterfeit and partisan version of history"[43] paves the way for a more "rational approaches to past conflicts," [44] he falls short of addressing the substantive problems encountered by his notion of "principled compromise". Other than contending that divulging the truth is an "antidote to such ideological perceptions of the past that undermine the mind's capacity for judgment and for learning;"[45] he did not offer compelling responses as to whether the disclosure of truth provides a sufficient basis for victims to come to terms with the perpetrators. Allowing perpetrators to go free in return for truth might intensify existing tensions by divulging the conspiracy and complicity of various institutions. Summarizing his argument of principled compromise, Vicencio offered a compelling argument when he said:

> [T]he inexactitudes of peaceful coexistence and national reconciliation are most likely to be born where legal, political and moral absolutes are decalcified under the spotlight of rigorous enquiry and a creative response to political realities. Principled compromise that ignores neither the realities of political context nor the wisdom of judicial insight captured in international human rights law can create a sustainable breakthrough toward achieving peace and reconciliation.[46]

In UNSCR 827 (1993) and 955 (1994) establishing the ICTY and ICTR, the Security Council indicated that prosecution of persons responsible for grave violations of human rights and humanitarian law will "contribute to ensuring that such violations are halted and effectively redressed."[47] The resolution proclaims that prosecution of the Rwandan genociders "would contribute to

[40] *Id* at 207.

[41] *Id* at 209.

[42] Bruce Ackerman, The Future of the Liberal revolution, cited in Villa Vicencio, *supra* note 18 at 206.

[43] *Id* at 212.; See also United States Institute of Peace, Info Advisory #18/T&R, CMSN Precedence, February 18,1999,available by request at usip_requests@usip.org.

[44] Charles Villa-Vicencio, *supra* note 18, at 211.

[45] *Id.*

[46] Charles Villa-Vicencio, s*upra* note 18 at 206-207.

[47] UNSC. Res. 827 (25 May 1993),UN. DOC S/Res/827, establishing the ICTY, Preamble; UNSC Res 955 (8 November 1994), UN DOC /Res/955 (1994) establishing the ICTR, See Preamble.

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the process of national reconciliation and to the restoration and maintenance of peace".[48]

1.4- Between Principle and Pragmatism: Reconciling Interests

While advocates of prosecution strongly argue that retributive justice is the means towards combating impunity and ensuring peace and reconciliation, others question the practicality of their argument. As Jose Zalaquett, Villa Vicencio, and others argued; there are practical difficulties in applying the noble principles of conventional retributive justice to the dynamics of societies in transition—where the military has remained in large control of the army, rebel groups and repressive regimes preconditioned peace-talks to amnesty. These realities call for new approaches that reconcile different view points.

Martti Ahtisaari, Noble Prize winner and acclaimed Peace-Maker, recognizes the need to punish offenders for a society to make a clean break with its horrific past.[49] But, he argues that recording past injustice and crafting a platform for national reconciliation is not always best achieved through prosecution.[50] Ahtisaari correctly observed that trials are not always the best instruments for memory and healing and the point should, therefore, be made that instead of replacing prosecution with other schemes that engenders a persistent culture of impunity, they should be augmented by other imperatives of justice.

Writing on El Salvadorian Truth Commission, Douglass W. Cassel offered an ingenious approach to the dilemma of transitional democracies when he argued that: "[i]n transitional societies, the accumulation of past human rights violations may far exceed the capacity of even a competent and honest judicial system to prosecute. Moreover, an attempt to prosecute all past violators might well provoke security forces to overthrow the incipient democratic government."[51] Without ignoring the interest of "incipient democracies" and grounding his argument in international human rights, Cassel suggests an array of options that ranges from selective and exemplary prosecutions to future prosecutions or Security Council mandated prosecutions.[52] He ruled out *de jure* amnesty demonstrating the importance of timing; what

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[48] *Id.*

[49] Martti Ahtisaari, 'Justice and Accountability: Local or International?' in Ramesh Thakur and Peter Malcontent (eds.), *From Sovereign Impunity to International Accountability: The Search for Justice in a World of States*, (United Nations University Press,2004),p-xv.

[50] *Id.*

[51] Douglass W. Cassel, International Truth Commissions and Justice, in Niel J. Kritz, *supra* note 37 at 328.

[52] *Id.*

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Rachel S. Taylor; writing on "Cambodia's Joint Tribunal", called "Better Late Than Never."[53]

In a nutshell, while no single approach can fully resolve this debate, it is beyond doubt that international law demands prosecution of gross violations of human rights and humanitarian law. While Zalaquett's "ethic of responsibility" provides an imaginative approach with respect to transitional societies, Diane's orientation of prosecutorial justice should always be the acid test in all cases: i.e., even if there is a competing interest of peace and transition into democracy, prosecution should be considered to the extent practicable. If prosecution is impossible or dangerous to the integrity of the nation, a cautious and comprehensive step-based approach suggested by Professor Douglass Cassel [54] must be adopted as minimum standard to avoid a moral degeneration.

2. Acts Repugnant to *Jus Cogens* Norms: The Duty to Prosecute

2.1- The Duty to Prosecute for Breach of *jus cogens* Norms

A norm of *jus cogens* is a preemptory norm of international law that cannot be set aside by agreement and "from which no derogation is permitted." [55] A violation of a norm of this nature requires states to investigate, prosecute and punish perpetrators.[56] Though the content of these norms and how this status can be attained is not clear, its distinctive nature and normative superiority is beyond dispute. Nevertheless, it is not totally clear how and when a norm of *jus cogens* generates *erga omnes* obligations despite certain writer's contention that obligations *erga omnes* "pertains to the legal implications arising out of a certain crime's characterization as *jus cogens*". [57]

The concept of obligations *erga omnes* is expounded by the ICJ in the *Barcelona Traction Case* where the court decisively held that:

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[53] *Id* at 329; Rachel S. Taylor, 'Better Later Than Never: Cambodia's Joint Tribunal', in Jane E. Stromeseth, *Accountability for Atrocities: National and International Responses*,(Transnational Publishers), (2003), p-237.

[54] See *supra* note 51.

[55] The Vienna Convention on the Law of Treaties, Adopted 23 May 1969,entered into force on 27 January 1980, 1155 UNTS,331,344,art.53; M. Cherif Bassiouni & Edward M. Wise, *Aut Dedere Aut Judicare*, *The Duty to Extradite or Prosecute in International law*, (Martinus Nijhoff Publishers, Dordrecht/ Boston/London,1995),p-51.

[56] *See* M. Cherif Bassiouni, *infra* note 58 at 50.

[57] M. Cherif Bassiouni, International Crimes: Jus Cogens and Obligations Erga Omnes, 59 Law &Contemporary Problems,1996, p-1.

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> [A]n essential distinction should be drawn between the obligations of a state towards the international community as a whole, and those arising vis-à-vis another state in the field of diplomatic protection. By their very nature the former are the concern of all states. In view of the importance of the rights involved, all states can be held to have a legal interest in their protection; they are obligations *erga omnes*.[58]

According to Cherif Bassiouni, when a prohibition of an act attains the status of *jus cogens* generating *erga omnes* obligation, it proscribes "the duty to prosecute or extradite, state liability, the inapplicability of statute of limitations, the inapplicability of any immunities including the head of state, the nullity of defenses of superior order, non-derogation under state of emergency and universal jurisdiction."[59] Though there is no consensus as to a complete list of rules of international law that attained the status of a norm of *jus cogens* generating *erga omnes* obligation, it is beyond dispute that piracy, the prohibition on genocide, war crime, crimes against humanity, slavery and aggression constitutes a preemptory norm from which derogation is impermissible.[60] It follows that the question of prosecuting, extraditing or cooperating in the prosecution of those accused of genocide, war crimes and crimes against humanity is not a matter of choice left to the discretion of individual states; rather, it is a duty of all states. The GOS is no exception to this rule.

2.1- Duty to Prosecute for Gross Violations of Human Rights and Humanitarian Law

Contemporary international human rights impose on the state the duty to investigate and prosecute for gross violations of human rights and humanitarian

[58] *Barcelona Traction, Light and Power Co. Ltd, (Belgium v. Spain)*,1970, ICJ 3, 32(Feb.5); Reservations to the Genocide Convention, (Advisory Opinion), 1951p-8, available at http://teaching.law.cornell.edu/faculty/drwcasebook/docs/genocide%20convention%20decision.pdf.

