

SECURITY COUNCIL RES. 1593,
REFERRING DARFUR TO THE ICC.

-Its consistency with the Rome Statute,
consequences regarding the Courts jurisdiction
and recognition.

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1. Introduction

1.1 Security Council resolution 1593

1. April 2005 the Security Council, acting under chapter VII of the UN Charter, voted to refer the situation in Darfur to the International Criminal Court (ICC)¹ in resolution 1593.²

The resolution marked the first time the Security Council referred a situation to the ICC and was passed with eleven votes in favor, nil against and four abstentions, (China, Algeria, Brazil and most notably the US,) only under the condition that personnel from “contributing states outside Sudan” who are not parties to the Rome Statute³, non-state parties, be “subject to the exclusive jurisdiction of that contributing state.... unless such jurisdiction has been expressly waived by that contributing state”.⁴ This means that citizens from states that have not ratified the Rome Statute, such as the US, operating in peace keeping missions in Darfur can not be investigated or prosecuted by the ICC

1.1.2 Background for the resolution

Ending a process that started five decades earlier⁵ the Rome statute finally provided the international community with a court competent of prosecuting international crimes⁶.

¹ International Criminal Court, created by the Rome Statute adopted July 17 1998

² United Nations Security Council Resolution 1593 (2005), (S/RES/1593 (2005))

³ Rome Statute on the creation of an international criminal court, adopted July 17, 1998

⁴ In the following, this condition in its entirety will be referred to as “the condition”

⁵ In 1948 the UN General Assembly issued a resolution asking the International Law Commission (ILC) to investigate the possibility and desirability of a permanent international criminal court. The ILC concluded affirmative in their rapport of 1950

Adopted 17. July 1998 and currently ratified by 100 states⁷, the statute was a milestone in the history of international law. Despite worries that need for support from the required number of states resulted in too many compromises in the final draft, the adoption of the treaty nevertheless provided for the worlds first permanent international criminal court, managing to unite the differing views of numerous governments around the world into an independent institution created by treaty. The court is built upon the principle of complementarity⁸ meaning the Court may only initiate investigations and prosecutions if it decides that national investigations does not meet the criteria for such investigation as set up by the Statute⁹. The Court has inherent jurisdiction¹⁰ over all member states, State Parties, and may also gain jurisdiction by way of referral of a situation from the UN Security Council¹¹ or if it has jurisdiction over the state on the “territory of which the conduct in question occurred”, meaning that personnel from a non-state party operating in peacekeeping missions on a territory of which the ICC has jurisdiction could, in theory, be subject of investigation and prosecution by the ICC¹².

Sudan has signed, but not ratified the Rome Statute and is thus a non-state party.

The Sudanese region of Darfur has for years been the scene of armed, internal conflict that has left many dead and forced even more to relocate. Despite ongoing peace talks and peacekeeping forces from the African Union being stationed, attacks are still occurring and the need for peace is evident. And an important instrument of peace is justice. As Sudan is a non-state party to the Rome Statute, a referral from the Security Council would be the only way for the ICC to gain jurisdiction and start investigations and prosecutions. Non government organizations, NGO's, such as Coalition for the International Criminal Court, CICC, and Amnesty International¹³ etc along with several governments called for the Security Council to refer the

- Miskowiak, The ICC, Consent, Complementarity and Cooperation, 2000 page 12

⁶ By “international crimes” it is meant.....

⁷ For a full list of member states, see www.icc-cpi/statesparties.html

⁸ Id Art. 1 of the Statute

⁹ Id Art 17 2) of the Statute

¹⁰ Meaning that the court gains jurisdiction over a State upon that States ratification of the Rome Statute.

¹¹ Art 13 b) of the Statute

¹² Id Art. 12. 2 a) of the Statute

¹³ See www.iccnw.org and also www.amnestyinternational.org

situation to the ICC arguing that impunity for the blood bath should end. However, a Security Council resolution can be blocked by a veto from any of the five permanent members¹⁴ and it was feared that the US who has repeatedly stated its opposition to the court would block any attempt of referral.

18. September 2004 the UN Security Council assembled an international commission of inquiry on Darfur, chaired by Mr. Antonio Cassese¹⁵. The report presented to the UN Security Council, January 25 2005,¹⁶ concluded that the crimes documented in Darfur met the thresholds for the Rome Statute of the International Criminal Court and that the situation in Darfur should be referred to the ICC. Furthermore, the report also confirms the “inability and unwillingness” of the Sudanese authorities to investigate and prosecute those suspected of committing war crimes.¹⁷

As such, in an unprecedented move, the Security Council voted to pass resolution 1593, and provided for the ICC to obtain jurisdiction¹⁸ in Darfur, but the condition excluded any non-state parties outside of Sudan, from that jurisdiction, thus straying somewhat from the original provisions of the Statute. Also the US decision to abstain from voting left many surprised.

1.3 Issues raised by Security Council resolution 1593

Although the resolution was welcomed by most of the international community¹⁹, and perhaps not surprisingly the Secretary General of the UN Mr. Kofi Annan²⁰ the condition also caused some to express their regret that it served as a “double standard”²¹, meaning that it gave some states the same

¹⁴ France, Russia, UK, China and US

¹⁵ S/RES/1564 (2004)

¹⁶ Report of the International Committee of Inquiry on Darfur to the United Nations General Secretary, pursuant to Security Council Res. 1564, www.un.org/news/dh/sudan/com_inq_darfur.pdf.

¹⁷ Report of the International Committee of Inquiry on Darfur to the United Nations General Secretary, p 162

¹⁸ Art 12 2 a)

¹⁹ See statement of Canadian Prime Minister Paul Martin, April 1 2005, welcoming the resolution. <http://pm.gc.ca>

And also Media release of the Australian Minister for Foreign Affairs Alexander Downer April 6 2005, supporting the resolution. <http://dfat.gov.au/>

²⁰ SG/SM/9866-AFR/1157

²¹ His excellency Ambassador Baali, Permanent representative of Algeria to the UN during the Security Councils 5158th meeting on Sudan 31 March 2005 www.un.org

impunity the resolution was meant to combat, and also that any agreement excluding the “nationals of a state from the jurisdiction of the Court...would affect the basis for such jurisdiction and thwart the letter and spirit of the Rome Statute²².

However, the fact that the resolution was passed at all, caused mild surprise, as the US ever since the Rome Conference repeatedly has stated that they believe the statute is “flawed” and that they will seek other ways of punishing war criminals.²³ The US’ decision to abstain from voting, thus allowing for the resolution to pass was a serious departure from the previously stated opposition to the court.

Resolution 1593 is interesting not only because it marked the first time the ICC was referred a situation by the Security Council, and it is therefore exciting to see how the Court operates when it receives such a referral, but also because of the controversy surrounding it. Did the Security Council exceed their powers by the Rome Statute in excluding non-state parties, outside Sudan, from the ICC’s jurisdiction? If so, to what consequence? What can we make of the US’ decision to abstain? Does it mean that they now embrace the Court, or was it a one shot deal? And what will the referral, mean for the ICC when one thinks about the future in the context of its scope of jurisdiction and also its legitimacy and recognition. These are all questions that arise from the April 1 referral of last year and that the international community have been debating throughout this year.

Therefore, I will in this paper attempt to examine the validity of the resolution, in the context of whether or not it abbreviates from the provisions, in the Rome Statute, or the purpose of the Statute and if so to what extent, and to what consequence. Although there is little doubt that the UN SC has the right to refer situations to the ICC, does that power also cover the right to include conditions in the referral? Thus setting parameters for the ICC’s prosecution.

In addition, I will analyze why the US has opposed the ICC and, with their decision to abstain from voting on res 1593, if the US now has changed its policy on the ICC, and discuss future scenarios for the ICC.

²² Ambassador Mayoral, Permanent Representative of Argentina to the UN during the Security Councils 5158th meeting on Sudan 31 March 2005. www.un.org

²³ John Bolton, Former Under Secretary for Arms Control and International Security, now the US ambassador to the UN, in his remarks to the Federalist Society, Washington DC November 14, 2002. To be found at www.state.gov

Whenever politics and law are mixed, like here with the UN Security Council and the ICC, the results are always complicated, and the more one investigate certain issues, new ones always emerge. States are used to operate on a political level, and naked, indiscriminate law is sometimes perceived as unaccountable due to the fact that it does not take into consideration any political agenda, It is in these crosshairs the ICC now finds itself in the middle of. The Court is constructed to serve the letter of the law, but what happens if that letter is tainted by politics?

There are numerous explanations as to how the relationship between the Security Council, the US and the ICC works, why it works the way it does and how it will work in the future. Most of these arguments involve politics to a variable degree, and as such, despite this being a judicial paper, I have allowed for some of the political aspects to appear in this paper. However, pure political reasoning and speculation, such as the link between Israel and the US²⁴ fall outside of this paper. I have also chosen to limit this paper to the issue of jurisdiction with regard to the referral and when it comes to the discussion of the future of the ICC, I have chosen to focus on the future in the respect of how the court will function and what legitimacy it will have. The discussion about the inclusion and definition of the crime of aggression will therefore not be included in this paper, although it was the subject of heavy discussion prior to, and during the Rome Conference, as well as it is going to be at the review conference in 2009.

The paper will then discuss these questions:

The validity of Security Council resolution 1593, in the context of the Rome Statute:

Is res. 1593 in accordance with the Rome Statute art. 13 b)

Is res. 1593 in disagreement with the prohibition on reservation in the Statutes art 120?

Does res. 1593 go against the objective and purpose of the Rome Statute?

In short, is the exclusion of jurisdiction for non-state parties in res 1593, in accordance with the letter and spirit of the Rome Statute?

Furthermore, what will be the consequences of any such disagreement? How will it affect the legitimacy as well as the future investigations by the ICC. Also, what can be learned, regarding the US' view on the ICC, by the US' decision to allow the referral to pass?

