

## EDITORIAL COMMENT

### ON PAYING THE PIPER: FINANCIAL RESPONSIBILITY FOR SECURITY COUNCIL REFERRALS TO THE INTERNATIONAL CRIMINAL COURT

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He who pays the piper calls the tune.

Atrocities in Darfur had been widely reported in the media for several years, but it was only on September 18, 2004, that the Security Council adopted Resolution 1564, requesting, *inter alia*, that the United Nations secretary-general

rapidly establish an international commission of inquiry in order immediately to investigate reports of violations of international humanitarian law and human rights law in Darfur by all parties, to determine also whether or not acts of genocide have occurred, and to identify the perpetrators of such violations with a view to ensuring that those responsible are held accountable.<sup>1</sup>

On October 8, 2004, the secretary-general reported to the Security Council that he had established a five-member commission of inquiry and requested that it submit its report within three months.<sup>2</sup> The commission submitted a full report of its findings on January 25, 2005.<sup>3</sup>

On March 31, 2005, at the conclusion of long and reportedly difficult negotiations, the Security Council issued Resolution 1593. After specifying that the Council was acting under Chapter VII, the resolution stated in its key operative paragraph that the Council “[d]ecides to refer the situation in Darfur since 1 July 2002 to the Prosecutor of the International Criminal Court.”<sup>4</sup> This resolution was an important event for the United Nations and, no less, for the as yet untested International Criminal Court (ICC).

The key operative paragraph of Resolution 1593 was entirely consistent with Article 13 of the Rome Statute, titled “Exercise of jurisdiction.” Article 13 provides in relevant part:

The Court may exercise its jurisdiction with respect to a crime referred to in article 5 in accordance with the provisions of this Statute if:

...

(b) 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.<sup>5</sup>

But paragraph 7 of Resolution 1593, which was presumably a condition of U.S. acceptance of the resolution, may be inconsistent with the Statute; at best, it raises policy questions that the drafters of the Statute did not clarify. Paragraph 7 states that the Council

<sup>1</sup> SC Res. 1564, para. 12 (Sept. 18, 2004).

<sup>2</sup> Letter Dated 31 January 2005 from the Secretary-General Addressed to the President of the Security Council, UN Doc. S/2005/60, at 1.

<sup>3</sup> Report of the International Commission of Inquiry on Darfur to the Secretary-General, *id.* at 2.

<sup>4</sup> SC Res. 1593, para. 1 (Mar. 31, 2005).

<sup>5</sup> Rome Statute of the International Criminal Court, July 17, 1998, 2187 UNTS 3, *reprinted in* 1 UNITED NATIONS DIPLOMATIC CONFERENCE OF PLENIPOTENTIARIES ON THE ESTABLISHMENT OF AN INTERNATIONAL CRIMINAL COURT, OFFICIAL RECORDS, UN Doc. A/CONF.183/13 (Vol. I) (2002) [hereinafter Rome Statute].

*[r]ecognizes* that none of the expenses incurred in connection with the referral including expenses related to investigations or prosecutions in connection with that referral, shall be borne by the United Nations and that such costs shall be borne by the parties to the Rome Statute and those States that wish to contribute voluntarily.<sup>6</sup>

Two provisions of the ICC Statute are relevant to this discussion. Article 114, "Payment of expenses," provides: "Expenses of the Court and the Assembly of States Parties, including its Bureau and subsidiary bodies, shall be paid from the funds of the Court."<sup>7</sup> Article 115, "Funds of the Court and of the Assembly of States Parties," provides:

The expenses of the Court and the Assembly of States Parties, including its Bureau and subsidiary bodies, as provided for in the budget decided by the Assembly of States Parties, shall be provided by the following sources:

- (a) Assessed contributions made by States Parties;
- (b) Funds provided by the United Nations, subject to the approval of the General Assembly, in particular in relation to the expenses incurred due to referrals by the Security Council.<sup>8</sup>

The attempt at externalizing financial responsibility in paragraph 7 of Resolution 1593 would appear problematic under both the Rome Statute and the UN Charter. The drafters of the Rome Statute had decided, not unreasonably, that when the Security Council "leased" the Court for prosecutions that the Council wished the ICC to pursue but the Office of the Prosecutor itself had not initiated, the United Nations, which otherwise has no financial obligations to the ICC, would bear the expenses. (For a case like Darfur, the costs could be hundreds of millions of dollars.) Mahnouch Arsanjani has written that, during the Preparatory Committee negotiations, "the general sentiment among the delegations was that if the Security Council refers a matter to the Court, the United Nations should pay the expenses."<sup>9</sup> Yet Arsanjani also notes that, whatever the legislative history, "the language of Article 115 does not compel the United Nations to pay for such expenses. There is nothing in the Statute that would prevent the Court from accepting Security Council referrals even if the UN does not pay for the expenses of those cases."<sup>10</sup>

Does the Statute allow the prosecutor or the Court to accept a Security Council referral on these terms or, if it is accepted, can the costs of the prosecution then be imposed on the states parties in a way that may be inconsistent with the mandate of the ICC Statute or the consent of the states parties? The legal uncertainty is aggravated by the failure of the Statute to make clear who within the ICC triumvirate is authorized to decide to underwrite the costs of a Security Council referral when the Council indicates in its referral that it will not pay. If the decision to accept financial responsibility is to be made by the prosecutor or the Court, then the states parties would have to pay without having been consulted, a consequence that would effectively invert the control mechanism in the Statute, which had envisaged the Assembly of States Parties as the ultimate watchdog.