[59] M. Cherif Bassiouni, *supra* note 57 at 1; *Application of the Convention on the Prevention and Punishment of the Crime of Genocide*, Preliminary Objections, Judgment, ICJ reports(1996),595 at 616; For cases of state liability, *See Armed Activities on the Territory of the Congo (Democratic republic of the Congo V. Uganda*),ICJ 3, 19 December 2005,available at http://www.icj-cij.org/docket/files/116/10455.pdf; Convention on the Non-Applicability of Statutory Limitations to War Crimes and Crimes Against Humanity, Adopted in 1968, entered into force 11 Nov 1970, art, 1; *See* also ICRC, *Customary International Humanitarian Law* (Cambridge University Press) (2005),p-603 recognizing universal jurisdiction for war crimes in non-international armed conflict; International Law Commission, Draft Code of Crimes against the Peace and Security of Mankind, 2Yearbook of International Law Commission,(1996), art.7.

[60] *See* M. Cherif Bassiouni, *supra* note 57 at 3-4.

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law.[61] The American Convention on Human Rights provides for the "right to a hearing, with due guarantees and within a reasonable time, by a competent, independent and impartial tribunal."[62] The most cited decision of the Inter-American Court of Human Rights in *Velasquez Rodriguez v. Honduras Case* made the duty to "prosecute norm" the central caveat of human rights obligation and hence significantly influenced thinking about the general obligations of states for human rights norms.[63]

Furthermore, the Inter-American Court had the occasion to opine on the language of "ensure respect" contained in Article 1(1) of the American Convention on Human Rights.[64] In its prominent judgment against Honduras, the Court has decisively declared that "[A]s a consequence of this obligation, the state must prevent, investigate and punish any violations of the rights recognized by the Convention."[65] Today, it is a settled principle in the jurisprudence of international human rights that human rights instruments in general involves the obligation to respect, prevent, fulfill, and protect violations of human rights. [66]

The African Charter to which the Sudan is a party recognizes the right of every person to have his cause heard by competent national organs against acts violating fundamental rights. [67] The African Commission on Human and Peoples' Rights correctly emphasized that the Charter as a human rights treaty, entails four layers of obligations, namely, the duty to respect, protect, promote, and fulfil these rights.[68] In interpreting the duty to protect, the Commission has noted that states have the duty to protect the right holders against intrusion upon their rights and provide remedy when they are violated. [69]

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[61] *See Velasquez Rodriguez v. Honduras*, *infra* note 63; *Khashiyev and another v. Russia, infra* note 77; T*he Social and Economic Rights Action Centre and the Centre for Economic and Social Rights / Nigeria, infra* note 71.

[62] The American Convention on Human Rights, Adopted on 22 November 1969, entered into force on 18 July, 1978, art.8 (1), available at< http://www.hrcr.org/docs/American_Convention/oashr.wpd>, accessed 15 December, 2007.

[63] *Velasquez-Rodriguez v. Honduras*, Inter-American Court of Human Rights, 1988, Ser.C, No.4, 9, Human Rights Law Journal 212 (1988) in Steiner and Alston, *supra* note 8 at 213.

[64] *Id.*.

[65] *Id.*

[66] *The Social and Economic Rights Action Center and the Center for Economic and Social Rights / Nigeria*, Comm. No. 155/96, African Commission on Human and Peoples' Rights, Fifteenth Annual Activity Report, 2001-2002, May 2002, Pretoria, South Africa, Para 44, p-6.

[67] African Charter on Human and Peoples' Rights, Adopted 27 June 1981,entered into force 21 October, 1986, art.7 (1)(a).

[68] See the Social and Economic Rights Action Centre and the Centre for Economic and Social Rights / Nigeria, *supra* note 66.

[69] *Id* at para-46, P-7.

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The European Court of Human Rights decisively pronounced state's duty to carryout a genuine investigation and prosecution of human rights violations.[70] In *Khashiyev and another v Russia*, the European Court of Human Rights has held that a mere attempt to investigate a human rights violation is not considered an efficient investigation and states must exercise due diligence necessary within the circumstances to investigate and punish offenders.[71]

The Updated Set of Principles on Impunity considers prosecution as a *conditio sina qua non* in the fight against impunity.[72] These Principles blame the prevalence of impunity on the failure of the state to investigate, prosecute and duly punish perpetrators of atrocity crimes.[73] Principle 19 articulates a state's duty to prosecute, try and duly punish those responsible for serious crimes under international law.[74] As a matter of classical international law, these Principles on Impunity do not constitute an independent, authoritative, and binding source of international law. However, those norms enunciated in the document and which pertains to the duty of the state to investigate, try, and punish, have already been crystallized into customary rules of international law.[75] This has been decisively affirmed for the first time by the pronouncements of the Inter-American Court of Human Rights in *Velasquez Rodriguez Case.*[76] This landmark judgment by the Court has been considered as the most authoritative exposition of the law of human rights and reflects a customary norm.[77] As a result, it was cited by major human rights bodies and

[70] Vasilev v Bulgaria (App no 48130/99), European Court of Human Rights, ECHR, 48130/99, 20March, 2007, Para-75; *Khashiyev and another v. Russia* (App Nos. 57942/00 and 57945/00), ECHR, 14 October 2004 and 27 January 2005,Para-157-158.

[71] *Khashiyev and another v. Russia* (App Nos.5794/00 and 57942/00), ECHR, 14 October 2004 and 27January 2005,Para--158.

[72] *See generall,* the Updated Set of Principles on Impunity, *supra* note 2, Principle I-V.

[73] *Id* at Principle I.

[74] *Id* at Principle 19.

[75] *See Velazquez Rodriguez v. Honduras*, *supra* note 63; *Khashiyev and another v. Russia, supra* note 70*; The Social and Economic Rights Action Centre and the Centre for Economic and Social Rights / Nigeria*, *supra* note 66; Diane F. Orentlicher, *supra* note 9; M. Cherif Bassiouni and Edwards M. Wise, *supra* note 55.

[76] See *Velazquez Rodriguez v. Honduras*, *supra* note 63. The Court proclaimed that the obligation to 'ensure the free and full exercise of the rights recognized by the Convention' implies the "duty of States Parties to organize the governmental apparatus and, in general, all the structures through which public power is exercised, so that they are capable of juridically ensuring the free and full enjoyment of human rights.

[77] See The African Commission on Human and Peoples' Rights in *The Social and Economic Rights Action Centre and the Centre for Economic and Social Rights / Nigeria*, *supra* note 66; *See* Henry J Stei-

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writings of 'the most highly qualified publicist of the various nations of the world'. [78]

2.2- Prosecuting the Darfur Atrocities: A Fight Against Impunity or An International Political Hypocrisy?

Before the indictment of Sudanese President, Omar Hassan Al-Bashir, one might think that prosecution of persons responsible for serious crimes will potentially serve the purpose of justice without compromising peace. After Al Bashir's indictment, though, international organizations and individual states have protested against the indictment and requested the Security Council to defer the situation in the interest of peace.[79] They argued, the prosecution of Al Bashir jeopardizes the hope for peace and perpetuates the suffering of civilians.[80] Others argue that instead of jeopardizing the progress towards peace and exacerbating the conflict, the indictment will induce the President and alleged co-perpetrators to aggressively pursue peace.[81] Although there is no empirical evidence to that effect, Al-Bashir's recent declaration of unconditional and unilateral cease-fire has been viewed as a confidence-building measure intended to soften the ICC, the Prosecutor and win the heart and minds of his African counterparts.[82]

Furthermore, when it is very apparent from the circumstances that the effort for justice is scuttling efforts for peace, the Security Council has the authority to defer the situation.[83] Since the ICC Statute stipulates for deferral of the entire "Situation", not specific cases, the Council should demand stronger measure evidencing commitment by the GOS and rebel forces to make pain-

. ner and Philip Alston, *supra* note 8 at 180 -184; James Nickel, How Human Rights Generate Duties to Protect and Provide, 15 Hum. Rts. Q.(1993), 77, P-80.

[78] *Velasquez Rodriguez v. Honduras*, *supra* note 63; *Social and Economic Rights Action Centre and the Centre for Economic and Social Rights / Nigeria*, *supra* note 66; Diane F. Orentlicher, *supra* note 9; M. Cherif Bassiouni and Edwards M. Wise, *supra* note 55. See the International Criminal Court, *infra* note 121.

[79] Sudan Tribune, Sudan confident China, Russia to block Al-Bashir indictment 4 August 2008 07:00, available at< http://www.sudantribune.com/spip.php?article28141>, accessed on 26 January, 2009.

[80] *Id.*

[81] Simon Montlake, The Christian Science Monitor, Sudan cease-fire call gets wary reception in Darfur, Many say the Sudanese president is trying to prevent a war-crimes indictment, 13 November, 2008, available at <http://www.csmonitor.com/2008/1113/p99s01-duts.html>, accessed on 14 December, 2008.

