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Opinion

THE ICC'S SOUTH AFRICA NON-COMPLIANCE DECISION: EFFECT OF SECURITY COUNCIL RESOLUTION 1593 ON REFERRING THE DARFUR SITUATION

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Introduction

On 6 July 2017, Pre-Trial Chamber II of the International Criminal Court (ICC) in the *Al Bashir* case, Darfur (Sudan) Situation, rendered a decision on South Africa's refusal to arrest and surrender the sitting Sudanese President Omar Al Bashir to the ICC during his visit in June 2015.¹ South Africa submitted that it is obliged to respect personal immunity of a Head of State embedded in customary law and it is under no obligation to cooperate.² The Pre-Trial Chamber, however, held that South Africa failed to comply with its obligations under the Rome Statute.³

In fact, Sudan has not signed up to the Rome Statute. In 2005, the UN Security Council referred Sudan, Darfur Situation to the ICC through Resolution 1593.⁴ In Resolution 1593(2005), the Security Council also decided that:

'the Government of Sudan and all other parties to the conflict in Darfur, shall cooperate fully with and provide any necessary assistance to the Court and the Prosecutor pursuant to this resolution and, while recognizing that States not party to the Rome Statute have no obligation under the Statute, urges all States and concerned regional and other international organizations to cooperate fully.'⁵

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¹ *The Prosecutor v. Omar Hassan Ahmad Al Bashir*, Decision under article 87(7) of the Rome Statute on the non-compliance by South Africa with the request by the Court for the arrest and surrender of Omar Al-Bashir, ICC-02/05-01/09-302, PT.Ch.II, 6 June 2017 (2017 *South Africa* Decision).

² *The Prosecutor v. Omar Hassan Ahmad Al Bashir*, Submission from the Government of the Republic of South Africa for the purposes of proceedings under Article 87(7) of the Rome Statute, ICC-02/05-01/09-290, 17 March 2017, the Government of the Republic of South Africa, paras.52-3.

³ 2017 *South Africa* Decision, p. 53; 1998 Rome Statute of the International Criminal Court, 2187 UNTS 90 (2002) (Rome Statute).

⁴ UN Security Council Resolution 1593(2005), UN Doc. S/RES/1593(2005), 31 March 2005, para.1.

⁵ *Ibid.*, para. 2.

The ICC in 2009 issued the first warrant of arrest for Al Bashir for the alleged war crimes and crimes against humanity during the Darfur conflict.⁶ The second warrant of arrest was issued in 2010 for his alleged genocide.⁷ After the issuance of the two warrants, Al Bashir has travelled to several States, including States that are parties to the Rome Statute, for instance, South Africa.⁸ The execution of the two warrants is still pending because States abstained from arresting him. Until now, the ICC has made several decisions for States Parties' failure to comply with its cooperation requests for the arrest and surrender of Al Bashir.⁹

This note critically discusses the effect of Resolution 1593(2005) in three respects. Firstly, it briefly summaries different approaches adopted in the ICC about States Parties' non-compliance issues. Secondly, it evaluates the effect of Resolution 1593. Thirdly, it argues that Resolution 1593 cannot make Sudan participate in the ICC as if it were a party to the Statute.

I. Different Approaches Adopted in the ICC

The main issue before the ICC was how to remove the personal immunity of a sitting head of a non-party State, as Sudan is a State not party to the Rome Statute. Debates occur as to the legality of the issuance of warrants by the ICC and Al Bashir's personal immunity embedded in traditional customary law. The ICC in previous decisions concerning Al Bashir has developed three divergent approaches.