²⁴ For instance, of the 27 resolutions the US has vetoed in the Security Council since 1987, 20 of them concerned Israel. See www.wikipedia.com

2. Methodology

As we find ourselves in the field of international criminal law, one has to examine what constitutes “international criminal law”. In his book, Antonio Cassese lists the primary sources as being “treaties and customary law”, and the secondary sources to be “general principles of international criminal law or general principles of law or in the final analysis such subsidiary sources as general principles of law recognized by the community of States”²⁵ In other words, the treaty in question is the primary source of law regarding this matter.

The Rome Statute contains the provisions that determine the functions, rules, powers, and proceedings of the ICC. It is however, important to note that following the adoption of the Rome-statute 17 July 1998, even the more optimistic delegates feared it would be another 10-15 years before it entered into force. Now only eight years later, not only has it entered into force(July 2002) but is also currently busy investigating and eventually prosecuting war-criminals in Darfur, Uganda and the Democratic Republic of Congo. By international treaty standards, progress has been remarkably swift. And whenever matters proceed quickly, there is always a possibility that unexpected situations surrounding the treaty may arise. One may for instance not have taken into account would will/would happen should such and such occur.

Also, what is put in writing may mean two different things to two different parties, and they might argue that their own perception of how an agreement was meant to be interpreted is the proper one. Or it could be that two different provisions of the same treaty seemingly contradict each other. It is therefore sometimes necessary to look beyond the written word and try to find the interpretation that is closest to the original meaning.

The International Criminal Court was created by treaty, the Rome Statute, and is therefore an independent, international institution regulated by

²⁵ Cassese, Antonio, International Criminal Law, US 2003. p.26

international law. As such, the Vienna Convention on the Law of Treaties²⁶ of 1969²⁷, is the point of departure for any discussion or interpretation of the Rome Statute.

Art. 31 1. of the Vienna Convention states that all treaties should be interpreted “in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the lights of its object and purpose”

This means that whenever there is a disagreement as to how the treaty, or certain provisions of the treaty is to be interpreted, one has to examine for what purposes the treaty was made and be interpreted in the context of that object and purpose. In addition art. 31 3 b) of the Vienna Convention reads that one should also take into consideration “any subsequent practice in the application” and art. 32 states that the preparatory work of the treaty and the circumstances of its discussion” are to be given weight when interpreting the treaty. The Vienna Convention determines what is to be considered when interpreting a treaty, what should be weighed important and what should be viewed as less important. If one were to interpret a treaty in conflict with the Vienna Convention, such an interpretation would not be valid and as such, any actions derived from such an interpretation would be void.

However, Art’s 31 and 32 of the Vienna Convention states that each treaty is to be interpreted in the context of the creation, object and purpose of the treaty.

Therefore, when analyzing and determining the validity of resolution 1593, in the context of whether or not it is in accordance with the Rome Statute, it is important to bear in mind how and for what purposes the International Criminal Court was created.

Therefore I will dedicate the first chapter to study why, or if, we need the ICC, the background and making of the Rome Statute and the proceedings at the Rome Conference as well as the results of the Rome Conference itself. What does the statute say?

The history of the Rome Statute is thoroughly described in several books about the ICC²⁸. As this paper is only of a certain length, I have tried to

²⁶The Vienna Convention on the Law of Treaties, adopted in Vienna 23 May 1969. In the following to be referred to as “the Vienna Convention” To be found at www.un.org

²⁷ www.un.org

²⁸ Schabas, William A, An introduction to the International Criminal Court UK 2001 p.1-21

McGoldrick, Rowe and Donnelly, The Permanent International Court, Legal and Policy Issues US 2004 p.9-45

recapture the most important points in my own words and formulations. For a more thorough presentation and the background and history I refer to the listed literature. The official websites of the UN²⁹, the US³⁰ and the ICC³¹ have also been helpful when searching for the official documents and statements in this regard.

Throughout the following chapter I will then evaluate the validity of the resolution in terms of its consistency with the Rome Statute, by first examining what powers are granted the Security Council by both the UN as well as International Law and also by the ICC. The Un charter³² and the Security Council relationship agreement³³ with the ICC will be the basis of this study.

I will then attempt to analyze and interpret the Rome Statute, especially art 13 b) which gives the Security Council the power of referral, but also art 120 which prohibits reservations, in order to find whether or not the condition in resolution 1593 was in accordance with the Statute, and also what the consequences of any inconsistency might be.

As the Vienna Convention states, in order to interpret the Rome Statute in the closest way possible to its original meaning, one has to constantly interpret in the context of the Courts purpose and objective as found in chapter 2 regarding the ICC's background. Furthermore, the actions by the parties to the treaty following its adoption may give indicators as to have a certain provision was perceived to mean. The negotiating history, such as drafts and comments prior to adoption and also during its adoption can also be helpful when determining how the treaty or a provision of the treaty was meant to be perceived. I will use the ILC drafts of 1994 and 1996 in order to see if they might provide any information as to how the Rome Statute is to be interpreted, especially in the context of res. 1593, as these drafts were the basis of the negotiations at the Rome Conference. By examining what provisions were kept what was added and what was not incorporated into the final Statute one might get an idea of what was perceived as particularly important or not important to the framers of the Statute, If one of the provisions in the 1996 draft was not included, or included in an altered state, in the Rome Statute that might indicate that this certain provision was given

Miskowiak, Kristina, *The International Criminal Court: Consent, Complementarity, and Cooperation* Copenhagen 2000, p. 9-15

²⁹ www.un.org

³⁰ www.state.gov

³¹ www.icc-cpi.int

³² Charter of the United Nations

³³ Agreement of the relationship between the UN Security Council and the ICC

extra consideration and that in the end the delegates felt that it would not serve the Courts interest if it were to be included, or included without alteration. It could also be that it was stricken because of the need to compromise in order to get the statute adopted. In any event, where the Rome Statute differs from previous drafts, it may indicate that the provision at hand was too controversial or that the framers found a better solution. In the cases where the Rome Statute incorporated word for word, or almost, what was written in the ILC drafts of 1994 and 1996, one can assume that these provisions were thought solid and unquestionable, thus giving less room for interpretation. In addition, statements, speeches, interviews and comments by government officials will be given some weight as to how the different states view on the matters at hand, however not to the same extent as official documents and agreements.³⁴

In chapter three, I will examine further what it is about the ICC that the US opposes to, and also what could have led them to allow for the resolution to pass as well as possible scenarios of the future of the ICC. To aid me in this study, the US governments website www.state.gov and also the official website for the UN www.un.org were of great help, guiding me to official statements and press releases.

In the conclusion I will try and nest up all loose ends and make a preliminary conclusion as to what I believe will be the most likely path for the ICC and the US' relationship, or lack thereof, with the court, as well as some thoughts on how I think they should be.

3. Background of the ICC

3.1 The need for the ICC

As far back as the middle ages,³⁵ society has displayed a will to punish those responsible for committing crimes that go against the moral code of civilization. However, the lack of a permanent international criminal court

³⁴ Speeches, remarks and statements by State Officials and articles on this subject are found at www.asil.org, www.derechos.org, www.ejil.org, www.law.duke.edu among many. See index of literature for full list.

³⁵ IN 1474, Peter Von Hagenbach was prosecuted for crimes ordered during his governorship of Breisach. See V. Morris and M.P. Scharf, *An insiders guide to the International Tribunal for the former Yugoslavia vol.1*, (1995) New York : Transnational Publishers,

competent of prosecuting suspected war-criminals³⁶ has rendered any attempts random and has resulted in an inconsistency in both prosecutions and judgments as well as adding a feel of “victors justice”, an argument many Germans felt valid after the Versailles treaty and also following the Nuremberg trials.

In addition, politics have also contributed in the difficulties of punishing war-criminals. Whenever a state obtains great financial, or other, gain from dealing with a state/representatives of states that are carrying out international crimes, it can often be hard to find the willingness to prosecute those responsible if it will entail loss of said gain. Or it could be that the domestic political climate, or national legislature³⁷ does not allow for prosecutions of this kind.

Nevertheless, the need for an institution such as the ICC is important as , in the words of UN General Secretary Kofi Annan; “Without justice, there can be no peace”. Combating impunity is a just one of the steps towards reconciliation. People who have suffered great wrongdoing will have a need for vindication in one way or another in order to feel justice restored. When that sense of justice does not arrive in the form of a judicial response, there is always a risk that it will reveal its face in a violent reply such as suicide bombing, terrorism etc, which in turn might lead to more violence, thus proving Mr. Annan right.

Imagine a society without an effective legal system. Those who commit crimes as an act of passion might do so regardless, but without a possibility of punishment, impunity would lead many more to resort to crime. This is why all states have a legal system and it is why the international community needs a legal system, to function where national legislature fall short. And this is where the crux of the challenge for international criminal law. When it comes to jurisdiction the norm, according to Cassese, is that States through their courts prosecute their citizens, perpetrators of crimes committed on their territory, or perpetrators of crimes that victimized that states citizens. The latter from of jurisdiction being the most recent.

³⁶ As illustrated by Pol Pot, the leader of the Khmer Rouge in Cambodia and suspected of being responsible for the killing of between 1.5 and 2.3 million people from 1975 to 1979. He was never convicted of any international crimes before he died in 1988. Source; www.en.wikipedia.org

³⁷ The US Senate has for instance a Constitutional right to propose reservations to treaties before ratifying them, the US therefore argue that ratifying the Rome Statute would be unconstitutional as it prohibits reservations

However, what happens when the States themselves are involved in the crimes? Or if there is no national court with the jurisdiction to prosecute?³⁸ Then we see the need for an international criminal court, with universal jurisdiction.