[82] *Id*

[83] The Rome Statute of the International criminal Court, Text of the Rome Statute circulated as document A/CONF.183/9 of 17 July 1998, entered into force on 1 July 2002, art.16.

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ful concessions for peace before it defers the situation.[84] Deferral of the "Situation" entails all ICC cases in Darfur, not just the case against Al-Bashir.[85] However, in an increasingly chaotic region where neither the rebel groups nor the GOS are serious about peace, the persistence for justice does not, of itself, constitute an impediment to peace.

Any argument which involves *de facto* or *de jure* amnesty to perpetrators of atrocity crimes unleash a clash of high normative principles that entails the reexamination of the utility of the very norms that are inherent to all legal systems. However, the reexamination of the norms, if at all necessary, must anticipate possible peace for Darfuris and transition into a democracy that guarantees a sustained peace in which human rights and fundamental freedoms flourish. Even when transition and lasting peace are real possibilities, legal and ethical principles exact dispensation of justice in a way that accommodates the concerns of victims, the society, and the state.

Writing on the controversy between peace and justice, Louise Arbour correctly summarized the appropriate course of action for situations like Darfur when she said: "The abandonment—even the postponement—of the process of justice is an affront to those who obey the law and a betrayal of those who rely on the law for their protection; it is a call for the use of force in revenge and, therefore, a bankruptcy of peace." [86] This view is at par with the view of the Council that "justice and accountability are critical to achieving lasting peace and security in Darfur." [87] Consistent with this assertion, Nsongurua J. Udombana made an appealing case in the call for justice when he wrote:

> Prosecuting perpetrators of the Darfur mayhem and making reparations to victims are essential for victims to come to terms with their loss. Such an exercise could have a positive impact on peace and security in Sudan, unless peace is intended to be a brief interlude between conflicts. Prosecution also has a potential to deter vigilante justice, now or in the future, it will discourage those who would want to seek revenge and take justice in their own hands.[88]

If an all inclusive political process that recognizes difference and upholds ideal notions of pluralism and multiculturalism is not instituted, peace will

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[84] *Id.*

[85] *Id.*

[86] Louise Arbor, UN High Commissioner for Human Rights, Address to the UN Commission of Human Rights in UN: No More Delay on Darfur, Human Rights Watch,March,18,2005,available at <http:/hrw.org/English/doc/2005/03/18/sudan10337.htm>. See also Nsongurua J. Udombana, *infra* note 98,at ,p-9.

[87] Security Council Resolution 1593/2005, 31 March, 2006.

[88] Nsongurua J. Udombana, Pay back Time in Sudan? Darfur in the International Criminal Court, 13 Tul. J. Comp. & Int'l L. (2005), 1, 9.

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simply be a brief interlude between conflicts with various groups. It is imperative that the GOS works to restore confidence in the rule of law and repress future violations by using prosecution as both a forward and backward looking strategy. Until the parties realize the legal and moral obligation to honor the dignity and intrinsic worth of their people, they should not be allowed to continue perpetrating atrocities with impunity. [89]

3. Security Council Referral of the "Darfur Situation": A Tilted Scale?

3.1- The Security Council Referral: Implications in Darfur and Beyond

When the Security Council has made the first historic referral to the ICC amid political standoff, many in the human rights movement believed that the referral turned a new page in the history of the human rights movement. Indeed, Resolution 1553 set forth a profound precedent demonstrating that the world can come together to save humanity even in the face of a sharp political standoff. This being the clearer message, the indictment of a sitting head-of-state under this resolution has led some to describe the decision to arraign the President as "bad of international law, bad for the Sudanese people -and bad for America." [90] Daniel Hannan accuses the ICC of overturning centuries of settled rules of territorial jurisdiction to enforce a covenant against states without its expressed or implied consent. [91] Whether the referral of the situation with the implicit consent of those who openly opposed to the Court is a tilted scale against the powerless will be discussed later. Though profoundly political in nature, it may be said that the decision was the right-move in the right direction.

The alleged implication of top civilian leaders in the ICC crimes left a doubt in the ability of the Sudanese judicial process to genuinely try and punish suspected perpetrators. That doubt intensified the controversy between the ICC and the GOS on how to best handle questions of accountability. At any

[89] Robert K. Goldman, "Amnesty Laws and International Law: A Specific Case," in International Commission of Jurists, Justice Not Impunity 209(Geneva: ICJ, 1993), in Naomi Roht-Arriaza, Impunity and Human Rights in International Law and Practice (ed.)(Oxford University Press),(1995), p-57.

[90] Daniel Hannan, Americans can Now Be Tried By the International Criminal Court, 6 March 2009, available at <http://blogs.telegraph.co.uk/daniel_hannan/blog/2009/03/06/americans_can_now_be_tried_by_the_international_criminal_court>, accessed on 7 March, 2009.

[91] *Id.*

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rate, neither peace nor justice will be realized unless the ICC, the Prosecutor, and the GOS design a *modus operandi,* which former UN Secretary General Koffi Annan, captured in the following terms:

> Justice, peace and democracy are not mutually exclusive objectives, but rather, mutually reinforcing imperatives. Advancing all three in fragile post-conflict settings requires strategic planning, careful integration and sensible sequencing of activities. Approaches focusing only on one or another institution, or ignoring civil society or victims, will not be effective. Our approach to the justice sector must be comprehensive in its attention to all of its interdependent institutions, sensitive to the needs of key groups and mindful of the need for complementarity between transitional justice mechanisms.[92]

The Prosecutor is expected to craft a workable strategy: striking balance between competing interests of peace and justice, questions of legitimacy and pragmatism, maintaining his independence and securing the cooperation of the Sudanese government.

Beyond Darfur, the referral is a clear signal to states and individuals that horrific violations of norms protected under the Rome Statute is inescapable. For the three veto wielding states, China, Russia and U.S.A., their abstention constitutes a tacit recognition of the ICC and its significance in the international criminal justice system. [93]

3.2- The International Criminal Court: Whom and How to Prosecute

> Mass atrocity could not occur without the organized cooperation of many, often numbering in several thousands. These include both soldiers of various rank and sympathetic civilians in government and private sectors. Their cooperation takes innumerable forms, and a satisfactory method for ascribing particular harms to specific defendants is not always readily at hand. This is particularly true of those not physically present at the crime scene. [94]

In deciding on the question of whom to prosecute for the atrocities, at least two factors must be critically assessed. First, since the ultimate purpose of prosecution and punishment is averting mass atrocities *ex ante* and redressing

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[92] Secretary General's Report to the Security Council on the Rule of Law and Transitional Justice in Conflict and Post-Conflict Societies, available at htttp://siteresources.worldbank.org/INTLAWJUSTINST/Resources/RuleofLawTransitional.pdf>, see summary, accessed on 22 October, 2007.

[93] Nsongurua Udombana, *supra* note 88, [emphasis added.]

[94] Mark Osiel, The Banality of Good: Aligning Incentives Against Mass Atrocity, (2005),105 Colum. L. Rev. 1751, 1751-1752.

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it *ex post*, prosecution strategies must take due account of this purpose. Secondly, given the size of both the victims and the perpetrators, the prosecutor must thoroughly assess all the existing options before deciding how many of the perpetrators to prosecute.

The first decision to be made is whether to prosecute the "big fish" or the "small fry". Accordingly, the question one should ask is whether the gravity of atrocities perpetrated by the *small fry*, who actually committed the acts, leads us to the conclusion that endorses punishment of only the *big fish*. How can we make a distinction between the gravity of the acts of the "big fish" that have not actually killed but ordered, facilitated or approved those acts and those of *smaller fry* who actually committed the atrocities? On what basis may the acts of the subordinates be fairly ascribed to the most elevated superior, from whom they are so distant in space and time? Should the prosecutor follow the precedents of the ICTY prosecutors who have relied upon the doctrine of participation in a joint criminal enterprise? Should it invoke command responsibility? So far, the two current indictments against the President, the State Minister and the militia leader supports the view that the Prosecutor is going to pursue the *big fish* that bears the greatest responsibility for the atrocities.

