



## PARLIAMENTARIANS FOR GLOBAL ACTION

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### **DARFUR: INTERNATIONAL PARLIAMENTARY GROUP WELCOMES UNITED NATIONS SECURITY COUNCIL RESOLUTION 1593 (2005) AND URGES ALL STATES TO FULLY COOPERATE WITH THE INTERNATIONAL CRIMINAL COURT**

#### **Regrets exemptions included in Resolution 1593 (2005)**

*NEW YORK/ROME; April 1, 2005* – Parliamentarians for Global Action (PGA), a network of elected legislators from 110 countries from all regions of the world, welcomes the adoption of the first United Nations Security Council resolution referring a situation to the International Criminal Court (ICC).

Resolution 1593 (2005) of March 31, 2005 on the situation in Darfur, Sudan, was adopted with 11 votes in favour and 4 abstentions. The members of the Security Council that voted in favour of the resolution were France, The United Kingdom, Benin, Greece, Denmark, Argentina, The United Republic of Tanzania and Romania (States Parties to the ICC Statute), as well as Japan, The Philippines and Russia, which are not yet ICC Member States. The United States, China, Algeria and Brazil abstained.

The measure had been under active discussion in the Security Council since January 25, 2005, when the International Commission of Inquiry on Darfur recommended the referral to the ICC under Chapter VII of the UN Charter and article 13.b of the Rome Statute of the ICC. Over two month, the United States opposed the referral, which it saw as conferring a 'legitimizing' effect on the Court. Only when the resolution was tabled for a vote by France and the United Kingdom, resolution 1593 (2005), did the majority of Council's Members prevail over this US resistance.

It should be noted that, in contrast to the other 3 abstentions, Brazil's abstention was linked to dissatisfaction with the exemption language contained in the resolution with respect to certain nationals, *not* the referral per se, as was the case for Algeria, China and the US..

"This resolution is a sign of hope for the people of Darfur", said Senator Alain Destexhe of Belgium, Convenor of the *PGA International Law and Human Rights programme*. In a message to Parliamentarians worldwide, Senator Destexhe encouraged all States, including Sudan, to cooperate fully with the International Criminal Court to bring to justice the persons bearing the greatest responsibility for atrocities committed in Darfur.

A controversial aspect of Resolution 1593 (2005) is that it purports to exempt from the Court's reach nationals and personnel deployed by Non States Parties to the ICC Statute operating under a UN or African Union mandate in Sudan, thus including US aid workers and peacekeepers. This sends a most unfortunate signal which directly contradicts the overall message of accountability, justice and equality before the law that the resolution itself highlights with respect to the current situation in Darfur.

In addition to the formal obligations of cooperation, Resolution 1593 (2005) contains several other positive elements, such as support and reparations for victims and a call to establish truth and reconciliation mechanisms aimed at underpinning the overall accountability process, peace and reconciliation in Sudan.

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“To assess the political and legal implications of Resolution, it is essential to make an in-depth analysis of its positive and negative aspects in order to draw a conclusion”, Senator Destexhe said.

### **POSITIVE ASPECTS OF RESOLUTION 1593**

- The referral to the ICC, as opposed to creating *ad hoc* institutions with time-limits, is recognised as the most viable solution to advance the cause of international criminal justice. The ICC is a *pre-established and permanent tribunal* and its utilisation should effectively bring to an end the need for the Security Council to take sometimes controversial initiatives such as the creation of the *ad hoc* Tribunals for the former Yugoslavia and Rwanda. Resolution 1593 (2005), and the obligations it imposes, represents a significant milestone in the evolution of the ICC.
- The resolution urges all States, not only Sudan, and regional and other international organisations to fully cooperate with the ICC. This is true notwithstanding a sentence in paragraph 2 of the resolution, which redundantly recognises that “*States not party to the Rome Statute have no obligation under the Statute*”. In fact, requests of cooperation to non Parties will be made by the Court on the basis of this resolution, which is adopted under Chapter VII of the UN Charter as an enforcement measure not implying the use of force (article 41, UN Charter). And if States prove unwilling to cooperate, the Prosecutor may bring the matter of non-cooperation to the attention of Council (article 87.7, Rome Statute), which may take further enforcement measures.
- The resolution expressly calls on the African Union to enter into negotiations with the Court with a view to holding ICC proceedings in an appropriate location in Africa. This will bring an added value to the ICC involvement given the veracity of the old adage that justice must not only be done but also be seen to be done. In this connection, victims and communities will clearly benefit from greater accessibility to the ICC the closer the proceedings themselves take place to the location of the commission of the crimes.
- The resolution requests the Court to collaborate with national efforts promoting justice and the rule of law within Sudan, in accordance with the “active complementarity” principle of the Rome Statute. For the first time, a UN Security Council decision recognises that this principle applies also to the benefit of States Non Parties to the Rome Statute, as the Statute itself envisages in its article 17.
- The Security Council underscores “*the need to promote healing and reconciliation*” and encourages the creation of truth and reconciliation mechanisms, to complement the justice process and promote a lasting peace with the participation of all sectors of Sudanese society.
- In a significant paragraph of the preamble, the resolution recalls the rights of victims to reparations and encourages “*States to contribute to the ICC Trust Fund for Victims*”, thus reaffirming the innovative mandate of the ICC to deliver restorative justice for victims.
- Lastly, the resolution requests the ICC Prosecutor to promptly and timely update the Security Council, hence paving the way for a new work-relationship to be built between the most dynamic political and judicial bodies of the international community, respectively, the Council and the Court.

