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Does the Principle of Complementarity Apply to Security Council Referrals to the ICC?

Reid Perry Swayze

Case Western Reserve University
School of Law
International War Crimes Research Lab

Memorandum for the International Criminal Court

Issue: Does the Principle of Complementarity Apply to Security Council Referrals to the ICC?

[The Sudan Claims That it Does and Seeks to Block the ICC from Investigating and Prosecuting Cases Related to the Darfur by Instituting its Own Investigation and Prosecution]

Prepared by Reid Perry Swayze
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TABLE OF CONTENTS

Index of Authorities

Treaties and Other International Instruments

UN Resolutions and Documents

11. U.N.S.C. Provisional Verbatim Record of the 3,175th Meeting, at U.N. Doc. S/PV.3175 (1993), IN AN INSIDER'S GUIDE TO THE INTERNATIONAL CRIMINAL TRIBUNAL FOR THE FORMER YUGOSLAVIA: A DOCUMENTARY HISTORY AND ANALYSIS VOL. 2 (EDS.), VIRGINIA MORRIS & MICHAEL P. SCHARF (1995)

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13. U.N.S.C. Res. 808, U.N. SCOR, 48th Sess., 3175th mtg. at U.N. Doc S/RES/808 (1993). IN AN INSIDER'S GUIDE TO THE INTERNATIONAL CRIMINAL TRIBUNAL FOR THE FORMER YUGOSLAVIA: A DOCUMENTARY HISTORY AND ANALYSIS VOL. 2 (EDS.), VIRGINIA MORRIS & MICHAEL P. SCHARF (1995)

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21. U.N.S.C. Res. 1627, U.N. SCOR, 60th Sess., 5269th mtg. at U.N. Doc S/RES/1627

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23. 30th Meeting of the Diplomatic Conference (9 July 1998), at A/CONF.183/C.1/SR.30, IN M. CHERIF BASSOUNI, THE LEGISLATIVE HISTORY OF THE INTERNATIONAL CRIMINAL COURT: SUMMARY RECORDS OF THE 1998 DIPLOMATIC CONFERENCE, VOL. 3. (2005)

24. 31st Meeting of the Diplomatic Conference (9 July 1998), at A/CONF.183/C.1/SR.31, IN M. CHERIF BASSOUNI, THE LEGISLATIVE HISTORY OF THE INTERNATIONAL CRIMINAL COURT: SUMMARY RECORDS OF THE 1998 DIPLOMATIC CONFERENCE, VOL. 3. (2005)

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United States Statutory and Congressional Documents

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I.) Introduction and Summary of Conclusions

A.) Issues*

The International Criminal Court (hereinafter the "ICC"), which was established by the Rome Statute that entered into force on 1 July 2002, has jurisdiction *ratione temporis*[1] over specific international crimes[2] committed either by individuals within the territory of a state that has ratified the Rome Statute, or by individuals who are citizens of a State party to the Rome Statute.[3] Certain preconditions must be met; however, before a case can be investigated and prosecuted before the ICC. The primary focus of this memorandum will be to evaluate whether a referral by the United Nations Security Council (hereinafter the "SC") can be challenged by a state pursuant to the principle of complementarity. In addition, this note will explore the particular situation[4] in the Darfur

*ISSUE: Does the principle of complementarity apply to Security Council referrals to the ICC? The Sudan claims that it does and seeks to block the ICC from investigating and prosecuting cases related to Darfur by instituting its own investigation and prosecution.

[1] *See,* The Rome Statute Art. 11. The ICC will only have jurisdiction over crimes committed after 1 July 2001 and the Rome Statute does not apply retroactively. {Reproduced in Accompanying Notebook at Tab 2}

[2] *Id.* at Art. 5 which states that the ICC shall have jurisdiction over the crime of genocide, crimes against humanity, and the crime of aggression (Note: a formal definition of aggression has yet to be set by the ICC and the next opportunity to do so will not come until 2009). *See also,* Art. 6-8 for detailed elements of the crimes listed *supra.*

[3] *Id.* at Art. 4.

[4] Note, the term "situation" is used by the Rome Statute to describe an instance when one of the four core crimes of Art. 5 is committed. During the Diplomatic Conferences preceding the adoption of the Rome Statute, the term, situation, was felt to be less restrictive than "war" or "armed conflict." Furthermore, the use of "situation" does not implicate one individual in particular and it is up to the Prosecutor to investigate the proceedings and determine if there is a "case." *See* Art. 15 of the Rome Statute.

and whether the Sudan, which is not party to the Rome Statute,[5] can employ the principle of complementarity and effectively supersede the SC's referral to the ICC. [6]

B.) Summary of Conclusions

1.) The Security Council Has the Broad Responsibility to Maintain International Peace and Security.

Among all international organizations, the SC has the unique responsibility and obligation to maintain international peace and security.[7] The powers conferred upon it by Chapter VII[8] of the UN Charter specifically allow the SC to determine how to uphold its mandate pursuant to the UN Charter. All UN Member States are bound to cooperate with, and abide by, the SC's decisions even if a treaty obligation would support contrary action.[9]

2.) The Principle of Complementarity Should Not Apply to a Security Council Referral to the ICC Pursuant to Chapter VII of the UN Charter.