3.3- ICC and the 'Special Criminal Courts on the Events in Darfur': The Challenges of Complementarity

The most decisive power of the ICC derives from the Principle of Complementarity enunciated in Article 17 of the Statute and underpins the entire functioning of the Court. Complementarity is a check on the absolute westphalian notion of sovereignty. The drafters of the Rome Statute were mindful of the many examples of sovereigns on the international arena and designed Article 17 to govern the conduct of those who let horrendous atrocities go unpunished. In addition to numerous other checks on the ICC's powers, the Complementarity regime allows "prosecutorial prerogatives of responsible states to use their forums to enforce international law[95] while at the same time providing for a back-up tribunal to step in and trump traditional sovereignty claims for failed or recalcitrant regimes." [96]

Sudan is not a State Party to the ICC. UNSCR 1593 (2005) provided ICC with jurisdiction. The Rome Statute bestows primary jurisdiction on the states to prosecute crimes that fall under the jurisdiction of the ICC. [97] While

[95] Larry Charles Dembowski, The International Criminal Court: Complementarity and Its Consequences, in Jane E. Stromseth, Accountability for Atrocities; National and International Responses, (Transnational Publishers, Ardsley, New York),(2003) at p-140.

[96] *Id.*

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state jurisdiction is the rule, ICC jurisdiction is exercised in exceptional circumstances if the state's unwillingness or inability to genuinely exercise jurisdiction over the accused.[98] In the case of Darfur, the question will be whether the Sudanese Special Criminal Courts on the Events in Darfur (hereinafter the SCCED) [99] setup to replace the ICC can legally override ICC jurisdiction.

The preamble to the Rome Statute declares that "most serious crimes of concern to the international community must not go unpunished" [100] and it is the duty of every state to "exercise its criminal jurisdiction over those responsible for international crimes". [101] There is no doubt that Sudan has primary jurisdiction to redress the wrongs committed within its own territories. However, the GoS have expressed their opposition to the Security Council referral[102] and they have opined that the SCCED is "considered a substitute to the International Criminal Court".[103] Self-serving as those arguments appear to be and, of course they were, they cannot be automatically dismissed.

The ICC jurisdiction is contingent upon proof by the Prosecutor that the national system is either unwilling or unable to genuinely investigate and prosecute the perpetrators.[104] Indeed, it has been determined that the Sudanese legal system is either unwilling or unable to deal with the atrocities committed in Darfur. In the words of the UNCI:

> The Sudanese justice system is unable and unwilling to address the situation in Darfur. … Laws in force in Sudan today contravene basic human rights standards. Sudanese criminal laws do not adequately proscribe war crimes and crimes against humanity, such as those carried out in Darfur, and the Criminal Procedure Code contains provisions that prevent the effective prosecution of these acts.[105]

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[97] The Rome Statute, *supra* note 83, article 17(1)(a) providing that the "Court shall determine that a case is inadmissible where it is being investigated or prosecuted by a state which has jurisdiction over it, unless the states is unwilling or unable genuinely to carryout investigations…" Emphasis added.

[98] The Rome Statute, *supra* note 83 at art.17.

[99] Human Rights Watch: Special Courts Not Prosecuting War Crimes, Nairobi, 8 June 2006, available at <http://www.irinnews.org/report.aspx?reportid=59255>, Accessed: 20 August 2008.

[100] The Rome Statute, *supra* note 83, Preamble Para-4.

[101] *Id* at Preamble,Para-6.

[102] Nairobi, 24 June 2005 (IRIN); Sudan's own judiciary was qualified and ready to try those accused of any violations in Darfur." The GOS declared its "total rejection" of UNSCR 1593, accusing the ICC of lacking justice and objectivity.

[103] *Id.*

[104] The Rome Statute, *supra* note 83, art.17.

[105] UNCI, *supra* note 7 at 5.

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However, since the finding of the UNCI predates the establishment of the SCCED, the Prosecutor must prove to the satisfaction of the Trial Chamber that his case is admissible and investigation by the SCCED falls short of the requirements of Article 17. The principle of complementarity limits the power of the ICC by creating a procedural hurdle to the admissibility of cases and in a way safeguards the rights of the state whose legal system is prepared to pursue alleged perpetrators. All that Sudan is expected to prove is that it is willing and able to genuinely prosecute the individuals on the list of the Prosecutor's indictment for the same conduct alleged by the Prosecutor.

The two Prosecutor's cases relate to the President of the Republic, Omar Hassan Al Bashir and Ahmed Harun (Former Minister of State for the Interior) and Ali Kushayb (Janjaweed militia leader) for "a systematic and organized initiative to attack civilian populations in Darfur".[106] In *the Prosecutor v. Thomas Lubango,* the Pre-Trial Chamber has enunciated the admissibility requirements of the Statute when it pronounced that: "it is a *conditio sine qua non* for a case arising from the investigation of a situation to be inadmissible that national proceedings encompass both the person and the conduct which is the subject of the case before the Court".[107] On its decision on the Prosecutor's application for an arrest warrant for Ahmed Harun and Ali Kusheyb, the Pre-Trial Chamber pronounced that the case is admissible and falls within the jurisdiction of the Court.[108]

In the case against Ahmed Harun and Ali Kusheyb, the Prosecution has shown that there is no national proceeding at all against Ahmed Harun in connection with Darfur for any of the alleged crimes.[109] In the case of Ali Kushayb, the SCCED has launched an investigation involving him and an-

[106] The International Criminal Court, Fifth Report of the Prosecutor of the International Criminal Court to the UN Security Council Pursuant to UNSCR 1593(2005) (hereinafter Fifth Report of Prosecutor to the UNSC or simply The Fifth Report), p -8, available at <http://www.icc-cpi.int/library/organs/otp/ OTP_ReportUNSC5-Darfur_English.pdf.>, accessed on 20 September 2008.

[107] *The Prosecutor v. Thomas Lubanga Dyilo*, Situation in the Democratic Republic of the Congo, Trial Chamber I, Decision on the Prosecutor's Application for a Warrant of Arrest Pursuant to Article 58 of the Rome Statute Case No.ICC-01/04-01/06,10 February 2006, at p-20, available at <http://www.icc-cpi.int/library/cases/ICC-01-04-01-06-8-US-Corr_English.pdf.>.

[108] *Prosecutor v. Ahmed Muhammad Harun ("Ahmed Harun") and Ali Muhammad Al-Abd-Al-Rahman("Ali Kushayb),* Situation in Sudan, Pre-Trial Chamber I, Decision on the Prosecution Application under Article 58(7) of the Statute, No.ICC-02/05-01/0, The Fifth Report, *id* at 7-8.

[109] Fifth Report of the Prosecutor to the UN Security Council, *supra* note 106.

[110] *See* Report of Human Rights Watch, available at http://hrw.org/backgrounder/ij/sudan0606/1.htm; The Fifth Report at p-7.

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other 12 individuals against whom a *prima facie* evidence has been found. [110] However, those investigations are for a separate incident of a very marginal nature compared to the prosecution's case and they are not related to those investigated by the prosecutor.[111] In summarizing the matter in which the Pre-Trial Chamber has ruled in his favor, Prosecutor Luis Moreno-Ocampo said:

> There is no investigation in the Sudan into such a criminal conduct. The Sudanese investigations do not encompass the same persons and the same conduct which are the subject of the case before the Court. To the extent that the investigations do involve one of the individuals named in the prosecution, they do not relate to the same conduct which is the subject of the case before the Court. National proceedings are not in respect of the same incidents and address a significantly narrower range of conduct. [112]

While the individuals are suspected of committing war crimes and crimes against humanity, trying them for theft and slaughter of a herd of sheep appears as an insult to the victims and constitutes an audacious affront to international standards against impunity. This is indeed a typical manifestation of the inability and unwillingness of the system to prosecute perpetrators and one intended to shield them from international prosecution—making the ICC prosecutions all the more important. Thus, SCCED prosecutions do not meet the standards set forth in Article 17 of the ICC Statute to override ICC jurisdiction.

3.4- Cooperation with the ICC: A Legal Obligation or an International Political Expedience?

As early as 1973, the UN General Assembly adopted a historic resolution which required all states to cooperate in the punishment, detection, arrest and extradition of persons guilty of war crimes and crimes against humanity. [113] Both the Geneva Conventions and the Torture Convention contains explicit provisions dealing with prosecution or extradition of persons guilty of grave breaches and torture. [114] It is now an established norm of customary interna-

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[111] Fifth Report of the Prosecutor to the UN Security Council, *supra* note 106.

[112] The *Prosecutor v. Ahmed Muhammad Harun* ("Ahmed Harun")and Ali Muhammad Al-Abd-Al-Rahman("Ali Kushayb), *supra* note 108, p-9.

[113] GA Res. 3074(XXVIII), Principles of International Cooperation in the Detection, Arrest, Extradition and Punishment of Persons Guilty of War Crimes and Crimes Against Humanity, UN Doc. A/9034/Add1(1973).

[114] *See* The Four Geneva Conventions of 12 August 1949,Geneva I at art.49, Geneva II, at art.50, Geneva III, at art.129, Geneva IV, at art.146; UN Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, in force 26 June 1987, art.5(2), 8.