This first approach may be labelled as a 'treaty-oriented' approach because, in effect, it aims to apply Article 27(2) to Sudan. Pre-Trial Chamber I in the 2009 *Arrest Warrant* Decision tried to justify its issuance of the arrest warrant against Al-Bashir. One of its reasons was that Resolution 1593 on referring the Darfur Situation to the ICC implied the application of the whole framework of Rome Statute, including Article 27(2) stipulating that no immunity could be claimed before the ICC, to the Darfur situation.¹⁰

The second approach could be called a 'custom-oriented' approach. In the 2011 *Malawi and Chad* Decisions,¹¹ Pre-Trial Chamber I held that both States failed to comply with their

⁶ *The Prosecutor v. Omar Hassan Ahmad Al Bashir*, Decision on the Prosecution's Application for a Warrant of Arrest against Omar Hassan Ahmad Al Bashir, ICC-02/05-01/09-3, PT.Ch.I, 4 March 2009 (2009 *Arrest Warrant* Decision).

⁷ *The Prosecutor v. Omar Hassan Ahmad Al Bashir*, Warrant of Arrest for Omar Hassan Ahmad Al Bashir, ICC-02/05-01/09-95, PT.Ch.I, 12 July 2010.

⁸ *The Prosecutor v. Omar Hassan Ahmad Al Bashir*, Report of the Registrar on the Information received as regards Travel by Omar Hassan Ahmad Al Bashir to the Republic of Uganda, ICC-02/05-01/09-307, Registry, 14 November 2017. These states were Algeria, Bahrain, Chad, China, Democratic Republic of Congo, Djibouti, Egypt, Equatorial Guinea, Eritrea, Ethiopia, Jordan, India, Iran, Iraq, Kenya, Kuwait, Libya, Malawi, Mauritania, Morocco, Nigeria, Qatar, Saudi Arabia, South Africa, and South Sudan, Uganda, United Arab Emirates. As of 31 December 2017, 9 of 27 States are Parties to the Rome Statute.

⁹ As of 31 December 2017, there exist 13 States Parties' non-cooperation decisions in the *Al Bashir* case.

¹⁰ 2009 *Arrest Warrant* Decision, para. 45; The UK, Article 23(5) of the *International Criminal Court Act* 2001, 11 May 2001.

¹¹ *The Prosecutor v. Omar Hassan Ahmad Al Bashir*, Decision Pursuant to Article 87(7) of the Rome Statute on the Failure by the Republic of Malawi to Comply with the Cooperation Requests Issued by the Court with Respect to the Arrest and Surrender of Omar Hassan Ahmad Al Bashir, ICC-02/05-01/09-139, PT.Ch.I, 12 December 2011(2011 *Malawi Decision*); *The Prosecutor v. Omar Hassan Ahmad Al Bashir*, Decision on the Non-compliance of the Republic of Chad with the

obligations to arrest Bashir because ‘the principle in international law is that immunity [...] cannot be invoked to oppose a prosecution by an international court.’¹² Meanwhile, a ‘critical mass’ had reached of ‘international community’s commitment to rejecting immunity’ in the context that international tribunals seek an arrest. A customary rule, therefore, exists providing an exception to the traditional customary rule on absolute personal immunity before international courts that seek arrest for the commission of international crimes.¹³

Lastly, in 2014 the *DRC* Decision did not follow the ‘custom-oriented’ approach as in the *Malawi* and *Chad* Decisions, but rather it adopted a ‘waiver’ approach that Bashir’s immunity was implicitly removed by Resolution 1593.¹⁴ The ICC has also adopted this waiver approach in its 2016 *Djibouti* and *Uganda* Decisions.¹⁵

In the 2017 *South Africa* Decision, the majority of Pre-Trial Chamber II does not rigidly adopt any of these approaches but introduces a variation of the ‘treaty-oriented’ approach.¹⁶ The majority in the *South Africa* Decision heavily relies on Resolution 1593 to reach its conclusion. The main argument of this decision is that:

‘the necessary effect of the Security Council resolution triggering the Court’s jurisdiction in the situation in Darfur and imposing on Sudan the obligation to cooperate fully with the Court, is that, for the limited purpose of the situation in Darfur, Sudan has rights and duties analogous to those of States Parties to the Statute.’¹⁷

Based on the idea that Resolution 1593 puts Sudan in the same position as a State Party to the Rome Statute, the Chamber explains that Article 27(2) applies to Sudan and no immunity issue has to be considered. It clarifies that the obligations and rights of Sudan are strictly limited to the Darfur situation. The majority of Pre-Trial Chamber II in its recent 2017 *Jordan* Decision further affirmed this view.¹⁸ This reasoning, however, is controversial.