### **NEGATIVE ASPECTS OF RESOLUTION 1593**

- The resolution seeks to affirm the exclusive jurisdiction of States non parties to the ICC Statute over the “*nationals, current or former officials, and personnel*” they contribute to operations in Sudan mandated by the Security Council or the African Union. Such purported limitation of jurisdiction contravenes existing international law – which allows for the primary, non-exclusive, jurisdiction of the State of

nationality of peace-keepers –, including the UN Charter and the Rome Statute. It also conflicts with the legitimate exercise of jurisdiction of the State of the territory in which crimes are committed and of the State of the nationality of victims.

- The legal implications of this exemption – adopted to accommodate US threats to veto the referral might be interpreted by the Court under article 21 of the Rome Statute, if a case of this nature would be *ever* brought before this impartial judicial body. Article 21 (“*Applicable Law*”) binds the Court to a clear hierarchy of sources of law, under which a Security Council resolution may be applied only if compatible with the Rome Statute. However, the political implications of this purported exemption are clearly negative, as a main organ of the UN tries to impose unfortunate restraints on the newly emerging system of international criminal justice.
- The resolution contains a *de facto* prohibition on the UN paying for the costs incurred by the ICC in its investigations and trials on Darfur-related cases: This seems inconsistent with the Statute’s provisions on financing, which encompass a duty of burden-sharing of costs between the UN and the ICC when the Council refers a situation to the Court. Nevertheless, individual UN Member States – including States that supported the resolution but are not *yet* ICC States Parties, such as Japan, the Philippines and Russia – may help in bridging the financial gap and support a prompt judicial intervention in Darfur.
- The Preamble of the resolution makes reference to existing “*agreements referred to in article 98.2 of the Rome Statute*”, which must be interpreted as only applicable to agreements that respect the letter and spirit of the Rome Statute and article 98. As widely agreed by international law scholars and international authorities like the Legal Counsel of the UN and the Council of the EU, the so-called bilateral non surrender agreements have been so far entered in violation of the Rome Statute and its article 98.

## ASSESSMENT

“All in all, there are enough elements to justify interpreting Resolution 1593 (2005) as a significant step forward in the relationship between the UN Security Council and the ICC, especially taking into account past moves by the Council to exempt entire categories of persons from ICC jurisdiction, which failed with the non-renewal of Resolution 1487 (2003),” remarked David Donat Cattin, Legal Advisor of PGA. Notwithstanding this overall positive nature of the resolution, the attempt to exempt certain nationals intervening in Sudan from the reach of the ICC would appear to be of questionable legal validity.

The referral of the Darfur situation to the ICC sets an important and concrete precedent in the fight against impunity. In particular, the decision to utilize the ICC as opposed to the possible establishment of another ad hoc or hybrid tribunal must be seen as an endorsement of sorts by the Security Council as a whole of the ICC.

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PGA IS AN ASSOCIATION OF OVER 1350 LEGISLATORS FROM 110 COUNTRIES UNITED TO PROMOTE SOLUTIONS TO GLOBAL PROBLEMS. PGA MEMBERS HAVE SUPPORTED THE ESTABLISHMENT OF THE ICC SINCE 1989 WHEN A.N.R. ROBINSON, THEN PRIME MINISTER OF TRINIDAD & TOBAGO AND CONVENOR OF PGA’S INTERNATIONAL LAW PROGRAMME, INTRODUCED A UN GENERAL ASSEMBLY RESOLUTION CALLING FOR THE ESTABLISHMENT OF AN INTERNATIONAL CRIMINAL COURT. SINCE THE ADOPTION OF THE ROME STATUTE OF THE ICC ON 17 JULY 1998, PGA MEMBERS HAVE PROMOTED THE RATIFICATION AND EFFECTIVE IMPLEMENTATION OF THE STATUTE, WHICH ENTERED INTO FORCE ON JULY 1, 2002. PGA MEMBERS ARE CURRENTLY WORKING TOWARDS UNIVERSAL PARTICIPATION IN THE INTERNATIONAL JUSTICE SYSTEM AND THE SHORT-TERM OBJECTIVE OF 100 STATES PARTIES TO THE ROME STATUTE.