

The Issues of Procedural Legitimacy Within Security Council Resolution 1593

Introduction:

A trial for Sudan's ex-President Omar Al-Bashir has been actively pursued by the International Criminal Court (ICC) for years, but procedural limitations may ultimately make this unachievable. Since the 1998 military coup which brought Al-Bashir to power,¹ Darfur has been in consistent conflict. Reports of violence have continued until the present day,² even though Al-Bashir was ousted in 2019 through a military coup which led to the collapse of his regime.³ Security Council Resolution 1593, issued in 2005, referred the Situation in Darfur to the ICC Prosecutor. It also signified the international community's condemnation of the mass atrocities committed. The referral triggered two ICC arrest warrants for Al-Bashir,⁴ both receiving firm signals of non-cooperation from every nation requested to cooperate,⁵ despite the Security Council's (SC) urging them to do so.⁶ Although there are other individuals who which are wanted by the ICC for the crimes committed in Darfur, Al-Bashir's case is unique.⁷ Al-Bashir is the only current Head of State which has ever been forcibly and non-consensually submitted to the jurisdiction of a treaty based Court. Furthermore, following this unprecedented referral the inaction of all the states called upon to cooperate with the ICC, warrants an investigation into the legal blocks and complications which have stalled this case. The ICC prosecutor, Fatou Bensouda, has stated that the international community has "failed the Darfur Victims who continue to bear the brunt of these crimes[...]."⁸ The inaction

¹ 'Omar al-Bashir: Sudan's ousted president' (BBC, 14 August 2019) <<https://www.bbc.co.uk/news/world-africa-16010445>> accessed 08 September 2020

² Hamid Abdulsalam, 'UN-African Union mission condemns recent spate of deadly attacks in Darfur' (UN News, 28 July 2020) <<https://news.un.org/en/story/2020/07/1069141>> accessed 08 September 2020

³ BBC (n 1)

⁴ *The Prosecutor v. Omar Hassan Ahmad Al-Bashir* (Arrest Warrant Decision in Pre-Trial Chamber I) ICC-02/05-01/09-1 (04 March 2009); *The Prosecutor v. Omar Hassan Ahmad Al-Bashir* (Second Arrest Warrant Decision in Pre-Trial Chamber I) ICC-02/05-01/09-1 (12 July 2010)

⁵ Tom White, 'States 'failing to seize Sudan's dictator despite genocide charge' (The Guardian, 21 October 2018) <<https://www.theguardian.com/global-development/2018/oct/21/omar-bashir-travels-world-despite-war-crime-arrest-warrant>> accessed 08 September 2020

⁶ UNSC Res 1593 (31 March 2005) UN Doc S/RES/1593

⁷ 'Who are those wanted by the ICC over Darfur?' (Aljazeera, 11 February 2020) <<https://www.aljazeera.com/news/2020/02/11/who-are-those-wanted-by-the-icc-over-darfur/>> accessed 24 September 2020

⁸ 'ICC Prosecutor Urges Support in Arresting Darfur Suspects' (Sudan News Media, 17 June 2014) <https://www.youtube.com/watch?v=CowdAiSZ_wI> accessed 09 September 2020

not only of Sudan, but all other states,⁹ highlights the complications of this case. The ICC's actions pursuant to Resolution 1593 seem to carry little weight in bringing Al-Bashir to justice. This begs the question: if Resolution 1593 was meant to lead to an investigation and potential prosecution, why did it result in so many legal complications that have blocked the ICC from carrying one out? I will argue that this is because the Security Council has been inactive in following up their referral with enforceable actions to resolve the legal complications that the ICC is facing.

This paper argues that SC Resolution 1593 did not empower the ICC with enough enforcement tools to carry out Arrest Warrant I&II. This paper will prove that this issue is one of procedural legitimacy. Further, that by subjecting a non-party state to a treaty based court which claims to be able to remove Head of State immunities,¹⁰ Resolution 1593 triggered immunity and jurisdictional complications. Moreover, the Resolution's wording reinforced international agreements which block the ICC's jurisdiction instead of those which extend it. Namely, the complicated relationship between Article 27 and Article 98 of the Rome Statute. The two main legal complications of Al-Bashir's case revolve around the existing international law on Head of State immunities and the ICC's jurisdiction over states which are not party to the Rome Statute. It is accepted that incumbent Head of State immunity is upheld in most cases, including those which concern allegations of international crime.¹¹ It is also accepted that treaties cannot create obligations or rights for a third state without its consent.¹² However, at the time of issuing the arrest warrants, the Security Council and the ICC had not clarified and identified the responsibilities of states. This resulted in the arrest warrants being vulnerable to rejection and ultimately, they were unable to override pre-existing international obligations and customs.

The first part of this paper will identify and define the scope of legitimacy and the Security Council's source of legitimacy. It will define the scope of legal legitimacy for this paper as focusing on the normative procedural legitimacy of Resolution 1593. In doing so, this paper will discuss that the concept of legitimacy which will be narrowed to mean a discussion of the Security Council's process of exercise of power. This discussion will take place within the framework of Resolution 1593: its legality, process of establishment and its results. To understand this scope, it will first ex-

⁹ White (n 5)

¹⁰ UNSC Res 1593 (n 6)

¹¹ Arrest Warrant of 11 April 2000 (Democratic Republic of the Congo v. Belgium), Judgment, I.C.J. Reports 2002 [55]

¹² Vienna Convention on the Law of Treaties (adopted 22 May 1969, entered into force 27 January 1980) 1155 UNTS 331 art 34

plore Allen Buchanan and Robert O. Keohane's concept of normative legitimacy.¹³ Christopher Thomas' definition of legitimacy as a property will also be discussed,¹⁴ and applied to Sebastian Jodoin's test of procedural normative legitimacy.¹⁵ This section will also discuss the various articles of the UN Charter which empower and limit the Security Council's actions, in relation to their impact on Resolution 1593.

The second part will analyse the language used in Resolution 1593 to ascertain its true aims and the legal complications that it triggered. It will discuss the procedural legitimacy of the Security Council's referral of the Situation in Darfur to the ICC. In particular, it will identify the debate around the implied invocation of Article 13(b) and whether the procedure of its invocation was legitimate.

The third part will delve into the procedural legal complications caused by Resolution 1593 around Head of State immunity. It will discuss the complications in relation to why countries have refused to arrest and surrender Al-Bashir. It will argue that the legal complications around ICC jurisdiction and Head of State immunities, was caused by the Security Council's inaction to create enforcement measures for the ICC to rely on. I will also argue that they were obliged to do so in order to fulfil their responsibilities under the UN Charter and the standard for normative procedural legitimacy. This section will conclude that because of Resolution 1593's provisions, any non-Rome Statute party aside from Sudan, would be violating their international obligations if they were to comply with the ICC and enforce the arrest warrants. My aim is to prove that these problems are the result of the discontinuity in procedural legitimacy and the differing aims between the Resolution and the ICC arrest warrants.

To conclude, I will argue that the procedural legitimacy issues of SC Resolution 1593 has resulted in procedural legitimacy issues within the ICC's arrest warrants. Consequently, Resolution 1593 has yielded legal complications which cannot be solved without effective action from the Security Council.