There are different ways of constructing an international criminal court. In the absence of a permanent international criminal court, the 20th century saw the creation of several ad hoc tribunals³⁹ in order to prosecute and punish those responsible for committing crimes against the peace and security of mankind, crimes which definitions were formulated in the International Law Commission⁴⁰ (ILC) draft on the creation of a permanent international criminal court to the UN General Assembly (GA) in 1950⁴¹, to become known as “the Nuremberg principles”. Both the trials of Nuremberg and Tokyo following WWII were ad hoc tribunals... In the recent years we have seen the creation of ad hoc tribunals in Rwanda, ICTR, and the former Yugoslavia, ICTY. Another option is the creation of hybrid tribunals⁴² such as the tribunal set up in Sierra Leone⁴³

The benefits of both an ad hoc tribunal and a hybrid tribunal is that they derive their power directly from the UN Security Council acting under chapter VII of the UN Charter, and are specifically designed for a certain situation. A permanent international criminal court would perform much in the same manner as any domestic legal system would, with the bench of judges and a prosecutor already at hand, and a set framework to be applied to wherever deemed necessary. A permanent court would thus go a long way to eradicate random and selective prosecutions that ad hoc and hybrid tribunals sometimes seem to represent. Furthermore, a permanent court would be better equipped to initiate investigations and prosecutions of alleged crimes rapidly, possibly even before they stopped, whereas ad hoc tribunals would need a Security Council resolution, and a commission prior to that before it could even start to assemble a tribunal. Thus it could be argued that a permanent international criminal court would be the best way to combat impunity for war criminals in a swift and just manner.

³⁸ Cassese, Antonio, International Criminal Law, US 2003 p.6-9

³⁹ Ad hoc tribunal- A tribunal set up by the Security Council under a chapter VII resolution, to cater to a specific situation.

⁴⁰ ILC-International Law Committee, A UN organ of legal experts.

⁴¹ For full text, see www.un.org

⁴² Hybrid tribunals- tribunals set up by the Security Council under chapter VII, drawing on both UN assistance and local representatives.

⁴³ See www.sc-sl.org

3.2 Historic background

The first to propose a permanent international criminal court is believed to be Gustav Moynier, one of the founders of the Red Cross. In 1872, after witnessing the gruesome acts committed during the Franco-Prussian war, he argued that an international criminal court would serve to uphold the provisions of the Geneva Convention of 1864.

Although the proposal proved to be almost a decade premature, the idea of such a court was nevertheless implemented in the consciousness of the international community. During the post WW1 period, two proposals were put forth to the League of Nations calling for the establishment of an international criminal court, however neither resulted in anything substantial.

Following the ad hoc tribunals of Nuremberg and Tokyo, the UN, replacing the League of Nations, asked the ILC to investigate the desire and possibility of establishing a permanent international criminal court.⁴⁴ The ILC submitted draft statutes on an international criminal court in 1950⁴⁵ and in 1953⁴⁶ but progress was halted in large part due to the cold war and also the inability to agree upon a definition of the term “aggression”. In 1981, the ILC was asked by the General Assembly (GA) to resume their work on drafting a statute for an ICC, and although they turned in several reports and contributed to many debates, the issue of jurisdiction of the court was not subject to nearly the same amount of attention as the list of crimes, definition of crimes and the penal system.⁴⁷

3.3 The road to Rome

Interestingly, it was Trinidad and Tobago who, heading 16 Caribbean states plagued by the 80s drug epidemic, requested the GA to ask the ILC to give “extra consideration to the matter of jurisdiction.”⁴⁸ The proposition originally stemmed from a desire for a court with jurisdiction to prosecute drug smugglers operating across multiple borders, but in the end the Rome Statute only included the very worst of crimes, such as genocide and war crimes.⁴⁹ The proposition did however lead to a draft statute prepared by the

⁴⁴ GA RES 260(III)

⁴⁵ The Nuremberg Principles, www.un.org

⁴⁶ The Code of Crimes Against the Peace and Security of Mankind, www.un.org

⁴⁷ Schabas, William A, An introduction to the International Criminal Court, UK 2001, p.9

⁴⁸ A/RES/44/16

⁴⁹ Art.5 of the Statute

end of 1993 and submitted to the GA in 1994, containing the suggested rules of procedure and elements of crimes for an international criminal court.

In parallel to the UN commissioned work on an international criminal court, the world witnessed the atrocities of the Balcan war and the brutal internal conflict in Rwanda further highlighting the need for a permanent international criminal court, able to react in a swift and just matter to prevent such acts in the future. Although the two ad hoc tribunals who were set up to prosecute criminals in Rwanda and former Yugoslavia performed admirably, many felt that the bureaucratic paperwork that had to be done in order to set up the tribunals was too costly and time-consuming. A sense of tribunal fatigue set in in most of the UN system, that the creation of ad hoc tribunals took up too much time of the Security Council and resulted in the prolonging of attacks in Rwanda and the Balcans. Also, there was wide recognition that ad hoc tribunals “remained inherently selective” as the Canadian delegate to the Rome Conference stated⁵⁰, meaning that ad hoc tribunals had to be created by resolution from the Security Council, which is a political organ and as such has other criteria for what constitutes an investigation and prosecution than a judicial court.

After almost 50 years of working on the establishment of an ICC, progress in the 90s was thus remarkably quick.

After reviewing the draft submitted to them by the ILC in 1994⁵¹, GA set up a preparatory commission 11 Dec 1995 and charged it with preparing a “widely acceptable consolidated text of a convention for an international criminal court as a next step towards a diplomatic conference.

The “prep-com” then presented the GA with a list of several proposed amendments to the 94 ILC draft in 1996⁵². In 1997, the “prep-com” held three additional meetings producing the “report of the preparatory Committee on the establishment of an International Criminal Court” in 1998⁵³, which contained various proposals to a more coherent text. After the zuthpen draft was reworked at the final “prep-com” session in 98 it represented the final draft for the convention on establishing an international criminal court, which was to be the basis of the negotiations in Rome.

⁵⁰ (2001) 46 McGill Law Journal L.J. 1141 p. 1147

⁵¹ Draft Statute for an International Criminal Court with commentaries 1994, www.un.org/law/ILC/

⁵² Draft Code of Crimes against the Peace and Security of Mankind with commentaries 1996, www.un.org/law/ILC/

⁵³ A/CONF.183/2

3.4 The Rome Conference

From 15 June to 17 July 1998, Rome was the host of the diplomatic conference, which eventually ended up producing the Rome-statute. At Rome, it soon became apparent that the international community, represented by their delegates, disagreed in their views on an international criminal court. Delegates soon split into two groups with opposing views. States like Norway, Sweden, Denmark who became known as the “like-minded” group, pressed for an effective, competent court with inherent jurisdiction, no Security Council veto on prosecutions as well as an independent prosecutor.

Their view was countered by that of what became known as the “restrictive group”, among them France, US, China and Israel, who insisted on state sovereignty and “extensive state or security council control”

Throughout the following five weeks work was being delegated to various sub-committees and provisions of the statute were slowly being adopted one after another.

Despite this progress, key issues such as the role of the Security Council and the scope of ICC jurisdiction were still not being openly debated although much lobbying took place on both parts. The relationship between the ICC and the UN Security Council was the subject of particularly much discussion. Views ranged from that of India, who wanted no Security Council control of the ICC as they felt it would further embellish the uneven distribution of power already illustrated by the five permanent members of the Security Council, Pakistan supported this view, claiming that to give the Security Council power to refer situations to the ICC would “undermine the principle of complementarity” and that only “a State Party should be able to activate the trigger mechanism”⁵⁴. The US on the other hand, wanted total Security Council control of the ICC. Given that the US holds a permanent seat in the Security Council, Security Council control of the ICC would in fact mean US control of the ICC. The inclusion of crime of aggression, and especially the definition of “aggression”, was also heavily debated. Cyprus was among those who wanted it included, but the US did not.

On the last day of the conference, chairman of the committee of the whole, which had the responsibility of overseeing the conference and also were responsible for dealing with the afore mentioned key issues, Philippe Kirsch presented the delegates with a “take it or leave it” package which basically

⁵⁴ GA/L/3079

was what became the Rome Statute. Although the Committee of the Whole had preferred to adopt the treaty by consensus, giving it a broad recognition, the US insisted on a vote and the Statute was subsequently adopted with 120 votes in favor, 20 abstentions and seven against. Although the vote was unrecorded, it is likely that among those who opposed the statute were the US, China and Israel.

3.5 Results of the Rome Conference

With the adoption of the Rome Statute July 17 1998, the foundation for a permanent international criminal court was finally completed. Although the majority of the international community were supportive of the adoption, as evident through the large number of signatures, almost every state had some form of concern about the Statute itself. During its discussion of the establishment of the ICC October 1998, the members of the sixth committee (Legal) of the UN, these concerns were addressed⁵⁵The Russian delegate, L.A Skotnikov said that “the relationship between the Court and the UN Security Council...(was based) on cooperation in the best interest of the international community” and that was only one of the elements that caused Russia to be supportive of the Statute, although Russia “regretted that several proposals had not been included...and that the document had been passed by voting”. Naste Calovski, of the Former Yugoslav Republic of Macedonia, stated that although his country had signed the Statute and would ratify it, Macedonia felt that a number of issues should be clarified, among them the relationship between the Court and the Security Council. The dominant view of the states that signed the Statute can best be summed up by the words of the Swedish delegate at to the Sixth Committee, Per Norström, who said that “it (the Statute) represented the best package which could possibly be obtained under the prevailing circumstances” and that one should look at “ the totality of what was achieved”. This illustrates that when determining the legality of re. 1593, in the context of whether or not it is in correspondence with the Rome Statute, one should take into consideration that while the Rome Statute may have been flawed, it did create the ICC. Likewise although, res 1593 may be flawed, it did enable the

⁵⁵ UN Press Release GA/L/3079

ICC to obtain jurisdiction in Darfur, and that is “what was achieved by re. 1593”

And what was achieved in Rome 1998, was a Statute providing for the establishment of a permanent international criminal court as an independent organ, with jurisdiction over crimes listed in art 5 of the Statute and also jurisdiction over any state that becomes a party to the treaty..