Cooperation Requests Issued by the Court Regarding the Arrest and Surrender of Omar Hassan Ahmad Al-Bashir, ICC-02/05-01/09-140, PT.Ch.I, 13 December 2011(2011 *Chad* Decision).

¹² 2011 *Malawi* Decision, para. 36.

¹³ *Idem*, para. 43.

¹⁴ *The Prosecutor v. Omar Hassan Ahmad Al Bashir*, Decision on the Cooperation of the Democratic Republic of the Congo Regarding Omar Al Bashir’s Arrest and Surrender to the Court, ICC-02/05-01/09-195, PT.Ch.II, 9 April 2014, para. 29 (2014 *DRC* Decision).

¹⁵ *The Prosecutor v Omar Hassan Ahmad Al Bashir*, Decision on the non-compliance by the Republic of Djibouti with the request to arrest and surrender Omar Al-Bashir to the Court and referring the matter to the United Nations Security Council and the Assembly of the State Parties to the Rome Statute, ICC-02/05-01/09-266, PT.Ch.II, 11 July 2016, para.11; *The Prosecutor v Omar Hassan Ahmad Al Bashir*, Decision on the non-compliance by the Republic of Uganda with the request to arrest and surrender Omar Al-Bashir to the Court and referring the matter to the United Nations Security Council and the Assembly of State Parties to the Rome Statute, ICC-02/05-01/09-267, PT.Ch.II, 11 July 2016, para.11. For debates about the effect of a Security Council referral on immunity issue, see D. Akande, ‘The Effect of Security Council Resolutions and Domestic Proceedings on State Obligations to Cooperate with the ICC’, *Journal of International Criminal Justice* 2012-10, p. 299; W. A. Schabas, *The International Criminal Court: A Commentary on the Rome Statute*, 2nd edn, Oxford: Oxford University Press 2016, pp. 604-5.

¹⁶ 2017 *South Africa* Decision, para. 88.

¹⁷ *Ibid.*

¹⁸ *The Prosecutor v. Omar Hassan Ahmad Al Bashir*, Decision under Article 87(7) of the Rome Statute on the non-compliance by Jordan with the request by the Court for the arrest and surrender of Omar Al-Bashir, ICC-02/05-01/09-309, PT.Ch.II, 11 December 2017, para. 37.

II. Effect of Resolution 1593(2005) on Referring the Darfur Situation to the ICC

Firstly, the Security Council has the power to modify the territorial and personal jurisdiction of the ICC by referring a situation to the ICC under Chapter VII of the UN Charter. This power is explicitly conferred by the Rome Statute in accordance with its Article 13(b), thus, the ICC has jurisdiction over the Darfur situation by virtue of Resolution 1593. Both the majority and Judge Perrin de Brichambaut in his minority opinion adhere to this.¹⁹

Unlike the 2014 *DRC* Decision, the majority of the Pre-Trial Chamber in the *South Africa* Decision clarifies that no waiver is implied in Resolution 1593 as no immunity issue exists.²⁰ The majority does not analyse or interpret Resolution 1593 in the way that Judge Perrin de Brichambaut does in his minority opinion. Judge Perrin de Brichambaut examines the interpretation of Resolution 1593 by observing its ordinary meaning, context, object and purpose, statements by members of the Security Council and other UN Security Council's resolutions, as well as subsequent practice of relevant UN organs and affected States. He concludes that a definite answer cannot be reached regarding the removal of Bashir's immunity by virtue of Resolution 1593.²¹ Judge Perrin de Brichambaut insists on this view in his minority opinion in the 2017 *Jordan* Decision.²²

Furthermore, although it is persuasive that Sudan is obliged to cooperate fully with the ICC based on Resolution 1593, the scope of this obligation is unclear, namely, whether it extends to a duty to waive Bashir's immunity. As a matter of fact, an answer to this question does not directly assist Pre-Trial Chamber II in analysing South Africa's obligation for Sudan's non-cooperation with the ICC to date.