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[5] The Sudan is a signatory to the Rome Statute but has yet to ratify it at the time this memorandum was authored.

[6] *See,* U.N.S.C. Res. 1593, U.N. SCOR 60th Sess., 5158th mtg. at U.N. Doc. S/RES/1593 (2005). {Reproduced in Accompanying Notebook at Tab 20}.

[7] *See,* UN Charter Preamble. *See also,* UN Charter Chapter VII. {Reproduced in Accompanying Notebook at Tab 3}

[8] *Id.*

[9] *See, e.g.,* Art. 2(2) of the UN Charter which holds that all UN Member States "shall fulfill in good faith the obligations assumed by them in accordance with this UN Charter." *See also,* Art. 103 of the UN Charter affirming, "In the event of a conflict between the obligations of Members of the UN and their obligations under any other international agreement, [the] obligations under the present Charter shall prevail." { Reproduced in Accompanying Notebook at Tab 3}.

Under Article 41 of the UN Charter,[10] the SC is empowered to employ various non-military methods to maintain international peace and security. The SC exercised this power when it established the International Criminal Tribunal for the Former Yugoslavia (hereinafter the "ICTY") and the International Criminal Tribunal for Rwanda (hereinafter the "ICTR"). Like the SC determination that situations in the Former Yugoslavia and Rwanda necessitated the establishment of the *ad hoc* tribunals, its referrals to the ICC should be deemed a legislative finding of fact. The SC itself determines that a State is unwilling or unable to genuinely prosecute or investigate the offenses that are the subjects of the referral; but, it does not act as the judiciary (as this is the prerogative of the ICC). Because the SC's mandate is supported by the primacy of Chapter VII, the principle of complementarity, found in Article 17 of the Rome Statute,[11] cannot exist contemporaneously with a SC referral.

3.) The Principle of Complementarity Should Not Apply to the Situation in the Darfur.

If the principle of complementarity applied and Sudanese domestic courts were able to handle *any* investigation or prosecution of individuals, genuine and adequate investigation and prosecution of individuals would be completely lacking. Pursuant to SC Resolution 1593, the SC established an International Commission of Inquiry on Darfur (hereinafter the "ICID") to investigate and to make recommendations on how to

[10] *See,* Art. 41 of the UN Charter. { Reproduced in Accompanying Notebook at Tab 3}.

[11] *See generally,* Art. 17 of the Rome Statute. { Reproduced in Accompanying Notebook at Tab 2}.

end the perpetration of war crimes and crimes against humanity.[12] The ICID found that Sudanese government was unwilling and unable to prosecute individuals[13] suspected of commissioning one of the core crimes outlined in Article 5 of the Rome Statute and that the legal system was in such disarray that the legal proceedings could not be genuinely handled in the Sudan.[14] The ICID suggested an immediate referral of the situation to the ICC as the most effective and efficient method to halt atrocities.[15]

4.) Policy Reasons Counsel Against Applying the Principle of Complementarity Contemporaneously With A SC Referral.

The referral of the situation in the Darfur[16] is the first time that the SC has employed Article 13(b) of the Rome Statute.[17] If the Sudan were allowed to counter the referral and demand application of the principle of complementarity, the purpose of a SC referral pursuant to Chapter VII would be defeated. The SC's determination that a serious threat to international peace and security existed in the Darfur, logically implies

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[12] *See,* Report of the International Commission on the Inquiry on Darfur to the United Nations Secretary-General: Pursuant to Security Council Resolution 1564 of 18 September 2004 (25 January 2005). {Reproduced in Accompanying Notebook at Tab 8}.

[13] *See,* Article 17 of the Rome Statute which employs the unwilling or unable language to determine if a case could in fact be admissible to the ICC. {Reproduced in Accompanying Notebook at Tab 2}.

[14] *See,* ICID Report, *supra* footnote 12, at ¶ 572.

[15] *Id.*

[16] *See,* U.N.S.C. Res. 1593, *supra* footnote 6. {Reproduced in Accompanying Notebook at Tab 20}.

[17] The ICC has received three self-referrals (pursuant to Art. 14 of the Rome Statute) of situations from Uganda, the Democratic Republic of the Congo, and the Central African Republic. *See generally,* Carsten Stahn *et al,* 99 Am. J. Int'l L. 421, 422. The referral by the SC of the situation in the Darfur is the first time that an Art. 13 referral has been made to the Court. {Reproduced in Accompanying Notebook at Tab 56}.

that the Sudan is not genuinely willing or able to investigate or prosecute individuals. The application of the principle of complementarity would stymie the effectiveness of a SC referral – thus forcing the SC to establish a new *ad hoc* tribunal in order to satisfy its mandate under the UN Charter. The ICC is to replace *ad hoc* tribunals, and in order for it to remain a legitimate, international judicial body, it needs to demonstrate that it is capable of effectively handling situations referred to it.