The court has an prosecutor with the power to launch his own investigations, providing jurisdiction. Other ways of bringing the court into action is by way of referral either by a State Party or by the Security Council, art’s 13a) and 13b). Art 13b) is the equivalent of art 23(1) of the ILC draft and is intended to “avoid the establishment of ad hoc tribunals by the Council”⁵⁶ By being referred a situation from the Security Council, the ICC may gain jurisdiction over nationals of non-state parties.

The Statute also gives the Security Council the power to defer investigations by the ICC for a period of up to 12 months, art 16. However, this is an important shift from the proposed 1994 ILC draft. Art 23(3) of the ILC’s draft stated that the Security Council had the power to defer investigation until it (SC) allowed for the investigation to proceed, meaning a veto from any of the permanent members would stop the investigation. In the Rome Statute, this is reversed, only giving the Security Council power to pass a resolution in order to defer investigation. As such, a single veto would not be sufficient to halt proceedings by the ICC. The inclusion of Art 16 was an attempt to limit the concerns raised by several states at Rome regarding the political aspects of the court. It is nevertheless of importance to keep in mind that after art 103 of the UN Charter, acting under chapter VII , the Security Council could pass a resolution of the creation of an ad hoc tribunal for instance that would have superior rank to the Rome Statute, as all member states of the UN are bound by the Security Councils resolutions under chapter VII.

The Statute gives the ICC jurisdiction regarding the crime if aggression, Art 5d), but leaves the definition to the review conference to be held in 2009, Art 121.

Furthermore, the statute does not allow for any reservations, meaning that there is no “opt-in” clause. The ILC draft envisioned a Statute only giving the Court inherent jurisdiction with regards to the crime of genocide, leaving

⁵⁶ Vera Gowlland-Debbas, “The relationship between the security Council and the ICC”, Graduate Institute of International Studies, Weltpolitik 2001, www.Globalpolicyforum.org.

it up to the states to determine which of the other crimes as listed in art.5 it would accept.

When the ICC entered into force in July 2002, with the swearing in of its 18 judges and its prosecutor, the world finally witnessed a permanent international criminal court ready to investigate and prosecute charges brought before them.

4.The validity of res.1593 in the context of its consistency with the Rome Statute

4.1 Introduction

As we have seen, one of the key issues in all of the five preparatory commissions leading up to the Rome conference in 1998 was the relationship between the ICC and the UN Security Council.

The ICC is an independent organ, with inherent jurisdiction over states that have ratified the Rome Statute, State-parties,⁵⁷ and over the crimes listed in Art 5⁵⁸ The ICC, the “Court”, can exercise its jurisdiction if a situation is referred to the prosecutor either by a State Party⁵⁹, or the UN Security Council⁶⁰, or the ICC’s prosecutor himself can initiate investigations⁶¹. However, non-state parties may only fall under the jurisdiction of the court

⁵⁷Id Art 12 1. Of the Rome Statute (the Statute)

⁵⁸ Id Art 5 of the Statute lists genocide, crimes against humanity, war crimes, and aggression as the crimes over which the ICC has jurisdiction. The crime of aggression however, has yet to be defined. Art’s six through eight further define the crime of genocide, crimes against humanity and war crimes respectively

⁵⁹ Id Art 13 a) of the Statute

⁶⁰ Art 13 b) of the Statute

⁶¹ Art 13 c) of the Statute

following a chapter VII resolution by the Security Council⁶², which in turn constitutes a previous determination under art 39 of the UN Charter.

As Sudan is a non-state party to the Rome statute, the 1. April referral was the only way for the ICC to commence investigation, and prosecution of suspected war criminals in Darfur.

After reviewing Cassese's report on Darfur, the Security Council concluded that the situation in Darfur constituted a "threat to the peace and security of mankind", although not labeling the conflict genocide as US president George W. Bush did in the fall of 2004, and acting under chapter VII of the UN charter referred the situation to the ICC and its chief prosecutor Mr. Luis Moreno-Ocampo. the UN Security Council resolution 1593 of 1 April 2005 referred the situation in Darfur to the ICC.

This referral was made possible by art 13 b) in the statute, acting under chapter VII of the UN charter. However, Art 13 b) of the Statute only states that the Security Council may refer a situation to the ICC, it does not say anything further about the power to include a condition in the referral. The condition in Res. 1593 means that personnel from non-state parties, like the US, operating in peace-keeping operations in Darfur, will not become the subject of the jurisdiction of the ICC, save explicit consent from that persons state. Art 12.2 a) of the Rome Statute on the other hand, dictates that the Court may exercise jurisdiction if "the state on the territory of which the conduct in question occurred" is under the ICC's jurisdiction. In this case, as Sudan is now under the jurisdiction of the ICC by way of Security Council referral, personnel from non-state parties operating in peace keeping missions in Sudan, should be subject to the ICC's jurisdiction. It may therefore seem as if res.1593, or at least the condition tied to it, is not in accordance with art.12.2 a) of the Rome Statute.

The question then presents itself; Was res.1593 consistent with the Powers given the Security Council and the ICC under International Law and the Rome Statute?

When analyzing this problem one has to first find under what basis the security council derive their right and how far those powers reach.

4.2 The Security Council and its powers

The UN Security Council is made up of five permanent members and ten elected ones alternating every two years. At the moment the permanent

⁶² Article 13b in the ICC statute allows the security council to refer situations to the ICC acting according to the UN charter chapter VII

members are France, U.K, China, Russia, The US⁶³. There have been suggestions that Japan, India or an African state should be awarded a permanent seat to help even out the power balance in the Security Council, but nothing has materialized of it. The Security Council is responsible for the upholding of international peace and security and under chapter VII of the UN charter has the power to decide what “measures shall be taken to restore international peace and security” in situations constituting “any threat to the peace, breach of the peace or act of aggression” , art 40 and 39 of the charter respectively. It is also in charge of determining what constitutes such crimes.

In order for a resolution to pass it must have nine votes in favor, however each of the five permanent members have a right to veto any resolution (although not technically a veto, but more of a response in form of “nay”, the effect is nevertheless the same”)

Some members of the UN have proposed limitations of the use of veto to chapter VII resolutions, but to do so could prove to be the demise of veto . power in the Security Council in entirety and as long as the veto power is used cautiously the UN sees no reason to put limitations on its use, even if they could. Since the end of the cold war, there has been 50 vetoes to Security Council resolutions, 34 of these have been by the US⁶⁴.

All chapter VII resolutions are binding to the UN member states, and as of Nov. 12 1956, Sudan has been a member. However, Chapter VII resolutions require a predetermination under art. 39 of the UN Charter that the situation must constitute a threat to, or breach of the peace and security of mankind or an act of aggression, and as the Security Council already in 2004 concluded affirmative⁶⁵ the Security Council acted within their capacity regarding the UN Charter⁶⁶, by referring the situation in Darfur to the ICC. As the powers given the Security Council by chapter VII resolutions are quite wide, the Security Council had full authority to exclude certain nationalities from the ICC’s jurisdiction. The problem however is: is res. 1593 inconsistent with the Rome Statute, and if so, will it then be binding on the ICC? Before we study the Security Councils ability to bind the ICC, it could serve to examine

⁶³ The elected seats are currently occupied by Argentina, Denmark, Democratic republic of Congo, Ghana, Japan, Qatar, Greece, Peru, Slovakia and Tanzania

⁶⁴ Source, www.globalpolicy.org www.en.wikipedia.org

⁶⁵ A/RES/44/16

the relationship between the two and what provisions are to be found in the Rome Statute regarding the power of referrals and jurisdiction, and also what provisions the ICC has imposed on itself in this regard

4.3 The Security Council vs. the ICC

The ICC is an independent institution, but enjoys a close relationship with the UN. Not only was it created as a brainchild of the UN and with UN help, art. 2 of the statute furthermore states that there shall be a relationship agreement between the UN and the Court. That relationship agreement⁶⁷, signed in 2004 regulates the way the Court and the Security Council are linked together.

4.4 Art 13 b) “situation”

Now, art 13 b) gives the Security Council authority to refer a situation to the ICC. However, it states nothing further, it does not say anything about the nature of such a referral. The exact wording of art 13 b) is “The Court may exercise 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”.

It could be argued that the inclusion of a condition in the referral of 1 April 2005 represents an overreach of the Council's powers after art 13 b).

Such an argument was made by Dr. Koehler, who in a response to the resolution⁶⁸ claimed that the referral “violates the letter and spirit of the Rome-statute of the ICC and severely undermines the court's efficiency, credibility and legitimacy”.

Furthermore, it is noteworthy that the security council only has the power to refer situations, and not individual cases or persons.

As such, the Security Council can not refer Osama Bin-Laden to the ICC, It can then be argued that where there is no power to refer cases/persons to the ICC there is no power to defer cases/ persons to the ICC.

Again, the security council has the right to defer situations after art 16, Hence, a case can be made that by exempting certain individuals, in this case citizens of a non-state party, from the ICC's jurisdiction, the security council

⁶⁷ SC/ICC relationship agreement.....

⁶⁸ Dr. Koehler, in a comment to res. 1593, IPO

were effectively removing a piece of the situation and therefore there is no “situation” at all in the purest sense of the word, just a partial situation. In addition, the word/formulation “situation” does not invite to exclude anyone.

It is also important to take into consideration why art. 13 b) is worded in that certain way.

Why does the Rome-statute only give the Security Council the power to refer situations?

As with any legal document, the words that constitute it are not put together haphazardly. Careful consideration is put to each formulation and the document is analyzed, debated and rewritten several times before given its final form. The Rome-statute is no exception. As we have previously seen, one of the key issues at Rome was in fact the relationship between the Security Council and the ICC. How much influence should the Security Council have on the ICC?