Part One:

¹³ Allen Buchanan and Robert O. Keohane 'The Legitimacy of Global Governance Institutions' (2006) 20 *Ethics & International Affairs* 405, 405

¹⁴ Christopher A. Thomas, 'The Uses and Abuses of Legitimacy in International Law' (2014) 34 *OJLS* 729, 733

¹⁵ Sébastien Jodoin, 'Enhancing the Procedural Legitimacy of the U.N. Security Council: A Normative and Empirical Assessment' (2005) 17 *Sri Lanka Journal of International Law* <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2942160> accessed 10 September 2020, 9

What is the scope of the definition of legal legitimacy for this paper?

This article begins by defining legal legitimacy in accordance to the scope of, and to identify a standard for, this paper. The legitimacy of the Security Council as an institution has been long debated, but it is generally agreed that the Security Council is a legitimate institution.¹⁶ Consequently, this paper will discuss the legitimacy of the Security Council's exercise of power in regards to the legality, process and results. Allen Buchanan and Robert O. Keohane suggest that the concept of legitimacy in the normative sense, means that an institution has the "right to rule".¹⁷ Antoinette Scherz & Alain Zysset also provide that "the right to rule[...]" sufficiently fulfils the concept of legitimacy.¹⁸ But what might that "right to rule" mean? Generally speaking, the term covers everything from their right to exist as an institution of authority, to have access to certain powers and the process of actually exercising those powers. Unlike assessments of state government legitimacy, the legal legitimacy of International law cannot originate from electoral legitimacy or democratic accountability.¹⁹ As such, one must look elsewhere for an explanation of legal legitimacy. Christopher Thomas defines legal legitimacy as "a property of an action, rule, actor or system."²⁰ He hypothesises that legal legitimacy assesses a subject against a specific normative framework, which he defines as "normative legitimacy".²¹ It can be taken from this that the property of legitimacy can be likened to a sliding scale against which an action, rule, actor or system can be judged against. In the context of this paper, my focus is on the legitimacy of Resolution 1593, an action of the Security Council. Consequently, the right to rule for the purposes of this paper, will be taken as the right to exercise their powers.

Buchanan and O'Keohane add on to Thomas and state that normative legitimacy depends on whether an institution has the right to rule, not whether it is perceived to.²² Contrastingly, Jean d'Aspremont and Eric De Brabandere assert that the legitimacy of institutions is a question of

¹⁶ Antoinette Scherz and Alain Zysset, 'The UN Security Council, Normative Legitimacy and The Challenge of Specificity' (2020) 23 *Critical Review of International Social and Political Philosophy* 371, 373

¹⁷ Buchanan and Keohane (n 13)

¹⁸ Charter of the United Nations (adopted 26 June 1945, entered into force 24 October 1945) 1 UNTS XVI Chapter V

¹⁹ Richard B. Stewart, 'Administrative Law in the Twenty-First Century' (2003) 78 *NYU Law Review* 437, 459

²⁰ Thomas (n 14) 735

²¹ *ibid*

²² Buchanan and O. Keohane (n 13)

whether an actor is “perceived” as having the right to rule.²³ It appears that within the concept of a right to exercise powers, there is a division between a right based on a normative framework, and a right based on perception. This indicates that irrespective of perception, if an institution can be recognised as normatively legitimate, they have a fundamental right to rule. In assessing the legitimacy of Resolution 1593, this paper is assessing the legality of the Resolution itself: as an action of the Security Council and as the product of their action. It is defined at this stage that the scope of this paper shall only cover the normative legal legitimacy of Resolution 1593. This standard does help to assess whether the Security Council has the right to rule, but what does it mean to assess whether they used their power correctly?

Daniel Esty reasons that questions of legal legitimacy often arise during disagreements about the delegation of judicial authority and the binding nature of that authority.²⁴ This indicates legitimacy is often questioned when there is a gap between the power that an institution legally holds and the power that it is proposing to exercise. Esty’s statement also highlights that questions of legal legitimacy arise when there is a disagreement.²⁵ This is noteworthy because it illuminates: first, that regardless of an institution’s normative legitimacy to hold powers and exist, questions can arise about its exercise of powers; and second, that there are indeed disagreements about the procedure of exercising powers which result in binding obligations. In summary, this statement draws attention to a key concern within questions of legal legitimacy: whether the exercise of binding powers has followed the proper legal procedure according to a normative legal framework.

But what does the proper legal procedure according to a normative legal framework look like? The normative legal framework of international law is composed of customary international law, general principles of law and treaty obligations.²⁶ Taking Thomas’ understanding of normative legitimacy, the origin of the basic norm against which legitimacy is judged against must be determined.²⁷ In the context Resolution 1593, its source of legitimacy is the Security Council. For the Security Council, its source of legitimacy is its establishment of existence and powers through the

²³ Jean d'Aspremont and Eric De Brabandere, ‘The Complementary Faces of Legitimacy In International Law: The Legitimacy of Origin and the Legitimacy of Exercise’ (2011) 34 *The Fordham Int'l L.J.* 190, 190

²⁴ Daniel Esty, ‘Good Governance at the Supranational Scale: Globalizing Administrative Law’ (2006) 115 *Yale LJ* 1490, 1509

²⁵ *ibid*

²⁶ Statute of the International Court of Justice (adopted 26 June 1945, entered into force 24 October 1945) USTS 993 art 38; Anthea Roberts and Sandesh Sivakumaran ‘The Theory and Reality of The Sources of International Law’ in Malcolm D. Evans (eds), *International Law* (OUP 2006)

²⁷ Thomas (n 14)

UN Charter. Jean d'Aspremont and Eric De Brabandere assert that "it must be acknowledged that international organisations are not subjected to the international obligations to abide by some procedural form of democracy in organising free and fair elections."²⁸ As such, the source of the decision makers' power must be identified. The Security Council, like many other international organs, must find their legitimate source of power through a treaty.

Defining Procedural Legitimacy in the Normative Legal Framework of the Security Council

The United Nations Charter (UN Charter) is the Security Council's fundamental source of power and legitimacy.²⁹ The Security Council was established to "ensure prompt and effective action" when breaches of international peace and security or acts of aggression occur.³⁰ This article is especially relevant because it highlights the reason behind the creation of the Security Council: to "embo[dy] the principle of collective security, in an attempt to avoid future conflicts at the scale of World War II".³¹ To date, the Security Council is the only institution which can oblige states to comply with their decisions irrespective of their consent.³² Additionally, UN Charter obligations will always take precedence over those of any other international agreement.³³ Devon Whittle has described their powers to act under Chapter VII as giving them a "supreme position in international law".³⁴ Their powers to act under Chapter VII have even been described as a "carte blanche".³⁵ This being said, there are limits on the Security Council's power: they must act according to the purposes and principles of the United Nations (UN) set out in Chapter I.³⁶ Whittle states that other limits to the Security Council's power include still being bound by *ius cogens* or peremptory norms and principles of the UN. Although the Security Council's powers are limited, they are mostly limited

²⁸d'Aspremont and De Brabandere (n 23) 202

²⁹ UN Charter (n 18)

³⁰ *ibid* art 24(1)

³¹ Devon Whittle 'The Limits of Legality and the United Nations Security Council: Applying the Extra-Legal Measures model to Chapter VII Action' (2015) 26 EJIL 671, 673

³² UN Charter (n 18) art 24; Whittle (n 31) 673

³³ *ibid* art 103

³⁴ Whittle (n 31) 674

³⁵ Jared Schott 'Chapter VII as Exception: Security Council Action and the Regulative Ideal of Emergency' (2008) 6 Northwestern Journal of International Human Rights 24, 24, 35

³⁶ UN Charter (n 18) art 24(2)

by the UN Charter itself. It appears that their extensive powers provide an incredibly generous source of legitimacy for the Security Council to draw upon.