II.) Factual Background

Acting pursuant to its UN Charter Chapter VII mandate, the SC determined that the escalating violence and continuous perpetration of heinous crimes in the Darfur region of the Sudan necessitated a referral to the ICC.[18] Prior to the referral, the SC enacted other measures to restore international peace and security in the Darfur; but, it was felt that the most effective and expedient means to end violence and impunity[19] in the region was to employ the ICC.

The Sudan, which is not party to the Rome Statute, has argued that it should be allowed to employ the principle of complementarity[20] and that the ICC has no

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[18] *See,* U.N.S.C. Res. 1593, *supra* footnote 6. { Reproduced in Accompanying Notebook at Tab 20}.

[19] Impunity is generally defined as "an exemption or protection from punishment." Black's Law Dictionary (8th ed. 2004)(West 2005). { Reproduced in Accompanying Notebook at Tab 58}.

[20] Sudanese President Umar al-Bashir stated that "his government would not hand over any of its citizens for trial outside [of the Sudan and] . . . Sudan's own judiciary was qualified and ready to try those accused of any violations in Darfur." *See,* "Sudan: Judiciary Challenges ICC Over Darfur Cases," 24 June 2005, United Nations Integrated Regional Information Networks, at www.irinnews.org. { Reproduced in Accompanying Notebook at Tab 62}.

jurisdiction over individuals who have perpetrated crimes in the Darfur. While some prosecution and investigation of criminals has occurred in the Sudan, only "small-time criminals," and not senior government officials, have been tried thus far.[21] The SC, and the UN as a whole, employed the ICID as a legislative finder of fact and it determined that the current Sudanese government, coupled with the ongoing instability and continuous perpetration of heinous crimes, created an environment where the Sudan is unwilling and unable to genuinely investigate and prosecute individuals.[22] The situation was referred to the ICC because the SC felt that it was the most appropriate venue to provide neutral adjudication of situations and the SC did not want to overstep its mandate by acting as a judicial body.

III.) Legal Discussion

A.) The Role of the Security Council

1.) The Powers of the Security Council in General

The significant powers of the SC must be considered when determining whether the principle of complementarity should apply to its referrals to the ICC. The SC is entrusted by all UN Member States as the primary body responsible for the maintenance of international peace and security,[23] and all UN Members (including the Sudan) are bound by, and expected to carryout, the mandates of the SC.[24] The general powers

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[21] *Id.*

[22] *See generally,* ICID Report, *supra* footnote 12. { Reproduced in Accompanying Notebook at Tab 8}.

[23] *See,* UN Charter Art. 24. { Reproduced in Accompanying Notebook at Tab 3}.

[24] *See,* UN Charter Art. 25. { Reproduced in Accompanying Notebook at Tab 3}.

given to the SC by the UN Charter, particularly under Chapter VII, suggest that a positive referral[25] of a situation to the ICC cannot be contested by any UN Member, regardless of whether or not they have accepted the ICC's jurisdiction. Obligations to the UN and its mandates supersede all other international agreements and have primacy.[26]

The SC is in the best position to determine what measures should be taken to maintain or restore international peace and security.[27] Specifically, in Article 41, the SC is authorized to employ non-military measures to give effect to its decisions.[28] While Article 41 does provide certain examples of when the SC is authorized to take non-military actions,[29] the list was not meant to be exhaustive, but rather to provide

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[25] *See,* Sir Franklin Berman, "The Relationship Between the ICC and the SC," In RELFECTIONS ON THE INTERNATIONAL CRIMINAL COURT: ESSAYS IN HONOUR OF ADRIAAN BOS, (EDS.) HERMAN A.M. VON HEBEL *ET AL* (2000). Sir Berman (head of the United Kingdom's delegation to the Rome Conference) calls SC referrals pursuant to Art. 13(b) of the Rome Statute, "positive referrals." I find that this is a useful term to distinguish the positive referrals (conferring jurisdiction on the ICC) from the negative referrals pursuant to Art. 16 of the Rome Statute under which the SC can prevent the ICC from having automatic jurisdiction. { Reproduced in Accompanying Notebook at Tab 40}.

[26] *See,* UN Charter Art. 103. { Reproduced in Accompanying Notebook at Tab 3}. *See also,* Michael A. Newton 167 Mil. L. R. 20, 50, citing UN Charter Art. 103. "All members of the [UN] are obligated to comply with orders of the [SC] even if the Rome Statute or any other international agreement would impose conflicting obligations." { Reproduced in Accompanying Notebook at Tab 52}.

[27] *See,* UN Charter Art. 39. { Reproduced in Accompanying Notebook at Tab 3}.

[28] UN Charter Art. 41. { Reproduced in Accompanying Notebook at Tab 3}.

[29] Article 41 specifically includes interruptions in economic relations and rail, sea, air, postal, telegraphic, radio and other communications, and the severance of diplomatic relations as situations under which the SC can deploy non-martial measures to give effects to its decisions.

examples.[30] The SC's effectiveness depends upon its ability to preserve international peace and security through a variety of channels.