Initially, the ICC was not thought to have the independence from the UN it enjoys today. One of the major differences from the 94/96 ILC draft to the Rome-statute is the inclusion of art. 15, giving the ICC’s prosecutor power to initiate investigations and prosecutions. Such independence was given the prosecutor as an effort to reduce Security Council control of the ICC and thus increase the courts independence. This was something many states, particularly the “smaller ones” felt was of crucial importance as the security council with its five permanent members represent the power balance in the world, and an independent court would be viewed as more balanced view among the poorer states. The fact that the ICC’s prosecutor was given the power to initiate investigations, and that the Security Councils control of the ICC was reduced from the original draft, can be viewed as an argument that the ICC should have total independence, and that as such, by the Security Council excluding certain states from the ICC’s jurisdiction, goes beyond the power originally given them by art 13 b)

4.5 Art 121 – “reservation”

Furthermore art. 121 of the statute reads as follows “ no reservations may be made to this statute”

So then, does the condition constitute a reservation?

The prohibition on reservations means that states ratifying the treaty may not choose to make reservations regarding any provision they might feel is unfortunate. Should the condition then prove to serve as a reservation to the

treaty, meaning it allows for a different approach than what is stated in the Statute, the referral could prove to be inadmissible to the ICC.

Regarding whether or not the condition constitutes a reservation, one should first study the condition in res. 1593.

Included at the request if the US they serve to prevent citizens from a non-state party operating in a peace keeping mission in Darfur from being prosecuted by the ICC.

However, although the condition serves as a guarantee, it is in reality superfluous, not changing the status quo due to numerous provisions in the Rome-statute.

Art. 8 of the Statute gives the court jurisdiction “in particular” over “serious war crimes part of a plan or strategy”

It is not highly likely that US personnel operating in a peacekeeping operation in Darfur would fall under the ICC’s jurisdiction in this regard. Although there is always a risk of peacekeeping personnel committing serious crimes when stationed abroad (rape is defined as a war-crime in the Rome-statute), these crimes will seldom be the result of a “plan or strategy” by the US government or army. Although art 8 of the Statute lists what crimes are to be viewed as war crimes and that unfortunately, these may be committed by peace keeping or invasion forces personnel, the gravity threshold is set so high that that it is very unlikely that any such crimes would meet them and thus be subject for investigation⁶⁹

Also, the ICC is a complementary judicial system⁷⁰, meaning that the ICC only gains jurisdiction where the state refuses to prosecute its citizens suspected of committing war-crimes or the ICC finds that a prosecution is a “sham” just meant to keep the ICC at bay.

These two provisions of the Rome-statute mean that regardless of the condition in res.1593, US citizens, or any citizens of any non-state party operating in peacekeeping operations in Darfur would highly unlikely be prosecuted for war crimes in Darfur. Furthermore, the US has a so called article 98 agreement with a host of states, giving the US a right to demand the extradition of its citizens in case of an arrest. This right is derived from art. 98 of the Rome-statute, a provision the US delegates in Rome managed to include on a late night meeting on the final evening of the conference. Although the meaning behind it was originally to make it possible for states

⁶⁹ See ICC’s prosecutor Mr. Luis Moreno-Ocampo’s statement on the decision to not initiate investigations of alleged war crimes committed by coalition forces in Iraq, February 10 2006 www.icc-cpi.int

⁷⁰ Art 1 of the Statute

to respect already existing, of the time of adoption, bi-lateral agreements of extradition, the US argue that the wording does not invite to discriminate between already existing agreements and future ones. Then Defense Secretary Donald Rumsfeld said regarding art 98 agreements that “fortunately there may be mechanism within the treaty by which we can work bilaterally with friends and allies... to prevent the jurisdiction of the treaty”⁷¹

Obviously, such agreements would have to be signed before demanding extradition. Hence, the US immediately following the Rome-conference formulated an agreement, to be known as an art. 98 agreement, and then “made their way around the world collecting signatures”, and although signatures have been known to be obtained through threats of withholding funds, withdrawal of army bases etc, more than ? states have signed. Of course, if the ICC is to punish it first has to capture and be able to hold the perpetrator captive. The Rome-statute gives the ICC the right to demand extradition of individuals who are being held captive in a state the ICC has jurisdiction over, be it a state party or in this particular case Sudan. Following. However art 98 as we have seen makes the ICC’s right to demand extradition from its state parties secondary to extradition agreements existing between states, and while it does not prevent the ICC from indicting a US citizen or even passing judgment in absentia, it does mean that the ICC might never be able to carry out the punishment. As the worlds sole remaining super power the US is in a unique position to negotiate such agreements, possibly leaving the world with a somewhat emasculated ICC.

4.6 Art 12 2 a)

Furthermore, as stated, art 12.2 a) of the Statute would give the ICC jurisdiction over peace keeping personnel from non-state parties operating in Sudan, providing the ICC has jurisdiction over Sudan, had it not been for the exclusion of jurisdiction for these nationals in res.1593. So does the resolution contradict art 12.2.a)?

In letter, it is hard to argue the opposite. However, as the Vienna Convention art 31. 3 a) dictates; one should interpret the treaty(the Rome Statute) by taking onto account” any subsequent agreement between the parties regarding the interpretation of the treaty”. This means that even if art 12.2 a)

⁷¹ News Release of the United States Department of Defense May 6. 2002.
www.defenselink.mil/releases/2002/b05062002_bt233-02.html

might seem at odds with res. 1593, one has to examine if there is any agreement of some kind following the completion of the treaty. In July 2002, the Security Council passed a resolution exempting UN peacekeepers from the jurisdiction of the ICC for a period of twelve months, after art 16 of the Statute⁷². The resolution was passed after the US earlier that year vetoed a renewal of the peace keeping operations in Bosnia on the grounds that an exemption for ICC's jurisdiction over, their, peacekeepers was not included. Although the Security Council was opposed to the idea, a resolution resembling the one the US wanted to include earlier was then passed, and the US subsequently agreed to renew the mandate for peace keeping operations in Bosnia. This shows that the idea of the Security Council exempting certain groups of people is not a new one. However the problem lies in that it is the Security Council telling the ICC what to do or how to proceed. And the grounds under which the Security Council can bind the ICC through a chapter VII resolution or otherwise, is questionable. Dan Sarooshi argues that although Security Council resolutions under chapter VII are binding to all States, the ICC as an international, independent organ as such not in any way obligated to act a certain way. Sarooshi admits that the US is of a different opinion as illustrated by former US ambassador David Scheffer remarks that art 13 b) of the Rome Statute "enables the Security Council to shape the ICC's jurisdiction"⁷³ I personally agree with Mr. Sarooshi, I believe that the Security Council may very well instruct or attempt to "shape the Court", but if it falls outside the parameters set by the Rome Statute, the ICC is nor under any obligation to comply. In fact if it is in disagreement with the purpose and objective if the court, the Court may not even be allowed to comply. I find basis for this assumption in art. 17 of the Statute, which gives the court the power to decide the "issue of admissibility", meaning that it is up to Mr. Moreno-Ocampo and the judges to determine the admissibility of res. 1593.

4,7 Remarks about the consistency and ability to bind the iCC

In addition, we have seen in the previous chapters, that one of the arguments against the legal validity of resolution 1593 was that it exceeds the powers

⁷² S/RES/1422 (2002)

⁷³ For more on this, see Mcgoldrick, Rowe and Donnelly, *The Permanent International Criminal Court, Legal and Policy Issues*, Dan Sarooshi, *the Peace and Justice paradox*. P.96

granted to the Security Council and as such , goes against the “spirit” of both Rome and the treaty.

However, the conference at Rome and the treaty itself were a result of compromise upon compromise. The group of the “like-minded” conceded to several provisions in order to gain acceptance for other more important, to them, matters. As did the “constrictive” group.

These compromises, although possibly weakening the statute, made it possible to achieve the ultimate goal, a permanent international criminal court.

Hence, res. 1593 does not necessarily go against the “spirit “ of Rome as the framers and all of the delegates at Rome did what they felt was necessary in order to create an institution the world has wanted for decades to help prevent war-crimes.

The security council referral, although somewhat inconsistent with the Rome Statute, was a direct result of the desire to fight crimes committed against humanity in Darfur. War- crimes were undeniably being committed in Darfur and despite peace talks and peace-keeping operations from the AU, among others, the security council inevitably felt that a referral to the ICC would be the only way to combat the impunity which prevailed in Darfur. Granted, the Security Council could have set up an ad hoc tribunal in Darfur, but with the ICC in place ready to commence investigation, an ad hoc tribunal would have been a stab in the back to an institution the UN helped create. In addition, one of the reasons behind the ICC was that ad hoc tribunals were to costly, both in a financial but also time consuming way and after ICTR and ICTY were to be avoided.

By setting up an ad hoc tribunal in Darfur the Security Council would send the rest of the international community a signal that the ICC for reasons political or practical was not indeed the institution to deal with war crimes the world had wanted it to be. After all, had the Security Council not referred the situation of Darfur to the ICC, when would they ever refer a situation to the ICC?

In effect, by not referring the situation in Darfur to the ICC, the Security Council would make their power of referral Rome a “dead letter”.

In conclusion, res. 1593 by the Security Council, although not uncontroversial, was at the time being, perceived as the best possible way to deal with the situation in Darfur. It is safe to say that a referral without the condition would have been vetoed by the US, and then the ICC would not have obtained jurisdiction to Darfur, and the brutal actions would have

continued. In the choice between the two “evils” the Security Council thus chose the lesser one.

Although one referral is hardly enough to set a precedence cast in stone, it is still the first of its kind and constitutes a valuable norm of which to judge future referrals by. The next time the security council finds it necessary to refer a situation to the ICC, the US would most likely have to start with a “clean sheet” again, meaning adding a similar condition would have to be proposed again and not be taken for granted, the rest of the permanent members of the security council could find it difficult to find adequate reasons for not including such a condition this time around all the while they did on 1 April 2005.