Lastly, a Security Council resolution might be considered as providing jurisdiction to an international criminal tribunal by relying on the 1948 Genocide Convention.²³ This idea has been proposed by some commentators²⁴ as well as the *Amicus Curiae* observation of the Helen Suzman Foundation.²⁵ Judge Perrin de Brichambaut might be influenced by these proposals as he tries to establish a relationship between Articles IV and VI of the 1948 Genocide Convention and the ICC as an 'international penal tribunal'. He explains that immunity has been removed by Article IV of the Genocide Convention; consequently, as

¹⁹ 2017 *South Africa* Decision, para. 85. It should be noted that it is not Resolution 1593 but the Rome Statute that is creating jurisdiction for the ICC over Al Bashir.

²⁰ *Idem*, para. 96.

²¹ *The Prosecutor v. Omar Hassan Ahmad Al Bashir*, Minority Opinion of Judge Marc Perrin de Brichambaut, ICC-02/05-01/09-302-Anx, 6 June 2017, paras. 64-83 (2017 *South Africa* Decision, Minority Opinion of Judge Perrin de Brichambaut).

²² *The Prosecutor v. Omar Hassan Ahmad Al Bashir*, Minority Opinion of Judge Marc Perrin de Brichambaut, ICC-02/05-01/09-309-9-Anx-t-ENG, 11 December 2017, para. 3.

²³ 1948 Convention for the Prevention and Punishment of the Crime of Genocide, 78 UNTS 277(1951).

²⁴ M. Gillett, 'The Call of Justice: Obligations Under the Genocide Convention to Cooperate with the International Criminal Court', *Criminal Law Forum* 2012-23, p. 63; R. H. Steinberg (ed), *Contemporary Issues Facing the International Criminal Court*, The Hague: Brill | Nijhoff 2016, Part II, pp. 73-137.

²⁵ *The Prosecutor v. Omar Hassan Ahmad Al Bashir*, Decision on the 'Request for leave to submit Amicus Curiae Observations by the Helen Suzman Foundation (HSF)', ICC-02/05-01/09-287, PT.Ch.II, 9 March 2017, para. 3.

Sudan and South Africa are contracting parties to the Genocide Convention the immunity issue before the ICC has been solved.

However, debates among scholars indicate that apart from the fact that Sudan is a contracting party to the Genocide Convention, an acceptance of the ICC's jurisdiction is required so as to link the Genocide Convention to the ICC.²⁶ The acceptance can be addressed through either other international law rules or a Security Council resolution. Until now, it is controversial to conclude that Resolution 1593 implies Sudan's acceptance of jurisdiction of the ICC for alleged genocide against Bashir. In fact, Judge Perrin de Brichambaut does not consider the effect of Resolution 1593 in this respect.

III. Can Resolution 1593 Make a Non-party State in a Position of a State Party?

The last issue is whether the effect of Resolution 1593 temporarily makes Sudan a State Party. The majority gives a positive answer without providing any more convincing reasoning. As Pre-Trial Chamber II itself acknowledged, 'this is an *expansion* of the applicability of an international treaty to a state which has not voluntarily accepted it as such.' It is not the *South Africa* Decision that first regarded Sudan as a 'State Party' on the basis of Resolution 1593. The 2015 *Sudan* Decision has decided that by virtue of Resolution 1593, Sudan failed to comply with rules governing State Party cooperation.²⁷ The court's findings on the power of Resolution 1593 depart from the generally accepted principle of state consent to a treaty which it overcomes by citing the 1971 *South West Africa* ICJ Advisory Opinion; according to this ICJ case, the Security Council can impose obligations on States.²⁸ Whilst the idea is uncontroversial, it does not help to justify such an expansive application.