Notably, the SC is empowered by the UN Charter to any establish subsidiary organs it deems necessary for the performance of its functions.[31] These subsidiary organs can comprise judicial bodies as evidenced by the UN's approval of the SC's establishment of the *ad hoc* tribunals to try war crimes perpetrated in both the Former Yugoslavia[32] (hereinafter the "FY") and Rwanda.[33]

B.) The Security Council's Establishment of the ICTY and the ICTR

It is important to recognize that the *ad hoc* tribunals established by the SC for the Former Yugoslavia and Rwanda provide the only real structural and procedural precedence for the ICC. Both courts confirmed the power of the SC to create "appropriate international agencies . . . to restore international peace and security,"[34] and

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[30] *See e.g., Prosecutor v. Tadic* (Decision on the Defense Motion for Interlocutory Appeal on Jurisdiction), ¶ 35, Case No. IT-94-1-AR72 (2 October 1995). The ICTY determined that Art. 41 was not meant to be narrowly construed and that the measures set out were, "merely illustrative *examples* which do not exclude other measures. { Reproduced in Accompanying Notebook at Tab 27}.

[31] UN Charter Art 29. { Reproduced in Accompanying Notebook at Tab 3}.

[32] *See,* U.N.S.C. Res 827, U.N. SCOR, 48th Sess. 3217th mtg., at U.N. Doc. S/RES/827 (1993) amended by U.N.S.C. Res 1166, in which the ICTY was established. { Reproduced in Accompanying Notebook at Tab 9}.

[33] *See,* U.N.S.C. Res 955, U.N. SCOR, 49th Sess. 3453rd mtg., at U.N. Doc. S/RES/955 (1994), in which the ICTR was established. { Reproduced in Accompanying Notebook at Tab 14}.

[34] *See,* Art. 48(2) of the UN Charter. { Reproduced in Accompanying Notebook at Tab 3}.

to use non-military means to satisfy its Chapter VII mandate.[35] Neither allowed the application of the principle of complementarity or domestic courts to assert jurisdictional primacy. Although the ICC differs somewhat from the ICTY and the ICTR, since it was not created as a direct, subsidiary body of the SC, the experiences of the tribunals and general world opinions concerning the *ad hoc* tribunals are relevant concerning the cooperative role between the ICC and the SC.

Finally, "nothing in the UN Charter prohibits referral to another international organization as an enforcement measure [to restore international peace and security],"[36] and it logically follows that the SC should be able to refer situations to the ICC in the same manner as it has to the ICTY and the ICTR. Finally, the establishment of the international tribunals by the SC represented the "first widening of the obligation to cooperate [by] States that [were] not party [to the Statutes]."[37] The same relationship that existed between the SC and the *ad hoc* tribunals, also exists between the SC and its power to make Article 13(b) referrals to the ICC. Even if the Sudan is not party to the

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[35] *See,* Art. 41 of the UN Charter. *See generally,* Chapter VII of the UN Charter. { Reproduced in Accompanying Notebook at Tab 3}.

[36] Kenneth S. Gallant, *The ICC in the System of States and International Organizations,* 16 Leiden Journal of International Law 553, 582 (2003). { Reproduced in Accompanying Notebook at Tab 51}.

[37] *See,* Guiseppe Nesi, "The Obligation to Cooperate with the International Criminal Court and States not Party to the Statute," IN THE ROME STATUTE OF THE INTERNATIONAL CRIMINAL COURT: A CHALLENGE TO IMPUNITY (EDS.) MAURO POLITI & GUISEPPE NESI (2001), at 222. { Reproduced in Accompanying Notebook at Tab 45}.

Rome Statute, the obligation to cooperate with the SC's Chapter VII mandates is extended beyond treaty provisions.[38]

1.) The Establishment of the ICTY

The history of the Yugoslav conflict caused the SC to determine that, in the interest of preserving international peace and security, it was necessary to establish an *ad hoc* international tribunal to try war criminals.[39] On 25 May 1993, the SC officially adopted a resolution establishing the Statute of the International Criminal Tribunal for the Former Yugoslavia (hereinafter "the ICTY Statute") by employing Chapter VII of the UN Charter.[40] The legitimacy of Chapter VII powers are also reiterated in all subsequent resolutions amending the ICTY Statute as the justification for the establishment of the tribunal. Article I of the ICTY Statute established the competence of the ICTY to prosecute persons responsible for serious violations of international humanitarian law and affirmed the legitimacy and impartiality of the tribunal.[41] The ICTY Statute suggests the possibility of the principle of complementarity, in that national courts have concurrent jurisdiction with the ICTY to prosecute persons for serious violations of international humanitarian law.[42] However, the ICTY Statute also explicitly

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[38] *See generally,* Article 103 of the UN Charter. { Reproduced in Accompanying Notebook at Tab 3}.