5. What might be deduced from res 1593?

We have seen that one of the goals for the International Criminal Court is to “put an end to impunity” for perpetrators of international crimes.⁷⁴

Although such crimes may never be prevented, it is nevertheless important for the international community to signal that it does not tolerate such crimes. In order for the ICC to achieve this objective of ending impunity, it is of importance that it has universal jurisdiction, or at least as close to it as possible.

After all, what function can a court without the ability to prosecute really serve? As previously stated, the ICC has inherent jurisdiction over all member states, meaning that regarding these states, the ability to investigate and prosecute is undeniable as the ICC’s prosecutor has the power to initiate investigations and prosecution on his own in these matters.⁷⁵

However, although there are 100 state parties to the ICC, there are still a substantial number of states that are not party to the treaty, and they may only fall under the ICC’s jurisdiction by way of referral from the Security Council⁷⁶. In addition, personnel from non-state parties operating on

⁷⁴ The Rome Statute, Preamble

⁷⁵ Art 13 c) of the Statute.

⁷⁶ Id Art 13 b) of the Statute

territory over which the ICC has jurisdiction, may also be subject to the ICC's jurisdiction⁷⁷.

This means that for the ICC to have true universal jurisdiction, the Security Council must prove a willingness to refer situations to the ICC.

It is of little use that, out of the five permanent members of the Security Council, three of them are state parties⁷⁸, if the remaining two⁷⁹ exercises their veto right and blocks any attempt of referral.

Granted, the ICC will still be able to investigate and prosecute in those situations it has jurisdiction⁸⁰, but what legitimacy and recognition will the Court have, if it is unable to prosecute serious international crimes due to lack of jurisdiction? Might it not be viewed as unfair that some states really have immunity?

Now that the US abstained from voting on res. 1593, and thus abstained from using their veto, what does this imply regarding the US' policy on the ICC? As evident by the reaction of many to res. 1593, the US was, more so than China, perceived as being the biggest threat to referrals to the ICC from the Security Council. The US had been the staunchest critic of the ICC and there was a question of whether or not the Security Council would be able to refer situations to the ICC because of the US' opposition to the Court and the veto power the US has in the Security Council.⁸¹

Therefore the question arises as to what one can deduce from res. 1593 in the context of the US/ICC relationship and why is the US policy on the ICC important?

Furthermore, what will res. 1593 and the exclusion of jurisdiction for personnel from non-state parties outside Sudan represent regarding Security Council control over the ICC and future scope of the ICC's jurisdiction?

5.1 US view on the ICC

In order to understand and discuss the reasons behind the US' persistence to include such a condition in the referral, and also why they allowed the

⁷⁷ Id Art 12. 2 a) of the Statute

⁷⁸ France, UK; Russia

⁷⁹ China and the US

⁸⁰ Aside from the situation in Darfur, The ICC is currently investigating the situation in Uganda and the Democratic Republic of Congo, both of whom are State Parties. See www.icc-cpi.int

⁸¹ See Fredric L Sturgis' article on the UN Commission's report on violations against Humanitarian Law in Darfur. February 2005. Available at www.asil.org/insights/2005

referral to pass, it is beneficial to further examine the US policy towards the ICC.

As the world's only superpower, with its military superiority, the US is convinced that it is their responsibility to promote peace and democracy to the parts of the world that are unwilling or unable to do so themselves.⁸² As such, they argue that their personnel will be more likely to be stationed around the world on a much larger scale than any other states' personnel. Therefore they feel that they will be at a much higher risk of investigation/prosecution, especially given the fact that the US has many enemies around the world and that that increases the risk of violent episodes.

The fact that the security council has to pass a resolution in order to deter an investigation, art.16, meaning that if one of the permanent members vetoed the resolution the investigation would be free to continue, rather than the other way around which was the way the US wanted it and also what was proposed by the ILC draft, was one of the reasons why the US ended up voting against the statute in Rome. The US is most hesitant to give away jurisdiction of their citizens to an independent institution such as the ICC. Partly because they fear politically motivated prosecutions, a fear that is somewhat unsubstantiated all the while the integrity of the prosecutor and judges of the ICC is undeniable, and also because the army, especially the pentagon, feels that it would hamper the decision making both in the strategy room and on the battle field.

Immediately following the Rome conference, the Senate Foreign Relations Committee summoned a hearing inquiring the US policy towards the ICC, ,⁸³ Ambassador David Scheffer listed these points as the main reasons the US opposed the statute:

That the ICC has jurisdiction over third parties after Art. 12 of the statute, the lack of an opt-out provision in the statute, the prohibition of reservations to the Statute⁸⁴, the power given the ICC's prosecutor to initiate proceedings, and finally the inclusion of "aggression" to the elements of crime without defining the term.

In speech addressing why the US opposed to the Statute 2002, under secretary of state Mark Grossman stated that although the US would always be supportive of the prosecution and punishment of war criminals "that

⁸² The US State Department asserts that it is the US' goal to "promote democracy...assist newly formed democracies....and identify and denounce regimes that deny their citizens the right to choose their leader" See www.state.gov/g/drl/democ

⁸³ www.senate.gov

⁸⁴ The US Senate has a constitutional right to propose amendments/reservations to any treaty before the US can ratify that treaty.

should be done wherever possible through reinforcing the capability of domestic legal systems”. He then went on to name the, then recent, creation of the hybrid tribunal in Sierra Leone. This view on international criminal and humanitarian law is in compliance with the US’ previous efforts to bring war criminals to justice, they were actively involved in the Nuremberg and Tokyo tribunals following WWII and also the tribunals of Rwanda the former Yugoslavia (ICTR and ICTY) He also said that the Rome Statute “dilutes the authority of the UN SC” What under secretary Grossman was referring to was most likely art. 16 of the Statute which, as previously stated, only allows the UN SC to defer investigations through a resolution, meaning that any of the five permanent members can veto it, thus allowing the investigation to proceed. The US, of course wanted it the other way around, where the UN SC had to green light every investigation allowing for a single state such as the US to block any investigation it wanted to. Since the US has a somewhat strong control of the UN SC, a strong SC control over the ICC would imply a strong US control over the ICC.

The US and its delegates at Rome felt the Rome-statute was a step in the right direction, and they managed to incorporate many of the US’ views on the ICC into the Statute. Despite this, they inevitably came to the conclusion that the statute did not harbor sufficient safeguards, and felt that the Rome Statute fell short of what they could accept and ended up voting against it. Although then US president Bill Clinton did sign the Statute in, literally the last hour before it closed for signatures in 2000, he also stated that he did not or would not recommend any future US government to ratify the treaty, and the signing was most likely to ensure the US would still be involved with the future shaping of the statute.

On May 6 2002, the US government delivered a letter to the UN SC “giving formal notice that the US has no intentions of becoming a party to the Rome Statute” (although the letter did not use the term withdrawal it did request that the US decision be reflected in the treaty’s signing list, effectively removing their signature)

This implied that the US would refuse to cooperate in any way with the ICC, be it of a financial or intelligence-sharing nature, and at the same time enabled the US to more actively pursue work against the ICC either by proposing establishments of ad hoc tribunals or gathering signatures on their art 98 agreements. The US ambassador for war-crimes issues Pierre-Richard Prosper stated in this regard that the “(ICC) prosecutor should build his case on his own and not rely on US information or cooperation”

Without US cooperation/participation the ICC and its prosecutor risk not being able to benefit from the US’ huge amount of intelligence and

information regarding current/future investigations. Although the state parties of the ICC themselves have more than adequate intelligence agencies, with the US as the world's only superpower and with its military superiority it is quite obvious that the US is in possession of information/able to obtain such information that could prove to be of crucial value to the ICC's prosecutor investigating a case/situation.

This means that not only is the US' policy on the ICC important for the Security Council's ability to refer situations to the ICC, but also to some extent important for the ICC to investigate all situations, as the decision of whether or not to prosecute relies on the information available to the ICC's prosecutor⁸⁵. In addition, it could also provide for a more effective court with a much more cohesive support allowing it broader acceptance throughout the international community. An ICC with US support would translate as a much improved likelihood of UN SC referrals passing and furthermore give the ICC stronger leverage concerning non-state parties by being able to say "the rest of the world is on board, why aren't you?"

However, it is a fact that the US, in part because of their role as a superpower but also of their recent forays into foreign territory (Iraq, Afghanistan, Somalia etc.), have a substantial number of sworn enemies around the world. Many of these states could view an international criminal court with US participation as just another mechanism in the US' grand scheme to control the rest of the world, thus diminishing the legitimacy of the ICC. Although this argument is not necessarily without merit, as the US "war on terrorism" is perceived by many as a "war on Islam/Arab world",

5.3 US view on the ICC post re. 1593

As the Rome Statute has not been subjected to any amendments since its adoption in 1998, can one assume that the US has changed their view on the ICC, or are there other factors that may have contributed to apparent change of course by the US?

⁸⁵ In ICC prosecutor Mr. Luis Moreno-Ocampo's response to alleged war crimes by coalition forces in Iraq, one of the phrases that he used the most was.."according to the present information", thus reiterating the value of information. See www.icc-cpi.int/organs/otp/otp_com.html

Although the condition does not single out US citizens as being exempt from the courts jurisdiction, it is of little doubt that they were included as a direct result of the US government's attempts to not give away the power to prosecute any US citizens.

Although the US will never concede to it, speculation arises as to whether the US, given its long held hostility to the ICC made sure the resolution contained the condition in the hope that it then might be deemed by either the other members of the security council or by the ICC as overreaching the security councils powers and thus be declared not valid. Opening up the way for an ad hoc tribunal in Darfur, which is what the US have wanted all along. Many were surprised when the US abstained from voting on res. 1593 last April, thus allowing for the resolution to be passed.

However, as we have seen in chapter 7 upon closer examination the decision to abstain from voting on the res. did in fact not veer significantly from the position held by the US and its delegates at Rome

By including the condition, the US managed in 2005 to do what they could not seven years earlier at Rome, namely to make it possible for a Rome-statute with an opt-in clause.