It has been established that the Security Council's framework of basic norms for its actions to be assessed against, are its purposes, responsibilities and limits within the UN Charter. But what does this look like when broken down into a procedure of assessment? Sébastien Jodoin discusses two aspects of legitimacy as input and output, the legitimacy of the source and procedure of an action, and the legitimacy of the product of that action.³⁷ Daniel Bodansky discusses input/output as procedural and substantive legitimacy.³⁸ I will use the latter terminology. In regards to normative legitimacy,³⁹ whether the Security Council *objectively* acted legitimately.⁴⁰ As discussed above, also whether the action's power originated from a normative legal framework.⁴¹ Richard Stewart describes the foundational goals of administrative frameworks as "fair, responsive, and accountable[...]"⁴² Whilst these are broad goals, they provide general characteristics against which decision makers can align their actions. Building upon Stewart, Esty considers that procedural legitimacy requires decision makers to "[...] demonstrate that their choices are legal, and subject their results to review and oversight [which] will further enhance the legitimacy of policy outcomes[...]"⁴³ This necessitates accountability. It obliges decisions to be legally legitimate enough to be reviewed and watched over to ensure continued legitimacy. Mattias Kumm also agrees that international law should be concerned with procedural quality and focused on the "jurisgenerative process".⁴⁴ The test should be whether procedures are transparent, participatory and have accountability checks. "The more of these criteria are met, the higher the degree of procedural legitimacy."⁴⁵ Stewart, Esty and Kumm all collectively agree that key steps in ensuring procedural legit-

³⁷ Daniel Bodansky, "Legitimacy in International Law and International Relations" in Jeffrey L Dunoff and Mark A Pollack (eds), *Interdisciplinary Perspectives on International Law and International Relations: The State of the Art* (CUP Press 2012) 331

³⁸ Jodoin (n 15) 9

³⁹ Bodansky (n 37) 327

⁴⁰ *ibid*

⁴¹ Thomas (n 14)

⁴² Stewart (n 19)

⁴³ Esty (n 24) 1522

⁴⁴ Mattias Kumm, 'The Legitimacy of International Law: A Constitutionalist Framework of Analysis' (2004) 15 EJIL 907, 926

⁴⁵ *ibid*

imacy involve the action being legal and a mechanism of judicial review to hold decision makers accountable. This evidences the clear opinion that decision makers' actions must have originated from a legitimate legal source and that those actions and their results must be checked against that source.

The Security Council's authority originates from the basic norm that all UN members have ratified the UN Charter and have agreed to be bound by its articles.⁴⁶ Their purpose is clear: maintain and restore global peace and security from threats of an international character. Ultimately, the Security Council's legal legitimacy is dependant on two aspects: first, procedurally, whether their actions are performed in accordance with the UN Charter articles and judicially reviewed;⁴⁷ second, substantively, whether the results yielded prompt further action to bring them in line with UN Charter objectives. This is in line with the definition of procedural legitimacy discussed above and it puts procedural legitimacy in the context of the Security Council.

However, fulfilling these tests of procedural legitimacy has proved difficult. It has been argued that the Security Council's exercise of Chapter VII powers face virtually no judicial review.⁴⁸ Although within Resolution 1593, the Security Council does request the ICC Prosecutor to report back on the progress of the investigation, this does not serve as a judicial review of the Resolution. Others who have specifically discussed judicial review of the Security Council's actions, have suggested that the Security Council was established based on a "Soviet-Western bipolar model" of the world, without checks and balances.⁴⁹ Further, that following the collapse of the bipolar model, "no political equilibrium has emerged to replace th[ose] lost checks and balances."⁵⁰ It has been suggested that a solution is for the International Court of Justice (ICJ) to judicially review the Security Council's actions in some way.⁵¹ There have in fact, been instances of the ICJ reviewing certain aspects of the Security Council's decisions.⁵² Most similarly, in the case of *Bosnia v. Yugoslavia* (Ser-

⁴⁶ Jodoin (n 15) 18

⁴⁷ *ibid* 18-19

⁴⁸ Whittle (n 31) 676

⁴⁹ Ken Roberts 'Second Guessing the Security Council: The International Court of Justice and Its powers of Judicial Review' (1995) 7 *Pace International Law Review* 281, 283

⁵⁰ *ibid*

⁵¹ *ibid* 284; Jose E. Alvarez 'Judging the Security Council' (1996) 90 *AJIL* 1, 4

⁵² *ibid*;

bia and Montenegro).⁵³ Ken Roberts suggests Judge Lauterpacht's way of reviewing the Security Council's actions was not to outright condemn or affirm its legitimacy, but to suggest the Council itself to review their actions.⁵⁴ It appears that although there is no precedent for the ICJ to conduct a full judicial review of the Security Council's actions, there is precedent for judgment to be passed about their actions. Whilst this is a positive step in the direction of more accountability and review, the ICJ has not indicated an intention to review Resolution 1593. Consequently, it does appear that at present, the accountability and judicial review aspects of procedural legitimacy still remains unfulfilled. The question of whether the Security Council's action to create Resolution 1593 and Resolution 1593 itself is legitimate, remains to be determined.

Part Two

Security Council Resolution 1593: Procedural Legitimacy

This section will discuss the Resolution and will highlight the main action points and takeaways. The Resolution was adopted on March 31st, 2005. This section will then discuss the Resolution's implied invocation of Article 13(b) and whether it was procedurally legitimate.

Resolution 1593 Key Takeaways

This Preamble does a few key things. First, it considers that the Security Council may postpone the investigation under article 16 and that they reserve the right to do so. Second, it highlights Article 98-2 of the Rome Statute instead of Article 27, even though it has been thought that they hold contradicting messages about Head of State immunity.⁵⁵ Third, the Security Council acknowledges that the conflict in Sudan had not been resolved, meaning that the violence was ongoing and Al-Bashir was still in power. Finally, they cited Chapter VII of the UN Charter as their legally legitimate source of power.

As with the Preamble, there are a few main takeaways and action points of Articles 1-9. The first is the referral of the Situation in Darfur to the ICC. The referral significant because it has identified the Situation in Darfur as a "[...]serious crim[e] of international concern[...]" to the "[...]in-

⁵³ Application of the Convention on the Prevention and Punishment of the Crime of Genocide, Provisional Measures, Order of 13 September 1993, I. C.J. Reports 1993, p. 325

⁵⁴ Roberts (n 49) 311

⁵⁵ Dapo Akande, 'The Legal Nature of Security Council Referrals to the ICC and its Impact on Al-Bashir's Immunities' (2009) 7 Journal of International Criminal Justice 333, 337

ternational community as a whole[...].⁵⁶ The second is in Article 2 of Resolution 1593, where the Security Council made an unprecedented invocation of Article 13(b) of the Rome Statute. Article 13(b) of the Rome Statute is a mechanism that enables the Security Council to refer a state to the ICC. However, Article 13(b) does not actually mention whether the state must already be party to the Rome Statute. Dapo Akande clarifies that although the Resolution did not cite Article 13(b), its relevance is implied as it is “[...]the only provision that would allow the ICC to exercise jurisdiction[...].”⁵⁷ Manisuli Ssenyonjo affirms that this is the case, citing that the Security Council acted through Chapter VII of the UN Charter and “in accordance with article 13(b) of the Rome Statute.”⁵⁸ By taking advantage of this ambiguity, the Security Council was able to use their Chapter VII powers to make this interaction possible. Article 48 of the UN Charter obliges all UN Member States to comply with and carry out the decisions of the Security Council. Furthermore, Article 103 broadly stipulates that Charter obligations must always take precedence over other international obligations. As such, by relying on their broad Chapter VII powers and basic Charter obligations, the Security Council was able to invoke Article 13(b). Mr. Mayoral, the Argentine Republic Representative, identified Resolution 1593 as the first time that Article 13 had been invoked and characterised it as a “[...]crucial precedent[...].” that had been set.⁵⁹ The third key point is also within Article 2 of Resolution 1593, where the Security Council deliberately does not oblige other states to cooperate with the ICC.⁶⁰ Jennifer Trahan asserts that Articles like this are legally unsatisfactory and suggests that “[t]he Security Council could also provide specific steps that a target State should take, rather than simply obliging the State to “cooperate fully” with the Court.”⁶¹ This aspect of the Resolution has led to complications about the ICC’s jurisdiction and questions regarding Al-Bashir’s Head of State immunity status, both of which are discussed below. Finally, Article 8 of Resolution 1593 is important in regards to the accountability of procedural legitimacy. Although the