The implications of the prosecutor's decision here may not be limited to Darfur, though the financial burden in that case alone could prove onerous. If this part of Resolution 1593 becomes the "law-in-action" for the ICC,<sup>11</sup> the states parties could find themselves bearing all the costs, in the future, of cases referred to the Court by the Security Council, especially if the decision

<sup>6</sup> SC Res. 1593, *supra* note 4, para. 7. "Recognizes" is a curiously undirected action verb in the context, but was presumably inserted to accommodate U.S. policy, which is designed to preclude the Organization from contributing to or bearing the expenses of the Security Council's referrals.

<sup>7</sup> Rome Statute, *supra* note 5, Art. 114.

<sup>8</sup> *Id.*, Art. 115(b).

<sup>9</sup> Mahnouch H. Arsanjani, *Financing*, in 1 THE ROME STATUTE OF THE INTERNATIONAL CRIMINAL COURT: A COMMENTARY 315, 325 (Antonio Cassese, Paola Gaeta, & John R. W. D. Jones eds., 2002).

<sup>10</sup> *Id.*

<sup>11</sup> See Mahnouch H. Arsanjani & W. Michael Reisman, *The Law-in-Action of the International Criminal Court*, 99 AJIL 385 (2005).

to bear the costs is made by the prosecutor of the Court. The irony of such a development would be that key members of the Security Council that are neither party to the Statute nor amicably disposed to the ICC would become its “free riders.”

The effort by the Security Council to externalize the contingent UN financial responsibility contemplated in Article 115(b) of the Rome Statute also poses interesting problems under United Nations law. Insofar as Article 115(b) charges the United Nations with the responsibility to provide funds, it would normally be subject to Article 17(1) of the UN Charter, which states that the General Assembly “shall consider and approve the budget of the Organization,” a competence explicitly acknowledged in Article 115(b) itself. Since the Charter provides no explicit budgetary authority to the Security Council, it could not ordinarily preempt this Assembly function by instructing the Assembly *not* to include this particular item in its budget. (In the case of the ad hoc tribunals, in contrast, the Council simply, but quite effectively, imposed the costs on the General Assembly under Charter Article 17, though not without some protests by Assembly members.<sup>12</sup>)

When, however, the Security Council is operating under Chapter VII, as it was explicitly doing in Resolution 1593, the Charter does not require the Council to act in accordance with every provision of the Charter. Rather, Article 24(2) provides that in fulfilling its primary responsibility for the maintenance of international peace, “the Security Council shall act in accordance with the Purposes and Principles of the United Nations.” Indeed, when the Council is acting under Chapter VII, the Charter explicitly discharges it from applying a provision as important as Article 2(7), which affirms domestic jurisdiction. It was not unreasonable to enable the Council, in advance, to ignore certain Charter provisions if necessary to achieve a security objective. But it is difficult to see how the Council could justify preempting the budgetary authority of the Organization in a matter such as the referral in Resolution 1593, for it does not appear to be plausibly necessary to achieve a security objective. Indeed, the verb in paragraph 7 is “recognizes” and not “decides.” Hence, it is quite possible that the General Assembly, a large number of whose members are party to the Statute, may quite rationally, under Charter Article 17(1), willingly accept the obligations of Article 115(b) of the Statute and include the costs of Darfur in the budget, despite the effort by the Security Council in Resolution 1593 to evade the expenses incurred in connection with the Council’s referral.

If the General Assembly should make such a decision and the United States should persist in its categorical opposition to any contributions by the United Nations to the ICC, insisting, perhaps, that Charter Articles 25 and 103 require all members of the General Assembly to comply with Resolution 1593, the United Nations would confront a crisis analogous to that which precipitated the *Certain Expenses* opinion.<sup>13</sup> It is ironic that in such a crisis the United States would be taking a position opposite to the one it took in 1962. But if the current matter were referred for an advisory opinion, there is scant reason to assume that the International Court of Justice would change the view of the law it had expressed earlier.

In the future, one can only speculate as to who will blink in confrontations over paying the piper. Will the prospect of payment by the United Nations for Security Council referrals (and by the United States for almost a quarter of that cost) lead the United States to veto prospective Security Council referrals to the ICC so as to preserve the integrity of its policy of not contributing in any way to the Court? Or will the United States, in an incremental and episodic accommodation with the Court, acquiesce, as the soft verb in paragraph 7 of Resolution 1593 may suggest, in indirectly contributing to the Court through the United Nations budget, when Washington

<sup>12</sup> See 1 VIRGINIA MORRIS & MICHAEL P. SCHARF, AN INSIDER’S GUIDE TO THE INTERNATIONAL CRIMINAL TRIBUNAL FOR THE FORMER YUGOSLAVIA 325 n.842 (1995); Arsanjani, *supra* note 9, at 325 n.39.

<sup>13</sup> *Certain Expenses of the United Nations (Article 17, paragraph 2, of the Charter)*, Advisory Opinion, 1962 ICJ REP. 151 (July 20).

decides that American interests are served by the referral of a particular case to the ICC? And will the General Assembly, perhaps in its eagerness to make the Court a meaningful institution in general or in a particular case, yield part of its budgetary competence to the Council and, acquiescing in the Council's instruction, refuse budgetary responsibility for a referral? Or will the Assembly insist on its Charter prerogatives and accept the costs of a referred case as part of the budget? As for the ICC, which component within its organizational structure will emerge as the decision maker when a case is referred by the Security Council and the Assembly, for whatever reason, refuses to pay the piper? How the question of financial responsibility for referred cases is answered will have important impacts on both the future of the Court and its relation to the Security Council.