This could simply be the US' attempt to block the referral without being publicly responsible for doing so, which would have caused them embarrassment all the time it was the US who initiated the report on Darfur.

Given the US' long outspoken hostility towards the ICC and the Rome-statute as it stands, it is highly unlikely that the US would have let a referral without any conditions pass. Now, whether or not the conditions prove to set a precedence in future referrals, the fact still remains that res. 1593 was indeed passed with a condition and that leads to the question of whether or not the decision by the US to abstain from voting was just a "one-time deal", allowing the US to "save face" in front of the international community by not allowing the impunity for criminals in Darfur to continue, while at the same time providing adequate safeguards for US personnel, or if it is to be interpreted as a softening in the US hostility towards the ICC. Although the passing of res. 1593 was met with mild surprise by many observers and governments around the world, it (the res.) does not in fact signal anything new, as we saw in paragraph 7. Under no circumstances will the US concede jurisdiction unconditionally to the ICC, and thus they will not sign a treaty to that effect. The US made their argument concerning US personnel operating in peacekeeping operations, but the line between peacekeeping forces and

invasion troops can at times seem blurred. With the inclusion of the condition, the US managed to obtain an additional safeguard, further prohibiting the occurrence of frivolous, in the eyes of the US, prosecutions, and as such, the outcome of res.1593 does not necessarily differ from the view held by the US at Rome. In addition, another US concern over the Rome-statute was stronger Security Council control over the ICC. In this particular case, the situation in Darfur was indeed referred to the ICC by the Security Council after they reviewed the commissioned report on the situation. Given the fact that this was the first time the ICC commenced an investigation, it solidifies jurisdiction by way of referral from the Security Council, further strengthening security council control of the ICC. Again, this is in compliance with US view on the court.

However, it could mean that the US is gradually trying to incorporate their view on the ICC into the statute, either by setting a precedence or by pressuring the member states to adopt needed provisions at the review conference. There are especially three scenarios that present themselves as valid courses the US might take regarding their attitude towards the ICC. The first is that the US has reconsidered its view on the ICC and by allowing the referral to pass, they are signaling that they intend to embrace the Court and even join it. Any such notions can be effectively dismissed. First of all, the US did not vote for the resolution, as they would have done had they wanted to signal their acceptance for the court. Second, representatives from the US government have repeatedly stated that the US believes that the Rome Statute is flawed and has no intention of signing it. This leads to the second scenario, that the US still is opposed to the Statute and that they will continue to work towards weakening the Court. The fact that the inclusion of the condition in the referral in reality added nothing new to what was already in the Rome Statute serves to illustrate this. There is nothing to suggest that the US has altered its view on the Court, no new developments. However, again the US abstained from voting. Had they really wanted to send a message to the world that they would never cooperate with the ICC, they would have vetoed the referral. Of course, the fact that the US allowed for the resolution to pass can be explained by either their desire to punish those responsible for war crimes and coming to a conclusion that as long as an ad hoc tribunal was out of the question, a referral to the ICC would be the best way to do so. Thus letting their moral obligation outweigh their opposition to the Court. Or it could also be, in connection with the previous point, that their decision to abstain

from voting was an attempt to save face in front of their allies and the rest of the international community. It was indeed the US who initiated the report on Darfur and President George W. Bush has stated that the US is “committed to combating war crimes”⁸⁶ thus making it difficult for the US to provide for the continuance of impunity for the war criminals in Darfur, by blocking the referral to the ICC.

The inclusion of the condition in the referral, however superfluous, may have been what was needed for the US to allow for the resolution to pass while still keeping its position of opposition to the Court intact. The condition, in a sense made it tolerable for the US.

This leads straight to the third and more likely scenario, namely that the US wants to see the Court in action, to examine its behavior further before it decides what action to take next. The fact that there is a review conference in the Statute in 2009, where State Parties may propose amendments to the Statute, is not lost on the US. By signing and ratifying the Statute prior to the review conference, the US would forfeit any leverage as to amendments of the Statute. Granted, the US would then be able to propose amendments themselves as a State Party, but they would be in a much better negotiating situation if they are able to dangle the possibility of them joining the ICC in front of the State Parties. Obviously, the referral made it possible for the Court to start investigating the situation in Darfur, an investigation that determined that “The jurisdiction of the Court covers the situation in Darfur since July 1, 2002 ...and the further commission of grave crimes will be the subject of on-going monitoring, investigation and potential prosecution by the ICC”⁸⁷.

However, what does this referral mean in the broader scope for the Court? Will it, now that the US has eased up on its position of never voting a referral through to the ICC⁸⁸ have the chance of finally functioning as a permanent international criminal court with universal jurisdiction, or will it take the more practical approach of a constructive partnership, and in either case, what would be the consequences, especially regarding the Court's legitimacy?

⁸⁶ Foreign Press Center Briefing by US Ambassador for War Crimes Issues Pierre-Richard Prosper, May 6 2002, www.state.gov

⁸⁷ Report of the prosecutor of the International Criminal Court, Mr. Luis Moreno-Ocampo, pursuant to UNSCR. 1593 (2005) June 29, 2005

⁸⁸ Although the US in fact did not vote to pass resolution 1593, a case can be made that their decision to abstain from voting was decisive in the passing of the resolution, thus achieving the same result as voting.

Regardless of whether or not the US wants to sign the treaty or become a party to it, the fact still remains that now that they have allowed for the first situation to be referred to the ICC, and the US might find it difficult to veto a new resolution to refer a situation to the ICC. Therefore, a constructive partnership between the US and the ICC, could prove to be beneficial for both. It would ensure the US that none of their personnel are never to be prosecuted by the ICC, as the US no doubt will make sure that the next referral also contains some sort of condition regarding exclusive jurisdiction over their personnel, while at the same time enabling the US to continue to pursue art. 98 agreements and lobby for amendments in the Statute at the review conference. The ICC, on the other hand would be able to be assured that the US would not veto any referrals to the ICC by the Security Council, and the ICC would also in essence, acquire a universal jurisdiction deriving from the powers of the Security Council acting under chapter VII. An important exclusion however to that jurisdiction, is that of China and the US. China and the US are the only two permanent members of the Security Council who has not signed the Rome Statute. This means that the only way they may fall under the jurisdiction of the ICC is by a referral from the Security Council. A referral that, of course, China or the US could veto and thus keep from reaching the ICC. In other words, the US could enjoy the same impunity that they will not allow others, if they were to cooperate with, but not become party to, the ICC. Because, as we have seen, the gravity threshold is very high for any crimes committed by US personnel operating in a peace keeping mission in a state that the Court has jurisdiction over. Which would be the only other way for US citizens to fall under the Courts jurisdiction, In addition the crimes committed would most unlikely meet the requirement of being part of a “plan, or policy”⁸⁹

Now, a constructive partnership like this might be what is necessary to make the ICC capable of dealing with situations such as Darfur, but what messages will such a partnership send to the rest of the international

With the ICC busy investigating the situation in Darfur, the US get to further study the proceedings of the Court as well as the integrity of the judges and the prosecutor.

The ICC’s prosecutor has the power to initiate proceedings on his own and it is the bench who determines whether or not the requirements for admissibility are met, especially regarding whether an investigation by the concerning state is legitimate following the criteria listed in art. 17 of the Statute, and the US has expressed serious concerns over this. They fear that

⁸⁹ Art 8 1. Of the Statute

such independency might result in politically motivated trials and frivolous investigations

The US could very well have chosen to veto the resolution citing its concerns about the Statute, but the fact that it did not speak volumes and has to be given more weight than the statements that have followed from US officials in the wake of the resolution. Although US statements and comments regarding their relationship to the ICC are by no means to be taken lightly, after all they are per definition an expression of official US policy, the comments made might very well be a part of the US' negotiating strategy towards the ICC and by allowing for the resolution to pass, the ball is now in the ICC's court.

It is easy to see the US' benefits of joining the ICC. It would strengthen relations with their allies, like France, the UK and Russia who are warm supporters of the Court, and it would furthermore give the US a chance to play an active role in the shaping of the court, as art 9 2. Regulates that only the judges, the prosecutor or a State Party may propose amendments to the Statute.

Although only State Parties may propose amendments at the review conference, that is not to say that the US can not suggest what it would take for them to join the treaty, and subsequently any of the State Parties could propose those certain amendments.

If one looks at the resolution in this manner, the US decision to abstain from voting begins to make sense. They wanted to see the ICC operating in order to evaluate the integrity of its prosecutor and judges, but at the same time did not want to be seen as to giving in to international pressure of relinquishing their opposition towards the ICC. The inclusion of the condition gives the impression that it is the SC that has succumbed to the view of the US and not the US that has conceded anything. In addition they managed to communicate some of the amendments that they (US) feel are necessary if they are to join the treaty; A guarantee that no US citizens will be prosecuted by the ICC, in essence the US are skeptical to the issue of complementarity, as the Security Council , and by that the US, has no control over the decision of when a national prosecution is not legit.

In any event, one of the things that can be said with certainty is that the US will keep its options open regarding what course to take regarding the ICC. It is highly unlikely that they will permanently decide anything before the review conference in 2009.

History has shown the US that persistence pays off, and what the US wants, it has a habit of obtaining. The treaty of the Law of the sea serves to illustrate this point. In 1982 this treaty was adopted, however the US had

concerns relating to certain seabed mining provisions and refused to sign it. After more than a decade of negotiations, a legally-binding agreement altering the agreement to be in correspondence with the US view on seabed mining, was concluded and the US subsequently signed. As all treaties signed by the US must receive the consent, and also advice, by the US Senate before it can be ratified, the US has yet to ratify it, although it has a broad support in congress.