⁵⁶ Rome Statute of the International Criminal Court Article (adopted 17 July 1998, entered into force 1 July 2002) 2187 UNTS 90, [1][5]

⁵⁷ Akande (n 55) 340

⁵⁸ Manisuli Ssenyonjo, ‘The International Criminal Court Arrest Warrant Decision for President Al-Bashir of Sudan’ (2010) 59 *The International and Comparative Law Quarterly* 205, 206

⁵⁹ UNSC Verbatim Report (31 March 2005) UN Doc S/PV/5158, 7

⁶⁰ *Bashir* (n 4) art 2

⁶¹ Jennifer Trahan, ‘The Relationship Between the International Criminal Court and the UN Security Council: Parameters and Best Practices’ (2013) 24 *Criminal Law Forum* 417, 463

provision details a review of the progress made at the ICC, it does not in any way promise further action by the Security Council to advance and aid the investigations.

Was Security Council Resolution 1593's referral of the Situation in Darfur to the ICC through their Chapter VII powers and Article 13(b) of the Rome Statute Procedurally Legitimate?

To take the Security Council's process step-by-step, it is crucial to determine whether the usage of Resolution 1593 to trigger Article 13(b) of the Rome Statute was procedurally legitimate. It is important to note that when discussing this referral at this stage, I am only discussing the legitimacy of the referral itself, not the legitimacy of the content in Resolution 1593, which will come later. Resolution 1593 must fulfil the mandate set out in Chapter V of the UN Charter and Article 13(b) of the Rome Statute in order to be considered procedurally legitimate. Resolution 1593 finds its main legal grounding in the Security Council's Chapter VII powers.⁶² The Security Council's exercise of their Chapter VII powers to refer a situation to the ICC, however, are dependant on the existence of Rome Statute provisions which permit this interaction between the Security Council and the ICC. Under normal circumstances, a treaty cannot create obligations for a state without its consent.⁶³ As discussed above, the Security Council has never subjected a non Rome Statute member state to its jurisdiction.⁶⁴ This invocation of Article 13(b) presents a new way for the Security Council and the ICC to interact without the consent of the state they are conferring upon.

The aims of the Chapter VII powers are to determine the existence of an international threat or breach of peace and to act to restore and maintain security and peace.⁶⁵ Article 13(b) of the Rome Statute permits a situation to be referred to the ICC if the Security Council acts under their Chapter VII powers. Moreover, the introduction line in Article 13 states that Article 13(b) can only be invoked if the court is being requested to investigate crimes of an Article 5 nature. Crimes which include genocide, crimes against humanity, war crimes and crime of aggression. It is noteworthy that Al-Bashir has been charged with three counts of genocide, five counts for crimes against humanity and two counts for war crimes.⁶⁶ It is the mandate of the ICC to ensure that effective measures are

⁶² UN Charter (n 18) Chapter VII

⁶³ VCLT (n 12) art 34

⁶⁴ Ssenyonjo (n 58) 207

⁶⁵ UN Charter (n 18) art 39

⁶⁶ *Bashir* (n 4)

taken to prosecute the most serious international crimes.⁶⁷ Furthermore, to end impunity for the perpetrators of those crimes.⁶⁸ Alexandre Gaaland suggests that the crimes listed in Article 5 of the Rome Statute are “[...] *erga omnes* [in] character[.]” and that it is “[...]the *jus puniendi* of the international community.”⁶⁹ In saying this, Gaaland advocates the international nature of these atrocities and the international community’s responsibility and right to investigate and potentially prosecute the perpetrators. As such, it naturally follows that the Security Council would characterise the crimes committed during the Conflict in Darfur as crimes within the ICC’s jurisdiction. It is argued in agreement with Akande, that Resolution 1593’s implied invocation of Article 13(b) to extend the ICC’s jurisdiction over a non Rome Statute party state is procedurally legitimate. The mandate of the ICC is to prosecute the exact crimes which Al-Bashir has allegedly committed. By referring the Situation in Darfur to the ICC, the Security Council devolved their powers appropriately to fulfil not just their own Chapter VII mandate, but enable the ICC to potentially fulfil theirs. Although it is argued that the referral itself was procedurally legitimate, whether the content of the referral is procedurally legitimate is still to be determined.

Part Three

The Discontinuity between Resolution 1593 and ICC Warrant I & II: Procedural Legitimacy Issues

Security Council Resolution 1593 is under scrutiny because aside from referring the Situation in Darfur to the ICC, it has not yielded further results in combating impunity. According to normative procedural legitimacy, in order for Resolution 1593 to be legitimate, it must satisfy the basic norms of Chapter VII and the purposes and principles of the UN Charter. The Security Council’s exercise of their Chapter VII powers in pursuit of triggering Article 13(b) of the Rome Statute was legitimate. However, it is argued that the provisions of Resolution 1593 were not comprehensive enough to adequately fulfil their mandate and enable the ICC to conduct a trial. Conflicting international obligations in regards to Head of State immunities which directly informs the jurisdiction of the ICC is at the heart of the procedural issues within Resolution 1593. I will argue that the legal complications around Head of State immunity and ICC jurisdiction, is caused by the Security Council’s inaction to specify more state cooperation and create enforcement measures for the ICC to rely on. I will also argue that they were obliged to do so in order to fulfil their responsibilities

⁶⁷ Rome Statute (n 56) Preamble [5]

⁶⁸ *ibid* [6]

⁶⁹ Alexandre Skander Galand, *UN Security Council Referrals to the International Criminal Court: Legal Nature, Effects and Limits*, vol 5 Leiden Studies on the Frontiers of International Law, Brill Nijhoff (2018) 32

under the UN Charter and fulfil the standard for normative procedural legitimacy. I will conclude that because of Resolution 1593's provisions, any non-Rome Statute party aside from Sudan, would be violating their international obligations if they were to comply with the ICC and enforce the arrest warrants.