[39] *See,* U.N.S.C. Res. 808, U.N. SCOR, 48th Sess., 3175th mtg., at U.N. Doc. S/RES/808 (1993). { Reproduced in Accompanying Notebook at Tab 13}.

[40] *See,* U.N.S.C. Res. 827, *supra* footnote 32. *See generally,* The ICTY Statute as amended by subsequent U.N.S.C. resolutions. { Reproduced in Accompanying Notebook at Tab 9}.

[41] *Id.*

[42] *See,* Article 9(1) of the ICTY Statute. {Reproduced in Accompanying Notebook at Tab 9}.

states that the principle of complementarity is limited by the primacy of the Tribunal and domestic courts must defer to the ICTY at all times.[43]

The nature of the establishment of the ICTY should be analyzed because it represents a historical, "Grotian moment"[44] in which new, universally accepted and binding international humanitarian law is created. Similarly, the acceptance by the ICC of the SC's referral of the situation in the Darfur, and a limitation on the principle of complementarity, could represent another important Grotian moment. The opinions of UN Delegates regarding the establishment of the ICTY suggest that it truly was a Grotian moment for customary international law. These statements are construable toward any SC employment of Article 41 and therefore relevant in a discussion regarding SC use of the ICC as a forum to enforce its Chapter VII powers.

The record of the 3,175th meeting of the SC (prior to the adoption of Resolution 808) demonstrates that SC delegates approved the use of Chapter VII to establish the ICTY.[45] Mr. Merimee (France) indicated that the competence of the ICTY was

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[43] *Id.* at Article 9(2).

[44] *See,* Boutros Boutros-Ghali, *The Role of International Law in the 21st Century: A Grotian Moment,* 18 Fordham Int'l L.J. 1609 (1995). This is perhaps the first time that the term "Grotian moment" (named for Hugo de Groot, the "father of international law") was used to refer to "a renaissance of international law needed to help transform the world. . ." Boutros-Ghali specifically identifies the establishment of the ICTY by the SC as a Grotian moment (1613). { Reproduced in Accompanying Notebook at Tab 48}.

[45] *See generally,* U.N.S.C. Provisional Verbatim Record of the 3,175th Meeting (22 February 1993) at U.N. Doc S/PV.3175. Reproduced in VIRGINIA MORRIS & MICHAEL P. SCHARF (EDS.), AN INSIDER'S GUIDE TO THE INTERNATIONAL CRIMINAL TRIBUNAL FOR THE FORMER YUGOSLAVIA: A DOCUMENTARY HISTORY AND ANALYSIS VOL. 2 (1995). { Reproduced in Accompanying Notebook at Tab 11}.

established *a priori* by the SC acting under its powers derived from Chapter VII.[46] Mr. de Araujo Castro (Brazil) affirmed the principle that the authority of the SC "is not self-constituted but originates from a delegation of powers by the *whole* membership of the [UN]" (emphasis added) and that "the SC, in the exercise of its responsibilities, acts on behalf of all [member states]."[47] Finally, Mr. Yañez-Barneuvo (Spain) also indicated to any of those who doubted the competence of the SC, that the establishment of an *ad hoc* tribunal was perfectly within the scope of the SC's powers and that the SC was not "attempting to establish any new jurisdictional or legislative framework of a permanent nature," nor was it "setting itself up as a permanent judge or legislature."[48] Thus, the SC was acting as a legislative finder of facts as opposed to a judicial body that would investigate and prosecute. These views were reiterated at subsequent meetings[49] and the general consensus of SC delegates suggests that the SC was completely justified in exercising its Chapter VII powers to establish the ICTY.

The only delegate that made any significant protest as to the legitimacy of the SC establishing the ICTY was, not surprisingly, the mission from Yugoslavia (Serbia and Montenegro) (hereinafter "Serbia"). Mr. Djokić, in his letter dated 19 May 1993, stated that Serbia felt that its national courts could adequately prosecute individuals and the SC lacked the power under Chapter VII of the UN Charter to establish both a tribunal and the

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[46] *See generally, Id.* at 164.

[47] *Id.* at 162.

[48] *Id.* at 172.

[49] *See generally,* Provisional Verbatim Record of the 3,217th Meeting (25 May 1993), at U.N. Doc/ SPV.3217, IN *supra* footnote 43, at 179 et seq. { Reproduced in Accompanying Notebook at Tab 12}.

ICTY Statute.[50] However, this was obviously a biased opinion and the SC, and the UN as an entire body, made the determination that Serbia was not able to adequately prosecute persons in its own courts and that the SC was legitimized in establishing the ICTY. For the first time since the creation of the UN in 1948, the SC utilized its Chapter VII powers to create an *ad hoc* Tribunal. The unanimous support for this innovation in the application of incidental authority[51] truly represents a Grotian Moment in international law. The power that the SC was legitimately able to apply concerning the ICTY should apply to a referral to the ICC since its relationship is almost exactly the same concerning the two international judicial bodies.