Additionally, commentators have not reached agreement on whether a binding Security Council resolution can effectively make a State Party to a treaty which it has not signed. Kreß claims that in the Darfur situation the Security Council has 'placed Sudan in a position that is analogous to the position of a state party'.²⁹ By contrast, Gaeta denies such a proposition.³⁰ As Schabas notes, serving as a trigger mechanism under the Rome Statute, the Security Council has no more power than a State Party.³¹ The Security Council cannot transform a non-party State into a State Party, even if it issues a binding resolution imposing obligations on that State. Judge Perrin de Brichambaut finds that a firm answer cannot be given about the status of Sudan on the basis of Resolution 1593.³²

²⁶ Steinberg (ed) 2016, *supra* note 24, pp. 73-137.

²⁷ *The Prosecutor v. Omar Hassan Ahmad Al Bashir*, Decision on the Prosecutor's Request for a Finding of Non-Compliance Against the Republic of the Sudan, ICC-02/05-01/09-227, PT.Ch.II, 9 March 2015, paras. 15-6.

²⁸ 2017 *South Africa* Decision, para. 89 and footnote 100.

²⁹ C. Kreß, 'The International Criminal Court and Immunities under International Law for States Not Party to the Court's Statute' in M. Bergsmo and Y. LING (eds), *State Sovereignty and International Criminal Law*, Beijing: Torkel Opsahl Academic Epublsher 2012, pp. 241-2.

³⁰ P. Gaeta, 'Does President Al Bashir Enjoy Immunity from Arrest?', *Journal of International Criminal Justice* 2009-7, p. 315.

³¹ Schabas 2016, *supra* note 15, p.604; L. Condorelli & S. Villalpando, 'Can the Security Council Extend the ICC's Jurisdiction?' in A. Cassese *et al.* (eds), *The Rome Statute of the International Criminal Court: a Commentary*, Outskirts Press 2002, p. 575.

³² 2017 *South Africa* Decision, Minority Opinion of Judge Perrin de Brichambaut, para. 58.

The ICC must also respect for provisions in international law in applying and interpreting law. Russian Federation had addressed in the Security Council meeting that:

‘the obligation to cooperate, as set forth in resolution 1593 (2005), does not mean that the norms of international law governing the immunity of the Government officials of those States not party the Rome Statute can be repealed, and presuming the contrary is unacceptable.’³³

This statement, at least, shows that one of the five permanent members of the Security Council has not expected such an expansive effect of Resolution 1593. The majority’s construction of the effect of Resolution 1593 may strengthen the power of the Security Council in selectively referring situations concerning non-party States to the ICC. This circumstance is undesirable, which may either undermine the ICC’s situation referral mechanism or provoke severe criticisms of the ICC’s legitimacy. The 2017 *South Africa* Decision on the effect of Resolution 1593 would also stimulate further discussion on the effect of Security Council resolutions in international law.

Conclusion

In summary, the ICC adopted three main approaches to repudiate personal immunity of Al Bashir. The ‘treaty-oriented’ approach intends to apply Article 27(2) of the Rome Statute. This approach contains some variations with references to either Resolution 1593 or the Genocide Convention. The ‘custom-oriented’ approach relies on a modified customary rule to remove Al Bashir’s personal immunity. The ‘waiver’ approach claims that his personal immunity has been waived through Resolution 1593, which implicitly recognises the traditional customary rule respecting personal immunity. Decisions of the ICC are not in a consistent fashion in solving the personal immunity issue, which is still not moot. These different approaches also evidence the disagreement with regard to the effect of Resolution 1593; such inconsistency in the ICC’s findings may undermine the predictability of its law. In the opinion of this author, the ICC is not an organ of the UN and therefore the effect of Security Council resolutions on the ICC should be interpreted restrictively so as to reduce the Security Council’s political influence on the ICC, thereby guaranteeing the ICC’s independence. The *South Africa* Decision is unconvincing when it concludes that Resolution 1593 can render Sudan in a position of State Party to the Rome Statute.

³³ ‘Reports of the Secretary-General on the Sudan and South Sudan’, Official Records of the Security Council, Provisional verbatim record of the 7963rd meeting, UN Doc. S/PV.7963, 8 June 2017.