Al-Bashir's ex-Head of State Immunity Status

At the time of Resolution 1593 and ICC arrest warrants I&II, Al-Bashir was the current sitting Head of State for Sudan. As mentioned above, Al-Bashir was only overthrown in 2019.⁷⁰ Neither of the ICC arrest warrants issued were complied with by any state, regardless of their Rome Statute membership status.⁷¹ Consequently, the ICC has found several Rome Statute State Parties in breach of their treaty responsibilities.⁷² Namely, Chad, Malawi, the Democratic Republic of the Congo, South Africa and Jordan.⁷³ Given the established nature of the Security Council to make referrals and the ICC to conduct investigations and trials over crimes of international character, this non-compliance unearths a crucial issue: what is the status of Sudan's ex-President Omar Al-Bashir's Head of State immunities? It is argued that this question has been the biggest contributor to the stalled nature of the investigation into the Conflict in Darfur. In this case, it cannot be assumed that customary international law and treaty obligations will provide a straightforward answer to the question. Both the Pre-Trial Chambers and various international legal scholars have sought to debate this issue, some in agreement and some not, but the outcome has remained one and the same: Al-Bashir has not been surrendered for trial at the ICC.

The Relationship between Article 27 and Article 98 of the Rome Statute on Head of State Immunities:

At first glance, Article 27 and Article 98 may seem to completely contradict each other. Article 27 is titled "Irrelevance of Official Capacity" and details that "immunities [...] shall not bar the Court from exercising its jurisdiction[...]" over "all persons without any distinction based on official capacity. In particular, official capacity as a Head of State [...]".⁷⁴ Contrastingly, Article 98

⁷⁰ BBC (n 1)

⁷¹ White (n 5)

⁷² David P. Stewart 'Official Immunity Under the Rome Statute: The Path From Principle to Practice is Seldom Straight' (Just Security, 2018) <<https://www.justsecurity.org/54678/official-immunity-under-rome-statute-path-principle-practice-seldom-straight/#:~:text=Immunities%20or%20special%20procedural%20rules,jurisdiction%20over%20such%20a%20person%20demonstrates>> accessed 24 September 2020

⁷³ *ibid*

⁷⁴ Rome Statute (n 56) art 27 (1)(2)

is titled “Cooperation with respect to waiver of immunity and consent to surrender”.⁷⁵ It provides that the court cannot request a state to surrender an individual if doing so would be inconsistent with its international obligations regarding respect to diplomatic immunities or agreements which require consent from that state.⁷⁶ Although they may seem to cancel out each other, it is important to keep in mind that these articles were created to protect the integrity of the ICC’s criminal trials. Therefore, it is reasonable that there will be provisions within the Rome Statute which appear to borderline contradict each other as with all criminal trials, there are competing interests at play. Consequently, the ways that they may be read compatibly will be explored. One way that these articles may coexist with each other is clear. Akande suggests that a way to interpret it is: although once Al-Bashir is physically present at the ICC for trial his immunities can be stripped, the ICC cannot request states to help get him there if doing so would be inconsistent with their other international obligations.⁷⁷ David P. Stewart agrees, stating that “by [the Rome Statute]’s terms, Article 27 can only apply to individuals who are within the ICC’s jurisdiction; it cannot supply jurisdiction merely by precluding an assertion of immunity.”⁷⁸ Paola Gaeta also affirms this point, stating that the logic of international criminal justice does not allow for national judicial authorities to completely obey an international court. Gaeta takes this further and reasons that this is especially true of the ICC, as it was established by a treaty “and therefore its authority derives from an instrument based upon consent.”⁷⁹

Akande also considers a contrasting perspective, which forms the bulk of his argument: that Article 27 removes immunities for the actions of state authorities when they are acting under a request from the ICC.⁸⁰ He asserts that a reading of Article 27 as only applying to international courts would result in most of that article being “practically meaningless.”⁸¹ He highlights that the ICC has no “independent powers of arrest” because it relies entirely on state cooperation and that if it only applied to international courts, it would confine the article to a “rare case where a person entitled to

⁷⁵ Rome Statute (n 56) art 98

⁷⁶ *ibid* art 98 (1)(2)

⁷⁷ Akande (n 55) 337

⁷⁸ Stewart (n 72)

⁷⁹ Paola Gaeta ‘Does President Al-Bashir Enjoy Immunity From Arrest?’ (2009) 7 *Journal of International Criminal Justice* 315, 325

⁸⁰ Akande (n 55) 337, 338

⁸¹ *ibid* 338

claim immunity surrender[s] voluntarily.⁸² Robert Cryer asserts this point as well, citing that “in addition to jurisdiction, the ICC needs co-operation[...].”⁸³ Erica de Wet agrees and furthers this by arguing that Article 27(2) “vertically inhibits Jordan and Sudan from claiming immunity.”⁸⁴ This is because “any other interpretation would make such provision meaningless, considering the the court is entirely reliant on national authorities to arrest and surrender suspects.”⁸⁵ Antonio Cassese affirms this, stating that a Court is a “giant without limbs” states do not arrest and surrender wanted individuals.⁸⁶ Flavia Lattanzi poignantly states that “it is very significant that the same States, in creating the Court, conceived themselves as its arms.”⁸⁷ It can be established at this point, that it is not the fault of the ICC for not being able to obtain custody of Al-Bashir. It is well agreed that the Court operates on a cooperation model under which contacting states have pre-agreed to the terms. However, these terms under the Rome Statute are still hierarchically, at the same level as state’s other immunity obligations within customary international law.

Cryer importantly recognises that the Security Council is the only institution which can impose a duty on non-party states to cooperate with a treaty based court.⁸⁸ This is especially pertinent to Article Two of Resolution 1593,⁸⁹ where the Security Council necessitates Sudan’s cooperation with the ICC but states that although they are urged to, non-Rome Statute party states have no obligations to cooperate. In my view, the vagueness of this Article does not instruct states clearly enough on the hierarchy of international obligations that they should respect. Aside from specifying Sudan’s cooperation, Article Two does not even specify the hierarchy of obligations that states party to the Rome Statute should follow when deciding whether to cooperate with the ICC. The Security

⁸² *ibid*

⁸³ Robert Cryer, ‘Sudan, Resolution 1593 and International Criminal Justice’ (2006) 19 *Leiden Journal of International Law* 195, 216

⁸⁴ Erika de Wet, ‘The Implications of President Al-Bashir’s Visit to South Africa for International and Domestic Law’ (2015) 13 *JICJ* 1049, 1055.

⁸⁵ *ibid*

⁸⁶ Antonio Cassese, ‘On the Current Trends towards Criminal Prosecution and Punishment of Breaches of International Humanitarian Law’ in *EJIL* 9 (1998) 2, 13

⁸⁷ *The Prosecutor v. Omar Hassan Ahmad Al-Bashir* (Amicus curiae observations submitted by Prof. Flavia Lattanzi pursuant to rule 103 of the Rules of Procedure and Evidence on the merits of the legal questions presented in "The Hashemite Kingdom of Jordan's appeal against the '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'" of 12 March 2018 in the Appeals Chamber) ICC-02/05-01/09 OA2 (18 June 2018) [11]

⁸⁸ *ibid*

⁸⁹ *Bashir* (n 4) art 2

Council is clearly aware that under the Rome Statute, ICC decisions do not enjoy the same status of priority over member states' other international obligations as Security Council decisions. Still, they chose not to instruct Rome Statute party states to prioritise their responsibilities to the ICC in respect to the Situation in Darfur. This being said, Akande does offer an argument for reading Rome Statute provisions in line with the principles and purposes of the ICC. He notes that treaty readers must prioritise the "principle of effectiveness in treaty interpretation". The principle of effectiveness in treaty interpretation provides that treaties must be read in a way that "gives meaning to all of them harmoniously".⁹⁰ Further, that treaty readers are not free to apply a meaning to treaties that would result in the redundancy of clauses or paragraphs.⁹¹ To this effect, he concludes that to interpret the Rome Statute in a way that favours non-cooperation over cooperation would be to render a provision "directed at combating impunity inoperable for most practical purposes."⁹²