2.) The Precedence of *The Prosecutor v. Tadic*

The ICTY's decisions in the seminal case of *The Prosecutor v. Tadic*[52] confirmed the legitimacy of both the ICTY and the SC's power to make referrals to an international court pursuant to its Chapter VII mandate without the hindrance of the principle of

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[50] *See,* Letter Dated 19 May 1993 From the Chargé D'Affairs A.I. of the Permanent Mission of Yugoslavia (Serbia and Montenegro) to the U.N. Addressed to the Secretary General at U.N. Doc. A/48/170, S/25801 (21 May 1993). IN *supra* footnote 43, at 480. { Reproduced in Accompanying Notebook at Tab 7}.

[51] Incidental Authority is defined as "authority needed to carry out actual or apparent authority." Although it is not explicit, it is deemed to be necessary and directly stemming from actual authority. The creation of an *ad hoc* tribunal, while not expressly given under Art. 41 of the UN Charter, is a prime example of incidental authority afforded to the SC. *See,* Black's Law Dictionary (8th ed. 2004), authority (West 2005). { Reproduced in Accompanying Notebook at Tab 57}.

[52] *See generally, Prosecutor v. Tadic*, *supra* at footnote 30. { Reproduced in Accompanying Notebook at Tab 27}. *See also, Prosecutor v. Tadic,* Case No. IT-94-1-T, Opinion and Judgment (7 May 1997). { Reproduced in Accompanying Notebook at Tab 28}.

complementarity. The ICC represents an evolution of the *ad hoc* tribunals[53] and the jurisdictional precedence set by this case is quite influential. The role of the SC in relationship to international tribunals was clearly continued by the precedent of *Tadic* and subsequent ICTY cases.

In its 1995 Appeal, the Defense in *Tadic* first attempted to attack the ICTY's jurisdiction on the grounds that the SC lacked the power to establish an international criminal tribunal and therefore that the ICTY was an illegitimate judicial body. The ICTY determined that the SC did have "general powers to maintain and restore international peace and security under Chapter VII at large," and that Chapter VII powers require all UN member states to "cooperate with the organization and with one another [to implement] action or measures decided by the SC."[54] Additionally, the ICTY found that, while Article 41 did not explicitly confer a power to the SC, it could establish an international criminal tribunal; "*prima facie* the International Tribunal matches perfectly the description in Article 41 of 'measures not involving the use of force."[55] The ICTY also determined that, "if the [UN] can undertake measures which have to be implemented through the intermediary of its Members, it can *a fortiori* undertake measures which it can undertake directly via its organs," and "action by Member States on behalf of the

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[53] *See,* "Evaluating the ICC Regime: The Likely Impact on States and International Law," Address by Mr. Hans Corell at a training course organized by T.M.C. Asser Institute, Science Alliance and No Peace Without Justice, 21 December 2000, Peace Palace – The Hague, The Netherlands, at 15. Mr. Corell indicated that "once the [ICC] enter[ed] into operation . . . the need for creating additional *ad hoc* tribunals by the Security Council in cases in which [it] is acting under Chapter VII of the UN Charter" would be eliminated. { Reproduced in Accompanying Notebook at Tab 60}.

[54] *See, Tadic, supra* footnote 30, at ¶ 31. { Reproduced in Accompanying Notebook at Tab 27}.

[55] *Id.* at ¶ 34.

Organization is but a poor substitute *faute de mieux,* or a 'second best' for want of the first."[56]

Avoiding implementation via UN Member State's own initiated actions ensures that the SC can implement its mandates more effectively and with less detrimental interference from third parties. Finally, the ICTY held that the establishment of the tribunal did not result in the SC "usurping for itself part of a judicial function which does not belong to it" and that "the establishment of a judicial organ . . . [was for] the exercise of [the SC's] own principle function of maintenance of peace and security . . . in the [FY]."[57] Thus, the ICTY felt that Tadic's challenge of jurisdiction based on the SC lacking power to establish the tribunal was ill founded. Although the power to establish an *ad hoc* tribunal was not explicitly stated in the UN Charter, the power to do so obviously flowed from Chapter VII.[58] Furthermore, the SC was not exercising undue political influence on an independent judicial body.

Tadic's second ground for appeal, essentially a complementarity argument, was vested in the language of Article 9 of the ICTY statute stating that, ". . . the Tribunal and national courts shall have concurrent jurisdiction to prosecute persons for serious violations of international humanitarian law."[59] However, Article 9 also explicitly states that "the International Tribunal shall have primacy over national courts [and that] . . . at any state of the procedure [the ICTY] may formally request national courts to defer to the

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[56] *Id.* at ¶ 36.
[57] *Id.* at ¶ 38.

[58] *See,* Art. 41 of the UN Charter. { Reproduced in Accompanying Notebook at Tab 3}.

[59] *Tadic, supra* footnote 30, at ¶ 50. { Reproduced in Accompanying Notebook at Tab 27}.

competence of the International Tribunal."[60] Therefore, while the principle of complementarity could apply in principle to the ICTY, it does not need to apply in practice. The ICTY Statute does not delineate a trigger mechanism that is necessary for the tribunal to assert primacy over national courts and the hurdle to overcome a complementarity issue is intentionally made quite low.