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tional law that all states have obligation *aut dedere aut judicare,* to prosecute or extradite offenders of preemptory norms of international law. [115]

Mark Lattimer and Philippe Sands maintain that in most cases, international human rights impose an obligation on state to prosecute or to cooperate in their prosecution rather than licensing them to abuse human rights with impunity.[116] In its concluding observation on Sudan, the Human Rights Committee urged the GOS to respect its duty to prosecute perpetrators of human rights and cooperate with the ICC. [117] As stated by Juan Mendez, Former Special Advisor of the Secretary General on Genocide, "cooperation with the ICC is not a matter of choice for any state". [118] Moreover, UNSCR 1593, a Chapter VII resolution, required the Sudan to cooperate with the ICC. [119] Accusing the ICC for lack of "objectivity and justice", and contrary to its international obligation, the Sudan has totally rejected the ICC and UNSCR 1593.[120] In its decision issuing an arrest warrant for President Hassan Al-Bashir, the Pre-Trial Chamber reiterated the position of the GOS and their refusal to cooperate with the Court.[121]

4. The Case against Al Bashir: the Demise of a Sitting Head-of-State Immunity or Political Vendetta?

Omar Hassan Al-Bashir is the President of the Republic of Sudan since 1989. Ever since he assumed power in June of that year, he has engaged in a constant political and military battle with his adversaries from within and outside Khartoum.[122] In May of 2007, the judges of the ICC issued an arrest warrant

[115] *See* M. Cherif Bassiouni, *supra* note 57.

[116] M. Lattimer & P. Sands QC, *Justice for Crimes Against Humanity* (ed.),(Hart Publishing: 2003), p-4.

[117] The Human Rights Committee, Consideration of Reports Submitted By States Parties Under Article 40 of the Covenant, CCPR/C/SDN/CO/3/CRP.1,26 July 2007,p-3, available at <http://www.unhcr.org/cgi-bin/texis/vtx/refworld/rwmain/opendocpdf.pdf?docid=46e516f52>, accessed on 18 December 2007.

[118] *See* Juan Mendez, Former UN Secretary General's Special Advisor on Genocide, available at <http://www.irinnews.org/report.aspx?reportid=56662>, accessed on the 27 July 2008.

[119] UNSCR 1593, Preamble.

[120] IRIN, SUDAN: Judiciary Challenges ICC over Darfur Cases, *supra* note 102.

[121] The International Criminal Court, Decision on the Prosecution's Application for a Warrant of Arrest against Omer Hassan Ahmed Al-Bashir, Case No: ICC-02/05-01/09, Para-228, 229. The Chamber specifically referred to one incident in which it noted "that the embassy of the State of Sudan in The Hague, The Netherlands, refused on 2 May 2007 and 11 June 2007, to receive from an officer from the Court's Registry, the cooperation request for the arrest and surrender of Ahmad Harun and Ali Kushayb".

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for Ahmed Haroun and Ali kusheyb.[123] On 14 May, 2008, Albashir publicly declared that he "will not hand-over Haroun or any Sudanese to the ICC."[124]

Having failed to secure the cooperation of Sudanese President, Hassan Al Bashir, in the apprehension and surrender of Ahmed Harun and Ali Kusheyb, Prosecutor Moreno-Ocampo turned to the Commander-in-Chief himself.[125] Accusing him for the most atrocious crimes imaginable: genocide, crimes against humanity and war crimes, the Prosecutor has made an unprecedented move in indicting a sitting Head-of-State.[126] Requesting an arrest warrant for the President, the Prosecutor made his toughest allegation claiming that "As Al Bashir decided and set out to destroy in part the Fur, Masalit and Zaghwa groups, on account of their ethnicity. His motives were largely political. His pretext was a "counterinsurgency". His intent was genocide."[127]

Despite his allegation, the decision of the OTP to indict Al Bashir has received a mixed reaction from around the world. While the African Union, the Arab League and many individual African leaders expressed disappointment and outrage at the decision of the Prosecutor, human rights activists have hailed the decision as a major breakthrough ushering in a new era in which those who are given the most power to do harm or good will be held to the "highest standards of international law, not the lowest." [128]

Sudanese neighbor, Ethiopia, has expressed its discontent with the indictment calling it a "single minded pursuit of justice."[129] The Ethiopian Premier linked his country's opposition to the indictment with the interest of peace,

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[122] The ICC, Situation in Darfur, The Sudan, Summary of the Case, Prosecutor's Application for Warrant of Arrest underArticle58 Against Omar Hassn Al Bahir, 14 July 2008, p-3.

[123] See *supra* note 108 at 11.

[124] Eighth Report of the ICC Prosecutor to the UNSC pursuant to UNSCR 1593 (2005), para-50.

[125] The ICC, Situation in Darfur, The Sdan, *supra* note 122 at page 3, English Report of the ICC Prosecutor to the UNSC, *id* at para-25, arguing that "Mr. Al Bashir as President and Commander in chief of the Armed Forces exercises both *de jure* and *de facto* authority. He provided directions to the operations against the civilians in Darfur. While he delegated authority to his subordinates, supreme authority was always his. He ensured the coordination of operations through the State administration and through Locality and State Security Committees reporting to him. He participated personally in the recruitment and direction of Militia/ Janjaweed incorporated into reserve forces. The events that occurred in Darfur, in particular their systematic and planned nature could not have occurred without his approval and will."

[126] UNSCR 1593, *supra* note 87.

[127] The ICC, The Situation in Darfur, The Sudan, Summary of the Case, *supra* note 122, p-3.

[128] Gilbert Sison, A King No More: The Impact of The Pinochet Decision on the Doctrine of Head of State Immunity, 78 Wash. U. L.Q. 1583, 1584.

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which according to him should not be trumped by the concern for justice.[130] Expressing his country's stance on the indictment of Al Bashir, the Ethiopian Minister for Foreign Affairs, H.E. Seyoum Mesfin, condemned any crimes against civilians and declared the indictment as unfair and unbalanced.[131] Eritrea on its part dismissed the indictment calling it an "insult" and "harassment" by the Western powers.[132] On the other hand, the Former U.S. Special Envoy to Sudan, Andrew Natsios has expressed his frustration over the indictment holding that the indictment:

> . . . [m]ay well shut off the last remaining hope for a peaceful settlement for the country. Without a political settlement, Sudan may go the way of Somalia, pre-genocide Rwanda, or the Democratic Republic of Congo: a real potential for widespread atrocities and bloodshed as those in power seek to keep it at any cost.[133]

Furthermore, the African Union, a body with unequivocal power to use military force against Member States to prevent gross violations of human rights,[134] expressed concern that such a pursuit of justice targeting the President of the Nation would only scuttle the effort for peace.[135] The AU Peace and Security Council anticipated the situation earlier; warning that any effort aimed at "justice should be pursued in a way that does not impede or jeopardize efforts aimed at promoting lasting peace in Sudan."[136] This Council has expressly condemned the move by the ICC prosecutor and called upon the Pre-Trial Chamber to refrain from issuing an arrest warrant against Hassan Al Bashir saying that "approval by the Pre-Trial Chamber of the application by the ICC Prosecutor could seriously undermine the ongoing efforts aimed at facilitating the early resolution of the conflict in Darfur and the promotion of long-lasting peace and reconciliation in the Sudan."[137]

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[129] Sudan Tribune, Ethiopia Voices Support to Sudan over ICC Charges Against Al Bashir, Monday, Tuesday 29 July 2008, available at < http:// www.sudantribune.com/spip.php?>, accessed on 10 November, 2008.

[130] *Id.*

[131] *Id.*

[132] *Id.*

[133] Andrew Natsios, ICC Prosecution of Bashir May Destroy Sudan, in *Larouche* Political Action Committee, available at <http://www.larouchepac.com/news/2008/07/16/icc-prosecution-bashir-may-destroy-sudan-says-former-u-s-spe.html>, accessed on 12 December, 2008.

[134] Constitutive Act of the African Union, OAU Doc. CAB/LEG/23.15, adopted at Lomé, Togo on the 11th of July, 2000, *entered into force* May 26, 2001, art.4 (h). Authorizing the 'Union to intervene in a Member State' pursuant to a decision of the Assembly in respect of grave circumstances, namely war crimes, genocide and crimes against humanity".

[135] *Id.*

[136] African Union Peace and Security Council, 141st Meeting, 11July 2008, Addis Ababa, Ethiopia.

[137] The Peace and Security Council, the African Union, Addis Ababa, Ethiopia, 21 July 2008, Para-9.