Gaeta favours a more conservative approach: the ICC was within their jurisdiction to circulate the Arrest Warrants, but states not party to the Rome Statute are not obliged to comply with the request as that would counter the purpose of Article 98(1).⁹³ Gaeta argues that the rules of customary international law on Head of State immunities are important to avoid inter-state interferences of the exercise of official functions.⁹⁴ She rightly points out, and Akande concedes, that the Pre-Trial chamber does not discuss or resolve the complications between Article 27 and 98.⁹⁵ Further, she argues that although Article 27 is a core provision, it is a core provision of a treaty based court.⁹⁶ As such, the article may only apply to states which are party to that treaty. Unless, it is demonstrated "that its content corresponds to a rule of customary international law."⁹⁷ In her observations as *amicus curiae* to the Appeals Chamber, Gaeta submits that Article 27(2) in indeed reflected in customary international law. However, she asserts that this general rule does not extend to judicial coopera-

⁹⁰ *ibid*

⁹¹ *ibid.*

⁹² Akande (n 55) 338

⁹³ Gaeta (n 79) 316

⁹⁴ *ibid* 320

⁹⁵ *ibid* 323; Akande (n 55) 337

⁹⁶ *ibid*

⁹⁷ *ibid*

tion.⁹⁸ As interpreting Article 27(2) would render Article 98 redundant, which as is contrary to the principle of treaty interpretation requiring that “effect utile is to be given to any treaty provision.”⁹⁹ Although Gaeta and Akande ultimately disagree in their conclusions, at least to this extent, they can both agree that the treaty provisions must be read in consideration of each other. Akande and Cryer argue strongly in favour of upholding the values in Article 27 and Gaeta is clear on the importance of not overstepping jurisdiction and respecting Article 98. But there are others who contend this view completely.

Roger O’Keefe asserts that Article 98(1) and 27(2) are completely unrelated in this circumstance.¹⁰⁰ His reasoning is founded in his argument that Resolution 1593 does not “alter the ordinary application of Article 98(1) of the statute.”¹⁰¹ He explains that Article Two of Resolution 1593 did nothing more than oblige Sudan to comply with the ICC’s specific requests.¹⁰² O’Keefe argues that by obliging Sudan to cooperate with requests, the Security Council certainly did not submit Sudan to the “full range of obligations of cooperation, including the obligation of arrest and surrender”.¹⁰³ As a result, O’Keefe states that Sudan cannot be taken to have waived Al-Bashir’s immunity and further, that it cannot be taken that the Court has obtained “the cooperation of Sudan for the waiver of immunity of President Al-Bashir.”¹⁰⁴ He explains that any decision to that binding effect would “need to be explicit”.¹⁰⁵

⁹⁸ *The Prosecutor v. Omar Hassan Ahmad Al-Bashir* (Observations by Professor Paola Gaeta as amicus curiae on the merits of the legal questions presented in the Hashemite Kingdom of Jordan’s appeal against the ‘Decision under Article 87 (7) of the Rome Statute on the noncompliance by Jordan with the request by the Court for the arrest and surrender [of] Omar Al-Bashir’ of 12 March 2018 in the Appeals Chamber) ICC-02/05-01/09 OA2 (18 June 2018) [III]

⁹⁹ *ibid*

¹⁰⁰ *The Prosecutor v. Omar Hassan Ahmad Al-Bashir* (Observations by Professor Roger O’Keefe, pursuant to rule 103 of the Rules of Procedure and Evidence, on the merits of the legal questions presented in ‘The Hashemite Kingdom of Jordan’s appeal against the “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”’ of 12 March 2018 (ICC-02/05-01/09-326) in the Appeals Chambers) ICC-02/05-01/09 OA2 (18 June 2018) [7]

¹⁰¹ *ibid* [14]

¹⁰² *ibid* [12]

¹⁰³ *ibid*

¹⁰⁴ *ibid*

¹⁰⁵ *ibid* [13]

Nicholas Tsagourias on the other hand, argues that Resolution 1593 did indeed “rende[r] Sudan a quasi State party to the Statute for the referred situation.”¹⁰⁶ Further, that because Sudan is considered a quasi State party for this case, it cannot be a third state “for the purposes of Article 98 and thus Article 98 is inapplicable.”¹⁰⁷ Tsagourias concludes that “an obligation imposed on Sudan by the Security Council has *erga omnes* effect.”¹⁰⁸ Consequently, raising the defence of Head of State immunities before the court would “constitute a breach of its obligation to co-operate under Resolution 1593.”¹⁰⁹ Lattanzi, who concurs with Tsagourias, considering that “Article 98(1) is simply irrelevant” in this case.¹¹⁰ She asserts that Resolution 1593 did indeed oblige Sudan to behave in compliance with the ICC, which it would not otherwise have been responsible to do. As such, the “application of Article 27(2) of the Rome Statute removes immunity with respect to Sudanese officials that would otherwise exist under international law.”¹¹¹ Lattanzi states simply that Jordan was never in the position to claim conflicting obligations, as both Jordan and Sudan were subject to Article 27 and neither of them were entitled to rely on Article 98.

On the discussion of jurisdiction on this matter, that the distinction to be made is the ICC’s jurisdiction over Al-Bashir and jurisdiction of the states request to arrest him. She contends that the former, the “adjudicatory” aspect, is not the same as the latter, the “jurisdiction to enforce.”¹¹² Finally, that the right to adjudicate does not extend to the right of nation states to enforce an arrest warrant in this case.¹¹³

¹⁰⁶ *The Prosecutor v. Omar Hassan Ahmad Al-Bashir* (Amicus Curiae Observations Pursuant to Rule 103 of The Rules of Procedure and Evidence on the Merits of the Legal Questions Presented in the Hashemite Kingdom of Jordan’s Appeal Against the 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 of 12 March 2018 in the Appeals Chamber) ICC-02/05-01/09 (9 June 2018) [13]

¹⁰⁷ *ibid*

¹⁰⁸ *ibid* [24]

¹⁰⁹ *ibid*

¹¹⁰ Lattanzi (n 87) [8]

¹¹¹ *ibid* [12]

¹¹² *The Prosecutor v. Omar Hassan Ahmad Al-Bashir* (Amicus curiae further observations submitted by Prof. Flavia Lattanzi pursuant to the oral order issued on 14 September 2018 by the Presiding Judge of the Appeals Chamber during the hearing on “The Hashemite Kingdom of Jordan’s appeal against the ‘Decision under article 87(7) of the Rome Statute on the noncompliance by Jordan with the request by the Court for the arrest and surrender [of] Omar Al-Bashir’” of 12 March 2018 in the Appeals Chamber) ICC-02/05-01/09 OA2 (28 September 2018) [III]

¹¹³ *ibid*

The definition of jurisdiction laid out by Gaeta is contended by Lattanzi's final conclusions which state that the "term 'jurisdiction' in Article 27(2) cannot be belittled to 'adjudicatory jurisdiction'".¹¹⁴ She argues that if 'jurisdiction' could only operate in the event of Al-Bashir's physical presence, it would imply that the Court can merely adjudicate on a specific matter. Further, that 'jurisdiction' must entail the right the "investigative, the prosecutorial, the adjudicatory and the enforcement jurisdiction the Court is endowed with."¹¹⁵ Interestingly, Lattanzi drew upon the ICJ in the Arrest Warrant case, where the ICJ "employed the term jurisdiction as referring both to adjudicatory and enforcement jurisdiction."¹¹⁶ This is especially pertinent as Lattanzi builds on this and cites the principle of *Mutatis mutandis*, reasoning that the ICJ recognised that this logic must be applied to other criminal courts.¹¹⁷ She concludes that it is "self evident" that the "ICJ referred to both the adjudicatory and in *executivis* jurisdiction of international criminal tribunals."¹¹⁸ The Appeals Chamber confirms this logic, citing *Arrest Warrant* and stating that Head of State immunities are not a bar to the Court's investigation or issuance of arrest warrant.¹¹⁹

Can this be resolved?