In a similar fashion, by getting the condition included in the referral, the US could be signaling what it would take in order for them to sign the treaty, , and ratify it. In resolution 1593 they incorporated a condition which the ICC let override an existing provision in the Rome Statute that was somewhat inconsistent with the resolution. Obviously, it would take several amendments to the Rome Statute for the US to embrace, the possibility of reservation with regards to certain provisions of the Statute is among the most crucial in that respect as the US claim it violates their constitution to ratify a treaty prohibiting reservations. Likewise would the US need to be absolutely confident that the ICC would not prosecute any US citizens but rather let the US take care of the investigation and prosecution of their own, citing the principle of complementarity. The review conference of the Rome-statute, to be held in 2009, will most likely be the center of intense negotiations as was the Rome conference itself, and the outcome is far from certain. However, the US and the rest of the international community got to see the integrity of the ICC when on February 10 2006 the ICC's prosecutor Mr. Luis Moreno-Ocampo announced that, after receiving over 240 "communications concerning the situation in Iraq" he would not be initiating any investigations of situations in Iraq.⁹⁰ Both private citizens and Non-Governmental Organizations, NGO's; had done what the US feared they would do, namely accuse the coalition forces of war crimes.. Mr. Moreno-Ocampo stated that although he regretted the loss of lives, he had a "very specific role and mandate, as specified in the Rome Statute" and that he could only initiate an investigation "if the available information satisfies the criteria of the Statute". He then went on to note that the ICC did not have jurisdiction over Iraq and as such, only had jurisdiction over citizens of State Parties operating in Iraq, With regards to the alleged crimes, he stated that since the Statute does not define "aggression", the court "may not exercise jurisdiction over the crime until a provision has been adopted which defines the crime", and that happen no sooner than the review conference in 2009. Mr. Moreno-Ocampo also dismissed allegations of genocide, Crimes against

⁹⁰ Iraq response 10.02.06 www.icc-cpi.int/organs/otp/otp_com.html

Humanity and war crimes as not meeting the criteria set by the Statute recognizing that the available information “provided no reasonable indication of...widespread or systematic attack” or “did not indicate intentional attacks on a civilian population”. There was however reason to believe that the war crime of willful killing and inhuman treatment, but Mr. Moreno-Ocampo stated that the low number of victims, 4-12 and less than 20 respectively, did not meet the sufficient gravity threshold.

Throughout the response, Mr. Moreno-Ocampo step by step takes us through the allegations and the relevant provisions in the Statute explaining repeatedly that he is bound by the statute and its provisions.

The decision reached by the ICC prosecutor was not very surprising to those who know the provisions of the Statute but to hear the reasoning behind Mr. Moreno-Ocampo’s decision not to investigate stands as a testament to the integrity of the Court, its sole determination to rule by law as opposed to politics, and was without doubt welcome in the eyes of the US government. Possibly soothing some of the US’ fears of an unaccountable prosecutor and frivolous prosecutions.

6. Conclusion

Now that we have seen the ICC’s independency being somewhat diminished, in the capacity of the Security Council passing res. 1593 with a condition that is not consistent with the Rome statute and which in turn led the US to allow for the resolution to pass, what consequences will that spell for the ICC?

As previously mentioned, during the Rome Conference India pressed for no Security Council control over the ICC, and the Indian representative to the UN Sixth Committee, Prem Singh Chandumajra, stated during the Committee’s discussion of the Rome Conference, that “by subordinating the future court (the ICC) to the discretion of the (Security) Council’s five permanent members” was an “overstretched interpretation of the powers of the Security Council” and that India doubted that the ICC under this

foundation “ had prospects of ever becoming universal.”⁹¹What Mr. Chandumajra probably was referring to was the veto power each of the five permanent members of the Security Council has, and as such it is not very likely that the US or China as the only non-state parties of the five, will ever allow a referral concerning themselves pass. In addition, by granting such impunity to these states, it also reinforces the perception that many states have that the worlds power balance is reflected in the field of international criminal law. The seemingly unfair distribution of power in the Security Council has been addressed several times by the smaller states, as evident by the already mentioned discussion of the inclusion of additional permanent members of the ICC.⁹² Nevertheless, it serves as an indicator as to what many states feel would constitute a threat to an ICC with broad recognition and legitimacy.

Now although an ICC with US cooperation could be beneficial for the Court, it all depends on the grounds of US cooperation.

There is little doubt that the ICC in the investigation of the situation in Darfur will operate in a cautious and just matter, especially since this is the first time the Court obtains jurisdiction by a referral from the Security Council, and the integrity of the ICC’s prosecutor, Mr. Moreno-Ocampo, has yet to be challenged. However, with a political body like the Security Council determining that certain individuals are to be exempt from the ICC’s jurisdiction, and at the persistence of the US no less, it politicizes the court more than the Rome Statute allowed for. The fact that the US is not a party to the Rome Statute may in fact even have contributed to the large number of signatures and ratifications. As the US can be perceived as wanting to police the world, while not applying the same standards to themselves all the time⁹³, an ICC without US participation might have been viewed by some states as somewhat of a guarantee that the US would not be allowed to influence proceedings at this institution. Therefore it is not unlikely that now that the US in fact has shown the capability of influencing the scope of jurisdiction for the ICC and that the Security Council and the ICC allowed for it, the Courts recognition as a legitimate Court where politics are secondary to the letter of the law, might be in danger.

In order for the ICC’s jurisdiction to be truly universal, the jurisdiction must be applied not based on politics but on facts and substantive law. The

⁹¹ GA/L/3079

⁹² Id chapter ?

⁹³ The revealing of torture of prisoners at Abu al-ghraib serves to illustrate this

jurisdiction, as well as the Court, must also be recognized as being impartial and just.⁹⁴ In addition the Court has to be able to obtain custody of the offender for the jurisdiction to have any significance. Although it can try the perpetrator in absentia, as long as the ICC is not able to bring the suspect to court physically or to incarcerate the convict, the importance of jurisdiction is somewhat diminished. As we have seen by the US' eagerness to sign art. 98 agreements with different states, the ICC might never be able to carry out any punishment on US citizens as long as the US is a non-state party, thus granting a possibility of impunity for them. This, paired with the US "control" over Security Council referrals to the ICC⁹⁵, raises the issue of selective jurisdiction. If one is to define selective jurisdiction as jurisdiction that is applied on a basis of political reasoning rather than an indiscriminate application of facts, then the degree of selective jurisdiction is proportionate with the Security Council control of the ICC.

Although the referral from the security council was very important to the courts future allowing it to launch its first investigation based on referral from the Security Council, the inclusion of the condition has caused much discussion as to what it might do to the future of the ICC in regards of its legitimacy and recognition.

It is a paradox that both the US and smaller countries like India fear the same thing; unfair, politically motivated investigations and prosecutions. However, as this paper has shown, they want to use different approaches in the pursuit of avoiding such proceedings.

It is nevertheless up to the ICC and its prosecutor and judges to prove their integrity both towards the US but also the rest of the world. They have to show that they are indeed the fair and just court it was designed to be, in

⁹⁴ Dan Sarooshi describes in the article "The peace and justice paradox" that prior to the Rome Conference, several States "the Non-Aligned countries" among them Italy and Indonesia, stressed the "importance of the ICC being independent as a judicial institution from political influence of any kind, including that of UN organs and in particular the Security Council". McGoldrick, Rowe and Donnelly; The permanent international court, legal and policy issues, USA 2004

⁹⁵ As illustrated by their success in excluding jurisdiction for non-state parties' personnel in Darfur for the ICC in res. 1593

order to gain acceptability and help put an end to impunity for war criminals and punish those guilty of international crimes.

Continued US hostility towards the ICC could in the end spell the end of referrals from the Security Council to the ICC. If the US decides to exercise its veto every time a referral of a situation to the ICC is voted upon, Given the US tendency of isolationism , it is not such an unlikely thought as one might immediately think. Therefore the future of the ICC hinges on the fact that the ICC needs even more ratifications than there already are to the Rome Statute, in order to approach the goal of universal jurisdiction.

Although there will still be states expressing concern and hostility towards the ICC, it would have a much more cohesive and authoritative support behind it with the US as a member state. Although again, the integrity of the ICC as a purely judicial body, will be put to its test as it was following the passing of res. 1593. The integrity did not pass that test as the US managed to incorporate their policy on the ICC into the res. and therefore also into the Court. It is of less importance that the US personnel, or other, would probably not have been the victim of investigation and prosecution of the ICC⁹⁶ anyway, it was the judicial integrity of the Court that was tainted with politics, and that may be difficult for some states to accept, thus limiting the recognition and legitimacy of the ICC.

With all the talk about “universal jurisdiction” it can be useful to keep in mind that the ICC also is in need of “universal recognition”. That the international community views the ICC as a legitimate court dedicated to combating war crimes and the impunity for war crimes as opposed to just another expression of the balance of power in the world, is vital for the future legitimacy of the ICC.

With the Rome Statute’s expressed aim to end impunity for war criminals and thus “contribute to the prevention of such crimes”⁹⁷ is it not imperative that accountability for these crimes includes all? Should the US further insist on being elevated above the very jurisdiction they infer on other states, either through military action or by allowing for a referral to the ICC to pass in the Security Council, it would constitute a serious threat that could

⁹⁶ Due to art 98 agreements, principle of complementarity, and the gravity threshold for crimes in the Rome Statute.

⁹⁷ The Rome Statute, the preamble

undermine the legitimacy of the ICC. The justice that is to be served would undeniably have an element of selectivity and could furthermore be difficult for the ICC, in the long run, to justify. After all, what legitimacy does a court have who prosecute only the weak?

One of the very purposes behind the creation of the ICC was to avoid future ad hoc tribunals, partly because of the fact that they provided for random prosecutions and had an element of selectivity. As such, it would be a step backwards for the ICC to allow that sense of randomness and selectivity to permit entering the Court. It for sure would not inspire other states to become a party to the Court, and it could even cause some members to pull out. States like Congo, Afghanistan, Liberia and Serbia and Montenegro have already ratified the treaty⁹⁸, all states with a violent past but willing to do their part in the battle against impunity for war crimes. It is of crucial importance that those who are already member states remain so, and that even more states continue to join. Then, one can truly speak of universal jurisdiction.

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