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According to African diplomatic sources familiar with Sudan and its political culture, "there are only two options for Sudan: progress toward a political settlement, or else chaos, war, and a failed state".[138] The AU and the Arab League have called upon the Security Council to defer the prosecution.[139] Within the Security Council itself, four members of the Council; Russia, China, Republic of South Africa and Libya have asked the Council to suspend the indictment for one year invoking the 'interest of peace' that empowers the Council to defer cases. [140]

For human rights groups, the indictment was considered a momentous victory for the global human rights enterprise. [141] For example, Africa Action, a Washington based human rights organization, dismissed the contention of the African Union, the Arab League and some regional leaders stating that "[T]he notion that, in this case, the pursuit of justice will scuttle a peace process for Darfur is misguided."[142] Human Rights Watch referred to Al Bashir's indictment as a "dramatic development" and called upon the African Union not to seek deferral, warning that such a move is tantamount to a denial of "redress to the victims of atrocities in Darfur." [143]

Despite the political earthquake that followed Al-Bashir's indictment, the Pre-Trial judges have found a reasonable ground to believe that two counts of "war crimes within the meaning of articles 8(2)(e)(i) and 8(2)(e)(v) of the

[138] *See* Larouche Political Action Committee, *supra* note 133.

[139] The Sudan Tribune, Islamic Countries Ask UN Defer ICC Move Against Sudan President, 5 August, 2008, available at <http://www.sudantribune.com/spip.php?article28159,>, accessed on 13 January 2009.

[140] Human Rights Watch, ICC Prosecutor Requests Arrest Warrant for Sudan's President, available at <http://www.hrw.org/en/news/2008/08/09/icc-prosecutor-requests-arrest-warrant-sudan-s-president>, accessed on 12 December, 2008.

[141] Charles Pierson, Pinochet And The End Of Immunity: England's House Of Lords Holds That A Former Head Of State Is Not Immune For Torture, 14 Temp. Int'l & Comp. L.J. 263, 263.

[142] Africa Action, "Al Bashir's Prosecution, Bold Step for Justice, Peace in Sudan",15 July 2008, available at <http://www.panapress.com/newslatf.asp?code=eng044728&dte=15/07/2008>, "The people of Darfur are strongly supportive of holding those responsible for genocide and crimes against humanity accountable, and the ICC is the only mechanism capable of fulfilling that role at this time," Gerald LeMelle, executive director of Africa Action, said in a statement.

[143] Human Rights Watch, "AU: Do Not Call for Suspending ICC's Investigation of President al-Bashir", A Letter Addressed to H.E. Mr. Kabinga Pande, Foreign Minister of Zambia, available at <http://www.hrw.org/en/news/2008/09/19/au-do-not-call-suspending-iccs-investigation-president-al-bashir>, accessed on the 12of December, 2008.

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Statute" [144] and five counts of "crimes against humanity of murder, extermination, forcible transfer, torture and rape, within the meaning of articles 7(l) (a), (b), (d), (f) and (g) respectively of the Statute, throughout the Darfur region, pursuant to the GoS policy to unlawfully attack were committed by GoS forces."[145] The Court has thrown out genocide charges by a two-one majority on the basis of insufficient evidence indicating Al-Bashir's direct or indirect intent to exterminate the alleged groups in whole or in part consistent with the rules of international law.[146] In finding Al Bashir's indirect responsibility for the two counts of war crimes and five counts of crimes against humanity, the Chamber found the GoS collectively responsible for designing and implementing a "common plan to carryout a counter-insurgency campaign" the core component of which constitutes the unlawful attack of civilian populations belonging to the Fur, Masalit and Zaghawa.[147] In establishing a legal nexus between the GoS and Al Bashir, the Chamber saw the President as the *de jure* and *de facto* head of the state of Sudan and found a "reasonable ground to believe that Omar Al Bashir is criminally responsible under article 25(3)(a) of the Statute as an indirect perpetrator, or as an indirect co-perpetrator, for those war crimes and crimes against humanity"[148] and issued an arrest warrant for his arrest and transfer to The Hague, The Netherlands.[149]

Although the indictment and even prosecution of a sitting Head of State for alleged violations of *jus cogens* norms is not unprecedented, Al Bashir's case is not uncontroversial. One of the controversies relates to the referral of the "Situation" to the ICC. Since the Sudan is not a party to the Rome Statute and bears no obligation towards the Court, the ICC can only intervene through Security Council authorization. Also, the referral of the "Situation" was done at least with the tacit consent of veto wielding political powers such as USA, China, and Russia-countries that denied jurisdiction to the ICC and in some cases gone to the extent of engaging in conduct contrary to the purpose and object of the Rome Statute.[150] As a result, some see the President's indictment as politically motivated.[151] After the Chamber's decision to issue the arrest warrant, many accused the Court as a new face of imperialism and

[144] The International Criminal Court, *supra* note 121 at Para-78.

[145] *Id* at Para-109.

[146] *Id* at Paras, 204-206. Dismissing the Prosecution's allegation, the Chamber held that "the Majority finds that the materials provided by the Prosecution in support of the Prosecution Application fail to provide reasonable grounds to believe that the GoS acted with *dolus specialis*/specific intent to destroy in whole or in part the Fur, Masalit and Zaghawa groups, and consequently no warrant of arrest for Omar Al Bashir shall be issued in relation to counts 1 to 3".

[147] *Id* at Paras- 213-215.

[148] *Id* at Para-223.

[149] *Id* at Para-248.

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asking whether President Bush and his aides or those who massacred children and women in the Gaza Strip will be equally subjected to this supra-national form of justice.[152] However, the history of prosecution of a head-of state has never been a politically neutral process and the debate is likely to continue.[153]

The Constitution of the ICC devised a prudent system that envisioned a world free of impunity for gruesome and violent crimes.[154] The Statute is premised on the principle that "there can be no impunity for perpetrators of genocide, crimes against humanity or war crimes."[155] To bring recalcitrant non-state-parties to the attention of the Court, the Statute authorized the Se-

[150] *See* Geert-Jan Alexander Knoops, The Prosecution and Defense of Peacekeepers under International Law, (Transnational Publishers, Ardsley: 2004), at 261; *See* also UNSC Res. 1422/2002 and Res. 1487/2003; When the entry into force of the ICC Statute approached, the United States asked the Security Council to grant immunity for peacekeepers in East Timor. The proposal was rejected and the United States warned the Council that it will consider withdrawing from present and future peacekeeping operations. When the Council was convened in 2002 to renew the mandate of the Peacekeeping operation in Bosnia, a NATO operation authorized by the Security Council, the US introduced a resolution that provided immunity for all military and civilian personnel and it was again rejected by the Council. As a result of the USA veto, the mandate of the Bosnia operation was extended three times for few days, days and finally after the adoption of the immunity resolution 1422, the mandate was renewed for six months.

[151] Sudan Tribune, Ethiopia Voices Support to Sudan over ICC Charges Against Al Bashir, *supra* note 129; Peter Clottey, African Union Demands Security Council Suspend ICC Indictment of Bashir, 22 July 2008, available at <http://www.voanews.com/english/archive/2008-07/2008-07-22-voa2.cfm?CFID=78687203&CFTOKEN=19309985>, accessed on the 10th of Dec., 2008.

[152] D'Escoto, President of the UN General Assembly: Bush Should Stand Trial, FARS News Agency, 07-03-2009, available at <http://english.farsnews.com/newstext.php?nn=8712171148>, accessed on 9 March 2009; Robert Parry, War Crimes and Double Standards, 8 March 2009, IN THESE TIMES, available at <http://inthesetimes.com/article/4289/war_crimes_and_double_standards/>, accessed on 9 March, 2009.

[153] The history of international prosecution of individuals has never been free of political alignments. The Nuremburg Tribunal is notorious for its politicization, and so was the trial of Slobodan Milosevic and Charles Taylor. This, however, does not mean that there are not good reasons to believe that those individuals were criminally responsible. The "Darfur Situation" is no exception.

[154] The referral by the Security Council is devised to deter unwilling states to refrain from engaging in egregious crimes offensive to common values and conscience of the global community. It is defining of state's determination to put an end to recurrent culture of impunity that plagued post conflict societies.

[155] See Statement by Mr. Luis Moreno Ocampo, Prosecutor of the International Criminal Court, Statement to the United Nations Security Council pursuant to UNSCR 1593 (2005) , 5 June 2008.

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curity Council to refer atrocities in their territory to the Prosecutor.[156] However, this does not change the fundamentally undemocratic nature of the Security Council resulting in the politicization of an independent judicial institution meant to repress heinous atrocities against humanity.