One way that this may be resolved is taken under the assumption that Sudan through Resolution 1593, Sudan has been put under the jurisdiction of the ICC. This way, Sudan is taken as a party to the Rome Statute and Article 27 can be applied to remove Al-Bashir's immunities. If this were declared by the Security Council clearly, Article 27 could be understood to remove Al-Bashir's immunity and a third state which arrests him would not be acting inconsistently with Article 98.¹²⁰ However, this does highlight the complication of interpretation discussed in the paragraph above. I have argued that Resolution 1593's referral of the Situation in Darfur is legitimate. The question of which states are permitted and obliged to cooperate, considering their international law obligations to respect Head of State immunities, still exists. The fact of the moment is that Al-Bashir remains imprisoned in Sudan, despite requests by the ICC to surrender him and the binding nature of Resolu-

¹¹⁴ *ibid* I. A

¹¹⁵ *ibid* [4]

¹¹⁶ *ibid* [5]

¹¹⁷ *ibid*

¹¹⁸ *ibid*

¹¹⁹ *The Prosecutor v. Omar Hassan Ahmad Al-Bashir* (Judgment in the Jordan Referral re Al-Bashir Appeal in the Appeals Chamber) ICC-02/05-01/09 OA2 (6 May 2019) [102]

¹²⁰ *ibid* 339

tion 1593 to cooperate with the ICC.¹²¹ Akande takes the position that this interpretation must be applied. He states that “the only way” to meaningfully interpret Article 27(2) is to act as though Article 27(2) removes immunities within the court but also for “national authorities acting to support the exercise of the Court’s jurisdiction.”¹²² Pre-Trial Chamber II and the Appeals Chamber have agreed on this position, most recently in their decision on the non-compliance of Jordan.¹²³ To date, this is the most resounding confirmation that Rome Statute Party States at least, are obliged to arrest and surrender Al-Bashir.¹²⁴ From the learned academics’ observations as *amici curiae* to the Court, it is also clear that the expert opinions on the obligations of states to cooperate, do not reach a unanimous or even close to unanimous opinion. As such, it is argued and concluded at this stage that this matter needs to be further reviewed and acted upon by the Security Council. Despite the Appeals Chamber affirming that Jordan failed its obligations under the Rome Statute to arrest and surrender Al-Bashir,¹²⁵ no further action has been taken to reinforce the arrest warrants and impose penalties on States who have an obligation to cooperate and did not.

Conclusion

The normative framework of the Security Council obliges them to take prompt and effective action to restore and maintain international peace and security.¹²⁶ The core of this paper argues that they have not fulfilled that mandate. It has been argued that their implied invocation of Article 13(b) through their Chapter VII powers was legitimate and a step in the right direction. However, the other provisions in Resolution 1593 have led to a long and arduous debate by academics, state representatives and the ICC Pre-Trial Chambers and Appeals Chambers. Most of this debate has been centred around one issue: the ICC acting in response to an Article 13(b) referral to conduct an investigation, and states in conflict with the ICC about which of their international obligations are

¹²¹ ‘Omar al-Bashir: Sudan agrees ex-president must face ICC’ (BBC, 11 February 2020) <<https://www.bbc.co.uk/news/world-africa-51462613>> accessed 28 September 2020

¹²² Akande (n 58) 342

¹²³ *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 in Pre-Trial Chamber II) ICC-02/05-01/09 (11 December 2017); *The Prosecutor v. Omar Hassan Ahmad Al-Bashir* (Judgement in the Jordan Referral re Al-Bashir Appeal in The Appeals Chamber) ICC-02/05-01/09 OA2 (6 May 2019)

¹²⁴ Leila Sadat, ‘Why the ICC’s Judgement in the Al-Bashir Case Wasn’t So Surprising’ (Just Security, 12 July 2019) <<https://www.justsecurity.org/64896/why-the-iccs-judgment-in-the-al-bashir-case-wasnt-so-surprising/>> accessed 27 October 2020

¹²⁵ *Bashir* (n 119) [2]

¹²⁶ UN Charter (n 17) art 24(1)

meant to prevail. The Security Council fail to comprehensively address the issue of head of state immunities and ICC jurisdiction in their initial referral. Moreover, following the fifteen years of the referral until present day, they have not provided more aid or guidance to aid the ICC. On this basis, this paper concludes that the Security Council had an obligation to take “prompt and effective” at every stage of the case to ensure the ICC could go forward with a trial for Al-Bashir.¹²⁷ Further, that following the response of non-compliance by every state requested to do so, the Security Council should have reviewed their instructions and re-addressed the situation. For this reason, it is argued that Resolution 1593 was not procedurally legitimate. It did not fulfil the Security Council’s obligations set out through the principles and purposes of the UN Charter, because it failed to stop the violence in Darfur. Additionally, because the Security Council’s inaction is why Al-Bashir remains out of the ICC’s custody and to this date, without trial.

Table of Cases

Application of the Convention on the Prevention and Punishment of the Crime of Genocide, Provisional Measures, Order of 13 September 1993, I. C.J. Reports 1993

Arrest Warrant of 11 April 2000 (Democratic Republic of the Congo v. Belgium), Judgment, I.C.J. Reports 2002

The Prosecutor v. Omar Hassan Ahmad Al Bashir (Arrest Warrant Decision in Pre-Trial Chamber I) ICC-02/05-01/09-1 (04 March 2009)

The Prosecutor v. Omar Hassan Ahmad Al Bashir (Second Arrest Warrant Decision in Pre-Trial Chamber I) ICC-02/05-01/09-1 (12 July 2010)

The Prosecutor v. Omar Hassan Ahmad Al-Bashir (Amicus Curiae Observations Pursuant to Rule 103 of The Rules of Procedure and Evidence on the Merits of the Legal Questions Presented in the Hashemite Kingdom of Jordan’s Appeal Against the Decision under Article 87(7) of the Rome Statute on the Non-Compliance by Jodan with the Request by the Court for the Arrest and Surrender of Omar Al-Bashir of 12 March 2018 in the Appeals Chamber) ICC-02/05-01/09 (9 June 2018)

The Prosecutor v. Omar Hassan Ahmad Al-Bashir (Amicus Curiae observations submitted by Prof. Flavia Lattanzi pursuant to rule 103 of the Rules of Procedure and Evidence on the merits of the legal questions presented in "The Hashemite Kingdom of Jordan's appeal against the ‘Decision un-

¹²⁷ *ibid*

der 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" of 12 March 2018 in the Appeals Chamber) ICC-02/05-01/09 OA2 (18 June 2018)

The Prosecutor v. Omar Hassan Ahmad Al-Bashir (Observations by Professor Paola Gaeta as Amicus Curiae on the merits of the legal questions presented in the Hashemite Kingdom of Jordan's appeal against the 'Decision under Article 87 (7) of the Rome Statute on the noncompliance by Jordan with the request by the Court for the arrest and surrender [of] Omar Al-Bashir' of 12 March 2018 in the Appeals Chamber) ICC-02/05-01/09 OA2 (18 June 2018)

