



INTERNATIONAL PROGRESS ORGANIZATION

Double Standards in International Criminal Justice: The Case of Sudan

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Security Council resolution 1593 (2005), adopted on 31 March 2005,¹ violates letter and spirit of the Rome Statute of the International Criminal Court (ICC) and severely undermines the Court's efficiency, credibility and legitimacy. By having granted immunity from prosecution by the ICC to nationals from non-States Parties to the Rome Statute operating in Sudan on Security Council or African Union missions, the United Nations Security Council has done disservice to the important cause of international criminal justice on the basis of universal jurisdiction. By this arbitrary measure, the Council has applied double standards in dealing with international crimes in Sudan.

Undisputedly, referral of a "situation" in which international crimes may have been committed to the Court's Prosecutor is sufficient basis for the exercise of jurisdiction by the ICC – which is of particular importance in cases where the Court would otherwise have no jurisdiction on the basis of territoriality or nationality. However, it clearly follows from the wording of Art. 13 (b) of the Rome Statute that any referral of a situation by the Security

¹ S/RES/1593(2005): *Reports of the Secretary-General on the Sudan*, adopted by the Security Council at its 5158th meeting.

Council must be made without conditions as to the categories of people to be investigated or prosecuted by the Court.²

In an inadmissible way, the Security Council has tied the referral of the situation in Sudan according to Art. 13 (b) of the Rome Statute to a deferral of investigation or prosecution according to Art. 16. While the Security Council, under the Court's Statute, has the right to refer a "situation" (not individual cases) in which crimes that fall under the jurisdiction of the Court appear to have been committed to the Prosecutor of the Court, the Council has no authority to order a deferral of investigation or prosecution on a *selective* and at the same time *preventive* basis.

Art. 13 (b) can simply not be interpreted in the sense of *selective* referral; according to that Article's wording, it is a "situation" that is being referred without any qualifications as to the groups of suspected violators. Similarly, Art. 16 cannot be construed in such a way as to grant immunity from prosecution to certain categories of people. Using Art. 16 to restrict the jurisdiction granted under Art. 13 (b) – i.e. to render that Article "harmless" for a powerful non-State Party, as resolution 1593 (2005) has effectively done – is an exercise in sophistry for the sake of power politics; it is an inadmissible effort by a political body, the Security Council, of exercising control over the International Criminal Court.

The resolution's "recalling" of Art. 16 of the Rome Statute in the Preamble is incompatible with the decision, under operative par. 6 of that resolution, that nationals, officials or personnel from non-States Parties to the Rome Statute (e.g. the United States) "shall be subject to the exclusive jurisdiction" of their respective state. By linking the referral of a situation to a collective deferral in favour of certain categories of people, the Council, under United States pressure, has not only undermined the authority of the International Criminal Court but introduced a "policy of double standards" into the practice of international criminal justice.

In its intention, resolution 1593 (2005) resembles earlier "preventive" resolutions, namely those adopted by the Security Council in 2002 and 2003 on the "collective" deferral of investigations or prosecutions of personnel of UN peace-keeping missions from non-States

² The Court may exercise its jurisdiction ... if "A situation in which one or more of such crimes appears to have been committed is referred to the Prosecutor by the Security Council acting under Chapter VII of the Charter of the United Nations ..."

Parties to the Rome Statute.³ While this particular practice has stopped in 2004 (as a result of the Iraq prison scandal), it has now been revived in another context.

Resolution 1593 (2005) has once more documented that the Security Council's decisions are mainly shaped by international power politics and that the Council's statutory relations with the International Criminal Court are prone to abuse in favour of the political agenda of the most powerful member state. The system of norms governing the ICC's exercise of authority is extremely fragile when compared to the robust mechanisms regulating the Security Council's enforcement powers under Chapter VII of the UN Charter. With the latest resolution on the Sudan, the Council has again arrogated *de facto* judicial powers and, by arbitrarily changing the meaning of Art. 16 of the Rome Statute, appears having acted according to the maxim of "might makes right."

As explained by Amnesty International in its statement of 29 March 2005, Security Council members should "respect the fundamental principle of equality of all before the law by not establishing exceptions to international justice."⁴ Urging the prosecution of international crimes while at the same time conditioning it on the granting of immunity to the nationals of the most powerful state is not only incompatible with letter and spirit of the Rome Statute of the ICC, but runs counter to the very idea of universal justice and makes a mockery of international criminal law. Such a policy, if not checked by the member states of the Security Council, will effectively replace the international rule of law by a system of power-oriented norms, tailored according to the needs of the most powerful member state(s), will further damage the credibility of the United Nations Organization and undermine the authority of the International Criminal Court.

³ For details see Hans Köchler, *Global Justice or Global Revenge? International Criminal Justice at the Crossroads*. Vienna/New York: Springer, 2003, esp. pp. 254ff.

⁴ "Sudan: Refer Darfur crimes to ICC, but no impunity for peacekeepers." *Amnesty International Press Release*, AFR 54/032/2005, News Service No: 74, 29 March 2005.