The *Tadic* Court's decision included a discussion of state sovereignty derived from Article 2(7) of the UN Charter and the power of the SC to override this general principle when acting pursuant to Chapter VII. The ICTY explicitly stated that, while "Appellant can call in aid Article 2, paragraph 7 . . . one should not forget the commanding restriction at the end of the same paragraph: 'but this principle shall not prejudice the application of enforcement measures under Chapter VII."[61] Article 9 of the ICTY Statute explicitly confirms that a State can never press for complementary jurisdiction if a when the SC is acting pursuant to its Chapter VII mandate. The precedent of the *Tadic* Appeals case should apply to the ICC and state sovereignty, in the guise of the principle of complementarity, should not trump a SC referral aimed at restoring international peace and security.

The subsequent *Tadic* case, Opinion and Judgment of *Prosecutor v. Tadic* (7 May 1997), reaffirmed the legitimacy of the ICTY's jurisdiction. The ICTY first reiterated that the SC, acting pursuant to Chapter VII, could create an International Tribunal to contribute to the restoration of international peace and security and that all UN members are required to cooperate fully with the ICTY as a subsidiary organ of the SC.[62] The

[60] *Id.*
[61] *Id.* at ¶ 56.

ICTY also confirmed the Trial Chamber's position that a challenge to the legitimate establishment of the ICTY was a "non-justiciable issue" and that the ICTY itself was "not competent to review the decision of the SC [to establish an International Tribunal]."[63]

The two *Tadic* decisions established the precedence that Chapter VII of the UN Charter enables the SC to establish and refer situations to an international tribunal. SC referrals are binding and compel all UN Members to cooperate with the tribunals. It is unimportant whether or not the FY agreed to the mandatory jurisdiction of the ICTY or whether the principle of complementarity would apply because this was superseded by the FY's obligation to the UN itself and the SC's decision to enforce its mandate via the tribunal.

Tadic's jurisdictional challenges parallel the current situation in the Darfur. While the Sudanese government has not ratified the Rome Statute and accepted the mandatory jurisdiction of the ICC, they are still a member of the UN and therefore are bound by all decisions made by the SC. Like the Appellant Tadic, Sudanese persons who have committed crimes against humanity cannot argue that the ICC lacks jurisdiction over them. This is a non-justiciable issue because the SC has made the determination that the ICC does, and should, have jurisdiction over these individuals. The ICC does not have a bevy of cases to rely upon to for precedence, and therefore the rulings in *Tadic* are seminal in determining the role of the SC in its continuation of making referrals to international tribunals including the ICC.

a.) Post *Tadic*: The ICTY is Influenced by the ICC

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[62] *See, Tadic* (Opinion and Judgment)*, supra* footnote 50 , at ¶ 2. { Reproduced in Accompanying Notebook at Tab 28}.

[63] *Id.* at ¶ 15.

After the establishment of the ICC by the Rome Statute in 1998, ICTY cases have been adjudicated in the light that they might influence the precedence of the ICC and vice versa. In March 2000, the ICTY Trial Chamber stated in *The Prosecutor v. Blaskic,* that "International Courts, today this Tribunal, tomorrow the [ICC], must appropriately punish all those, and especially those holding the highest positions, who transgress these principles."[64] The Trial Chamber realized the importance of the nascent ICC and the influence that the two international tribunals have on each other.

In addition to the public statement made by Judge Jorda, the *Blaskic* Judgment itself is filled with references to provisions in the Rome Statute and the court used the language of the Statute to aid in defining crimes and determining how to adjudicate the case.[65] Not only was the precedent of *Tadic* upheld in *Blaskic,* but the text of the case indicates the level of cooperation that is expected between all international tribunals. By negative inference, this also reaffirms that the SC should enjoy the same comity in all international tribunals and the principle of complementarily applying to Article 13(b) of the Rome Statute SC referrals can only erode this convivial relationship.

3.) The Establishment of the ICTR

The SC established another international tribunal to prosecute individuals who committed crimes against humanity in Rwanda. The Statute of the International Criminal Tribunal for Rwanda (hereinafter the "ICTR Statute") was adopted on 8 November

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[64] *See, The Prosecutor v. Tihomir Blaskic,* Case No. IT-95-14-T, Statement of the Trial Chamber at the Judgment Hearing (3 March 2000), at www.un.org/icty/pressreal/bla-sumj000303e.htm. { Reproduced in Accompanying Notebook at Tab 31}.

[65] *See generally, The Prosecutor v. Tihomir Blaskic,* Case No. IT-95-14-T, Judgment (3 March 2000). { Reproduced in Accompanying Notebook at Tab 30}.

1994.[66] The ICTR Statute is very similar to the ICTY Statute and affirms that the SC was acting pursuant to Chapter VII of the UN Charter and that the principle of complementarity is limited by the primacy of the tribunal's jurisdiction.[67] The ICTR Statute is explicit in its requirements that UN member states are obliged to cooperate with the ICTR in the investigation and prosecution of persons accused of committing serious violations of international humanitarian law.[68] Unlike the ICTY, the primacy of the ICTR has not been challenged in a *Tadic*-like case or by the principle of complementarity. This provides additional support for the role that the SC should play in relationship to an international tribunal.