The Prosecutor v. Omar Hassan Ahmad Al-Bashir (Observations by Professor Roger O'Keefe, pursuant to rule 103 of the Rules of Procedure and Evidence, on the merits of the legal questions presented in 'The Hashemite Kingdom of Jordan's appeal against the "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"' of 12 March 2018 (ICC-02/05-01/09-326) in the Appeals Chambers) ICC-02/05-01/09 OA2 (18 June 2018)

The Prosecutor v. Omar Hassan Ahmad Al-Bashir (Amicus Curiae further observations submitted by Prof. Flavia Lattanzi pursuant to the oral order issued on 14 September 2018 by the Presiding Judge of the Appeals Chamber during the hearing on "The Hashemite Kingdom of Jordan's appeal against the 'Decision under article 87(7) of the Rome Statute on the noncompliance by Jordan with the request by the Court for the arrest and surrender [of] Omar Al-Bashir"' of 12 March 2018 in the Appeals Chamber) ICC-02/05-01/09 OA2 (28 September 2018) [III]

The Prosecutor v. Omar Hassan Ahmad Al-Bashir (Judgment in the Jordan Referral re Al-Bashir Appeal in the Appeals Chamber) ICC-02/05-01/09 OA2 (6 May 2019)

Table of Legislation

Charter of the United Nations (adopted 26 June 1945, entered into force 24 October 1945) 1 UNTS XVI

Rome Statute of the International Criminal Court Article (adopted 17 July 1998, entered into force 1 July 2002) 2187 UNTS 90

Statute of the International Court of Justice (adopted 26 June 1945, entered into force 24 October 1945) USTS 993

Vienna Convention on the Law of Treaties (adopted 22 May 1969, entered into force 27 January 1980) 1155 UNTS 331

UN Documents

UNSC Res 1593 (31 March 2005) UN Doc S/RES/1593

UNSC Verbatim Report (31 March 2005) UN Doc S/PV/5158

Bibliography

- Abdulsalam, H, 'UN-African Union mission condemns recent spate of deadly attacks in Darfur' (UN News, 28 July 2020) <<https://news.un.org/en/story/2020/07/1069141>> accessed 8 September 2020
- Akande, D, 'The Legal Nature of Security Council Referrals to the ICC and its Impact on Al Bashir's Immunities' (2009) 7 *Journal of International Criminal Justice* 333
- Alvarez, J.E, 'Judging the Security Council' (1996) 90 *AJIL* 1
- Aspremont, J, and Brabandere, E, 'The Complementary Faces of Legitimacy In International Law: The Legitimacy of Origin and the Legitimacy of Exercise' (2011) 34 *The Fordham Int'l L.J* 190
- Bodansky, D, "Legitimacy in International Law and International Relations" in Jeffrey L Dunoff and Mark A Pollack (eds), *Interdisciplinary Perspectives on International Law and International Relations: The State of the Art* (CUP Press 2012) 331
- Buchanan, A, and Keohane, R.O, 'The Legitimacy of Global Governance Institutions' (2006) 20 *Ethics & International Affairs* 405,
- Cassese, A, 'On the Current Trends towards Criminal Prosecution and Punishment of Breaches of International Humanitarian Law' in *EJIL* 9 (1998) 2
- Esty, D, 'Good Governance at the Supranational Scale: Globalizing Administrative Law' (2006) 115 *Yale LJ* 1490
- Gaeta, P, 'Does President Al Bashir Enjoy Immunity From Arrest?' (2009) 7 *Journal of International Criminal Justice* 315
- Galand, A.G, *UN Security Council Referrals to the International Criminal Court: Legal Nature, Effects and Limits*, vol 5 *Leiden Studies on the Frontiers of International Law*, Brill Nijhoff 2018)
- Jodoin, S, 'Enhancing the Procedural Legitimacy of the U.N. Security Council: A Normative and Empirical Assessment' (2005) 17 *Sri Lanka Journal of International Law* <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2942160> accessed 10 September 2020

- Kelson, H, "The Pure Theory of Law" (1934/1935) 50/51 L.Q.R. 474, in Dennis Lloyd, Introduction to Jurisprudence (Stevens & Sons Ltd., 1959)
- Kumm, M, 'The Legitimacy of International Law: A Constitutionalist Framework of Analysis' (2004) 15 EJIL 907
- Roberts, A, and Sivakumaran, S, 'The Theory and Reality of The Sources of International Law' in Malcolm D. Evans (eds), International Law (OUP 2006)
- Roberts, K, 'Second Guessing the Security Council: The International Court of Justice and Its powers of Judicial Review' (1995) 7 Pace International Law Review 281
- Sadat, L, 'Why the ICC's Judgement in the Al-Bashir Case Wasn't So Surprising' (Just Security, 12 July 2019) <<https://www.justsecurity.org/64896/why-the-iccs-judgment-in-the-al-bashir-case-was-nt-so-surprising/>> accessed 27 October 2020
- Scherz, A, and Zysset, A, 'The UN Security Council, Normative Legitimacy and The Challenge of Specificity' (2020) 23 Critical Review of International Social and Political Philosophy 371
- Schott, J, 'Chapter VII as Exception: Security Council Action and the Regulative Ideal of Emergency' (2008) 6 Northwestern Journal of International Human Rights 24, 24
- Ssenyonjo, M, 'The International Criminal Court Arrest Warrant Decision for President Al Bashir of Sudan' (2010) 59 The International and Comparative Law Quarterly 205
- Stewart, D, 'Official Immunity Under the Rome Statute: The Path From Principle to Practice is Seldom Straight' (Just Security, 2018) <<https://www.justsecurity.org/54678/official-immunity-under-rome-statute-path-principle-practice-seldom-straight/#:~:text=Immunities%20or%20special%20procedural%20rules,jurisdiction%20over%20such%20a%20person%20demonstrates>> accessed 24 September 2020
- Stewart, R.B, 'Administrative Law in the Twenty-First Century' (2003) 78 NYU Law Review 437
- Trahan, J, 'The Relationship Between the International Criminal Court and the UN Security Council: Parameters and Best Practices' (2013) 24 Criminal Law Forum 417
- Thomas, C.A, 'The Uses and Abuses of Legitimacy in International Law' (2014) 34 OJLS 729
- Wet, E.D, 'The Implications of President Al-Bashir's Visit to South Africa for International and Domestic Law' (2015) 13 JICJ 1049
- White, T, 'States 'failing to seize Sudan's dictator despite genocide charge' (The Guardian, 21 October 2018) <<https://www.theguardian.com/global-development/2018/oct/21/omar-bashir-travels-world-despite-war-crime-arrest-warrant>> accessed 08September2020
- Whittle, D, 'The Limits of Legality and the United Nations Security Council: Applying the Extra-Legal Measures model to Chapter VII Action' (2015) 26 EJIL 671

'Who are those wanted by the ICC over Darfur?' (Aljazeera, 11 February 2020) <<https://www.aljazeera.com/news/2020/02/11/who-are-those-wanted-by-the-icc-over-darfur/>> accessed 24 September 2020

'ICC Prosecutor Urges Support in Arresting Darfur Suspects' (Sudan News Media, 17 June 2014) <https://www.youtube.com/watch?v=CowdAiSZ_wI> 09September2020

'Omar al-Bashir: Sudan's ousted president' (BBC, 14 August 2019) <<https://www.bbc.co.uk/news/world-africa-16010445>> accessed 8September2020