Traditionally, international law has recognized both procedural and substantive immunity for a Head of State and diplomats.[157] Though the Head of State immunity is not explicitly delineated in the Vienna Convention on Diplomatic Relations, it originates from a customary understanding of sovereign immunity deemed inseparable and indivisible from the leader of the state.[158] Customarily, "the immunity granted to the Head of State was seen as an extension of the immunity granted to the state itself."[159] Although the concept survived to the recent date, its importance was significantly reduced with the shift in emphasis from the sacrosanct conception of sovereign equality to the recognition of the overarching role of human rights culminating into individual liberty and accountability.[160] Former Czech President, Václav Havel emphatically stated that: "[t]he enlightened efforts of generations of democrats, the terrible experience of two world wars--which contributed to the adoption of the Universal Declaration of Human Rights-- have finally brought humanity to the recognition that human beings are more important than the state".[161]

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[156] *Id.*

[157] Joseph W. Dellapenna, Has the Time Come to Revise the Foreign Sovereign Immunities Act? 88 Am. Soc'y. Int'l. L. Prac. 509, 512 (1994) (as reported by Mark S. Zaid, Sovereign Immunity: A Comparative Perspective, 88 Am. Soc'y Int'l L. Proc. 509, 512 (1994)) in Gilbert Seson, *supra* note 128 at 1586. "The famous remark of King Louis XIV of France, "L'etat, c'est moi" (I am the state), best represents this notion of the state and the head of state being thought of as one and the same".

[158] *Tachiona v Mugabe*, 2001 US Dist. LEXIS 18712, 33-34 (US S.D. NY 2001), See judge Victor Marrero's holding that: "There is now growing recognition that the sovereign is solely the state and that the nation's ruler is a distinct entity".

[159] Joseph W. Dellapenna, *supra* note 157 at 1585; *Tachiona v Mugabe*, *id* at p- 148 at 33; Heidi Altman, The Future of Head of State Immunity: The Case against Ariel Sharon, April 2002, at p-4, available at <http://www.indictsharon.net/heidialtman-apr02.pdf>., accessed on 25 November, 2008.

[160] See U.N. Draft Code of Crimes against the Peace and Security of Mankind (1996) art. VII.; Draft Code on Crimes against the Peace and Security of Mankind, U.N.Doc. A/CN.4/L.532 (Jul. 8, 1996), reprinted in Lyal S. Sunga, The Emerging System of International Criminal Law: Developments in Codification and Implementation, Annex VI 435-45 (1997); Cf. Nuremberg Charter, art. 7.

[161] Václav Havel, Kosovo and the End of the Nation-State, N.Y. Rev. of Books, June 10, 1999, at 4 (reprinting President Havel's address to the Canadian Senate and the House of Commons in Ottawa, Canada on April 29, 1999) in Charles Pierson, *supra* note 141 at 263

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With this progressive evolution of international law, the place of the individual in the context of international human rights has continued to grow as the value placed on state sovereignty consistently declined.[162] This decline in sovereignty is marked by a decline in immunity for heads of states and diplomatic officials with respect to preemptory norms; norms that are considered by the international community as deep-seated and worthy of serious protection.

The end of the First World War marked the first time a head of state immunity came into question when the Treaty of Versailles signed between the belligerent parties called for a public arraignment of the then Emperor of Germany, William II of Hohenzollern.[163] In the aftermath of WWII, the London Charter declared official position of those accused of heinous crimes as irrelevant to a finding of criminal responsibility and punishment.[164] Although these trials were considered as victor's justice, the Nuremburg Principles have been crystallized into customary norms of international law. [165]

Moreover, the atrocities committed in the Former Yugoslavia and Rwanda has brought about a decisive blow to the concept of Head of State immunity. Article 7(2) of the Statute of the ICTY and Article 6(2) of the Statute of the ICTR declares that "[t]he official position of any accused person, whether as Head of State or Government or as a responsible Government official, shall not relieve such person of criminal responsibility nor mitigate punishment."[166] Rejecting the argument by *amici* pleading a head of state immunity on behalf of the late Slobodan Milosevic, the Court emphatically pronounced that Article 7(2) is a restatement of customary rule of international law.[167] This holding of the ICTY marked the first time an international tribunal unequivocally rejected substantive immunity for sitting Head of State for crimes of genocide, crimes against humanity and war crimes.[168]

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[162] Heidi Altman, *supra* note 159 at p-4.

[163] Treaty of Versailles, 22 June 1919, art. 227 in Heidi Altman, *supra* n. 159, p-8.

[164] Charter of the International Military Tribunal, annexed to Agreement for the Prosecution and Punishment of the Major War Criminals of the European Axis ("London Agreement") (Aug. 8, 1945), 59 Stat. 1544, E.A.S. No. 472, 82 U.N.T.S. 279, reprinted in 39 Am. J. Int'l L. 258(Supp.1945). art. 7; William Schabas, Enforcing International Humanitarian Law: Catching the Accomplices, 83Int'l Rev. Red Cross 439,440(2001).

[165] General Assembly Resolution 95(I); See also Report by the International Law Commission on Principles of the Nuremburg Tribunal, Yearbook of the ILC, 1950, vol. II, p.195.

[166] The Statute of the ICTY, *supra* note 47 at art. 7(2); Statute of the ICTR, *supra* note 47 at art. 6(2).

[167] *See Prosecutor v Slobodan Milosevic*, Preliminary Motion, IT-99-37-PT (ICTY,2001), para-45.

[168] *Id.*

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Monumental in this regard is the decision of the UK House of Lords in the *Pinochet* that represented a real change in the international law doctrine of the head of state immunity.[169] In the *Pinochet*, a five-member panel of the House of Lords pronounced that a former head of state is entitled to immunity from criminal process for official acts committed in the performance of official duties.[170] However, the majority decision, though a tiny majority, affirmed that egregious acts "condemned as criminal by international law cannot amount to acts performed in the exercise of the [official] functions of a head of state". [171] According to the majority reasoning, because torture and hostage taking are contrary to preemptory norms of international law, they cannot constitute "official functions" of a head of state for which immunity is available. [172]

Although the Pinochet ruling dealt with a much narrower aspect of immunity within the context of the English Extradition Statute,[173] the case sets a momentous precedent in its pronouncement that a former head of state cannot enjoy an absolute immunity for appalling crimes of the most serious concern to the world. Since "violent crimes of exceptionally serious gravity and consequence to the victims and the international community" cannot in anyway amount to "official functions" of the head of state, the majority in the case did not find a legal rationale to bestow immunity on Ugarte Pinochet for acts of torture.[174]

Despite its significance, the *Pinochet* decision is distinguishable from *Al Bashir* in two significant ways. Firstly, the *Pinochet* decision dealt with a former head of state and made a clear distinction between immunity for a former head of state and a sitting head of state.[175] A typical account of this assertion is the holding by five of the six Law Lords that a sitting head of state will

[169] Gilbert Sison, *supra* note 128 at 1584.

[170] *Regina v. Bartle*, 37 I.L.M. 1302, 1334 (Lord Nicholls), 1338 (Lord Steyn), 1339 (Lord Hoffman), 1998.

[171] *Id.*

[172] Id at 1334; *See* also the See Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, G.A. res. 39/46, [annex, 39 U.N. GAOR Supp. (No. 51) at 197, U.N. Doc. A/39/51 (1984)], *entered into force* June 26, 1987 ; 6/34/L.23 (1979)). Convention Against the Taking of Hostages, 18 I.L.M. 1456, 1456 (1979) (reproduced from U.N. Doc. A/C.

[173] Curtis A. Bradley & Jack L. Goldsmith, Pinochet and International Human Rights Litigation, 97 Mich. L. Rev. 2129, 2133 (1999), at 2138; See also *Ex Parte* Pinochet, 38 I.L.M. at 588 (Lord Browne-Wilkinson), 613 (Lord Hope), 627 (Lord Hutton).

[174] *Regina v. Bartle*, *supra* note 170.

[174] *Regina v. Bartle*, *supra* note 170.

[175] Lords Hotton, Millett, Phillips, Saville and Browne-Wilkinson, in Sarah C. Rispin, Implications Of Democratic Republic of the *Congo v. Belgium* on the Pinochet Precedent: A Setback For International Human Rights Litigation?, 3 Chi. J. Int'l L. 527, p-530.

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continue to enjoy absolute immunity under international law regardless of the gravity of the crimes he committed.[176] Secondly, while the Pinochet decision pertains to extradition decision to another state for prosecution, Al Bashir's prosecution is before an international tribunal, the ICC, pursuant to jurisdiction created by UNSC. Therefore, despite its importance in analyzing substantive issues relating to head of state immunity, the Pinochet decision does not provide an authoritative reference to the case.

In general, although both substantive and procedural immunity is available for a sitting head of state, general international law seems to be moving to the direction that abrogates immunity for violations of higher norms of international law such as genocide.[177] In the words of Arthur Watts; "It can no longer be doubted that as a matter of general customary international law a Head of State will personally be liable to be called to account if there is sufficient evidence that he authorized or perpetrated such serious international crimes."[178] However, state practice is grossly inconsistent and the Head-of-State immunity seems to stand at a bizarre cross-current of history. Nevertheless, the unique circumstances created under the Rome Statute expressly abrogating all forms of official immunity places Al Bashir's case in a unique situation.

4.1- Al Bashir's Case in the Light of "*Case Concerning the Arrest Warrant of 11 April 2000*"

In the *Congo v. Belgium,* the International Court examined whether an incumbent Minister for Foreign Affairs, Abdoulaye Yerodia, can be tried before Belgian Courts for offenses of "crimes against humanity and war crimes" or protected by immunity from criminal jurisdiction abroad.[179] In assessing the extent of immunity enjoyed by the Minister for Foreign Affairs, the Court adopted a function-based-approach and equated the functions of Foreign Minister with that of the Head of State.[180] In its judgment, the Court enunciated its vision of the state of the law relating to the Head of State immunity and proclaimed that:

[176] *Id.*

[177] See Judge Victor Marrero's statement: ". . . since 1967, however, some conceptual fissures have separated the ancient notion that equated the head-of-state to the state itself. There is now growing recognition that the sovereign is solely the state and that the nation's ruler is a distinct entity".

[178] Arthur K. Watts, The Legal Position in International Law of Heads of States, Heads of Governments and Foreign Ministers, III *Recueil Des Cours* 35, 84 in Heidi Altman, *supra* note 159.

[179] *See Case Concerning the Arrest Warrant of 11 April 2000* (*Democratic Republic of the Congo v. Belgium*), 14 February 2002 General List No. 121, para. 54.

[180] *Id* at para-53.

[181] *Id* at para-53.

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> [a] Minister for Foreign Affairs, responsible for the conduct of his or her State's relations with all other States, occupies a position such that, like the Head of State or the Head of Government, he or she is recognized under international law as representative of the State solely by virtue of his or her office.[181]

Ruling in favor of the DRC, the Court proclaimed that an incumbent Minister for Foreign Affairs "enjoys full immunity from criminal jurisdiction and inviolability" "throughout the duration of his or her office".[182] However, the Court has delineated four exceptions under which the Minister for Foreign Affairs can be denied "immunity from criminal jurisdictions and inviolability". In part, the judgment reads: "[a]n incumbent or former Minister for Foreign Affairs may be subject to criminal proceedings before certain international criminal courts, where they have jurisdiction. Examples include . . . the International Criminal Court created by the 1998 Rome Convention."[183] Thus, the absolute personal immunity enjoyed by the Minister for Foreign Affairs and head of states does not exonerate the Minister or the President from the jurisdiction of the ICC. Thus, in the light of *Congo v. Belgium,* Al-Bashir's official capacity does not exclude his criminal responsibility, nor does it accord immunity from standing trial before the ICC.

4.2- Al Bashir's Head-of-State-Immunity in the Light of the Rome Statute

The Rome Statute unambiguously states that "official capacity as a Head of State or Government, a member of a Government or Parliament, an elected representative or a government official shall in no case exempt a person from criminal responsibility under this Statute, nor shall it, in and of itself, constitute a ground for reduction of sentence".[184]

Even though the immunity of a sitting head of state stands at a strange cross-road, the express reference of the ICJ to the Rome Statute as an exception to its assessment of the *Congo v Belgium* case, renders any plea of immunity from the Court's jurisdiction legally implausible. Article 27 of the Rome Statute is similar with Article 7(2) of the Statute of the ICTY. In *Prosecutor v. Slobodan Milosevic*, the ICTY declared Article 7(2) as a codification of customary international law.[185] Even if the state of the law under customary international law is a *lex lata*, the Rome Statute seems to prevail over all other contradictory laws as the *lex speciali* for the "Darfur Situation".

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[182] *Id* at para-54.

[183] *Id* at para-61. Emphasis added.

[184] The Rome Statute, *supra* note 83 at art.27(1).

[185] *Prosecutor v Slobodan Milosevic*, Decision on Preliminary Motions, IT-99-37-PT (ICTY, 2001), Para-76.

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Therefore, the head of state immunity does not exonerate Al Bashir from the competence of the ICC. The Pre-Trial Chamber reiterated this argument in its decision for arrest warrant against Al-Bashir.[186]

Conclusions

There are difficulties in striking a balance between the backward-looking aspects of justice and ensuring effective accountability mechanisms, and the forward looking concerns towards the pursuance and maintenance of peace. The most vexing problem in prosecutorial justice is the question of whether traditional prosecutions effectively address contemporary conception of accountability that embraces truth, reparation and guarantees of non-repetition.

The question of accountability for gross violations of human rights is no longer a mere question of investigating and punishing the perpetrator. Although punishment forms the centerpiece of accountability, equally compelling is the response to intuitive human desire to discover the truth and the detail of how and why, by whom and when the victims of human rights have suffered the atrocities. The incumbent duty of the state to provide a fair and just compensation for victims of human rights and its duty to guarantee that those atrocities will never happen again is equally compelling and at the heart of the obligation of states. As great as these understandings of accountability might appear, international justice does not have the sophistication and institutional capability to achieve all of these objectives without compromising the other.

Firstly, *habeas corpus* rights and procedural guarantees such as the standard of proof and guilt, the presumption of innocence and rules on the admissibility of evidence makes obtaining a guilty verdict against powerful perpetrators very difficult, if not impossible. This is even more precarious when the accused is a civilian President of the nation or former high ranking officials capable of mobilizing the state apparatus to suppress evidence.

Secondly, since punishing perpetrators is only one imperative of justice, the interest of peace, and the search for truth will not be possible without a certain level of cooperation forthcoming both from the victims and the perpetrators and these calls for some sort of compromise. When allegations of the victims are corroborated by the perpetrator; it provides a perfect basis for divided societies to come to terms with their brutal past. If the accused is not willing to disclose the truth; victims, either primary or secondary, the larger society who are indirect victims and subsequent regimes will be all left to guess the truth, which is essential for memory and healing.

[186] The International Criminal Court, *supra* note 121 at Paras-43 and 44.

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Thirdly, there are stronger voices against the arrest warrant issued against Al Bashir arguing that the move will derail the effort for peace. It should be emphasized, however, that peace and justice are mutually reinforcing imperatives and not mutually exclusive phenomena. The principle of the head of state immunity does not exonerate President Al Bashir from ICC jurisdiction. The only way peace could be given a chance is through deferral under Article 16 of the Rome Statute. However, the deferral of prosecution in the interest of peace should anticipate a lasting peace. Even if the indictment is deferred in the interest of peace, it should not mean total impunity and responsible individuals should be held to account when circumstances so permit. The present arrest warrant against Al Bashir has nothing to do with the President's guilt or otherwise. It simply means that the Prosecution has established a *prima-facie* case so that the President has a case to answer before the Court.

In Darfur, alleged war crimes and crimes against humanity have been perpetrated. When the violation of norms of international law relates to *jus cogens* principles, establishing accountability is never a matter solely within the internal affairs of the state. Nevertheless, the Sudan has remained adamant about the transfer of Omar Al Bashir, Ahmed Harun and Ali Kushayb to the ICC invoking the principle of complementarity and dismissing the Court as political. Article 17 of the Rome Statute entitles a state to investigate and prosecute the perpetrators only when it is found willing and able to genuinely investigate and prosecute the atrocities. The Sudanese SCCED started investigation of cases that related to Ali Kushayb but not Ahmed Harun and Omar Al Bashir. However, while Ali Kushayb has been charged before the ICC for acts that constitutes war crimes and crimes against humanity, the SCCED has tried him for minor offenses that are of a marginal importance compared to the issues before the Court. In addition, the investigation is not related to the conduct which is the object of investigation before the Court. These two requirements are cumulative. Therefore, invoking the principle of complementarity stipulated under Article 17 of the ICC simply flies in the face of the Rome Statute.

Norms of international justice clearly require the GoS to investigate, prosecute and duly punish those responsible for the atrocities or transfer them to the ICC or states willing and able to do so. Since the ICC is going to undertake only a handful of exemplary prosecutions, the Sudan should prosecute the "small fry" before its own Special Courts consistently with its international obligations. On the other hand, the international community must reckon with the grim realities of millions of Darfuris languishing in unbearable life situations and place their aspirations before political-point-scoring and defer the indictment, if and when the GoS and the rebel groups provide sufficient guarantees to make painful concessions for a lasting peace. ■

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