In one of the ICTR's first adjudicated cases, *The Prosecutor v. Akayesu,*[69] the Tribunal took the opportunity to reaffirm its legitimate jurisdictional power. The ICTR stated that the SC made the determination that the situation in Rwanda represented a threat to international peace and security and, acting pursuant to Chapter VII of the UN Charter, it confirmed that the establishment of the Tribunal was necessary to end abuses.[70] There have not been any subsequent challenges to either the ICTY's or ICTR's jurisdiction or the power of the SC to refer situations to the tribunals.

The power of the SC to mandate the creation of *ad hoc* tribunals is firmly established. If the ICC were to prevent the SC from employing its Chapter VII mandate

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[66] *See,* U.N.S.C. Res. 955, *supra* footnote 33. *See also,* subsequent Annex containing the ICTR Statute. { Reproduced in Accompanying Notebook at Tab 14}.

[67] *See, Id.* at Art. 8(1 – 2).
[68] *See, Id.* at Art. 28(1).

[69] *The Prosecutor v. Jean-Paul Akayesu*, Case No. ICTR-96-4-T, Judgment (2 September 1998). { Reproduced in Accompanying Notebook at Tab 29}.

[70] *Id.* at ¶ 2.

via the implementation of a superseding principle of complementarity, the result could very well be the establishment of an alternative *ad hoc* tribunal to fulfill obligations to the maintenance of international peace and security. The ICC must keep this in mind if it hopes to remain a legitimate international judicial body.

C.) The Rome Conference and Debates Concerning the Role of the Security Council

Logically, the SC's established role in the ICTY and the ICTR should automatically confer a similar relationship between the SC and the ICC. The heated debates at the Rome Diplomatic Conference (hereinafter the "RDC") prior to the adoption of the Rome Statute suggest that the role of the SC was not *a priori* deemed the same. In particular, the power of the SC to refer a situation to the ICC and to supersede a state's own judicial system (i.e. to thwart the principle of complementarity) was the subject of significant concern among delegates. However, a careful analysis of RDC delegate's statements concerning the language of the Rome Statute and a literal interpretation of the text itself, suggests that the SC is not hindered in its ability to make referrals.

1.) The RDC Debate Concerning the Role of the Security Council

During the RDC, the SC's role in the ICC was contested by several delegations (most notably India). As stated in the Rome Statute, the SC has the power to refer situations, acting pursuant to Chapter VII of the UN Charter, to the ICC Prosecutor when

an Article 5[71] crime has been committed.[72] The Indian position, articulated by delegate Mr. Lahiri, envisioned no role for the SC in the ICC. Primarily, India felt that "the [ICC] was an independent judicial body" and that "the [ICC], unlike the [SC] had no role whatsoever in the maintenance of international peace and security."[73] India was also concerned that "a large number of States Members of the UN considered that the structure of the SC was unrepresentative."[74] Essentially, Mr. Lahiri argued that SC involvement in the ICC would bring an unwanted political element to the functioning of the Court and that the two bodies should be completely independent – the only way to achieve this would be complete disassociation by the SC. Other delegates supported this position, but the majority wanted a role for the SC much like the one that it already had with the international tribunals.

Many delegates emphasized that the SC had effectively established and participated in the functioning of the *ad hoc* tribunals and that "no one had accused the SC of interfering with [their] independence."[75] By not allowing the SC to participate in the ICC, the alternative would be to continue its establishment of future *ad hoc*

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[71] *See,* Art. 5 of the Rome Statute. Article 5 states that the ICC has jurisdiction over four core crimes including, genocide, crimes against humanity, war crimes and the crime of aggression. Notably, a working definition of "aggression" has yet to be adopted. { Reproduced in Accompanying Notebook at Tab 2}.

[72] *See,* Art. 13(b) of the Rome Statute. { Reproduced in Accompanying Notebook at Tab 2}.

[73] 10th Meeting of the Diplomatic Conferences (22 June 1998) at A/CONF.183/C.1/SR.10. Reproduced in M. CHERIF BASSIOUNI, THE LEGISLATIVE HISTORY OF THE ICC, VOL. 3, 179 (2005). { Reproduced in Accompanying Notebook at Tab 22}.

[74] *Id.*

[75] *See, Id.* at 186. This was the opinion given by Ms. Wilmshurst, the delegate from the United Kingdom.

International Tribunals – exactly what the ICC was created to supersede.[76] The delegate from Bosnia and Herzegovina, Ms. La Haye, stated that "the SC should have the power to trigger the jurisdiction of the [ICC] with respect to situations in which one or more of the core crimes [ICC Statute Article 5] had been committed."[77] This argument is particularly persuasive because of Bosnia and Herzegovina's first-hand experience with the ICTY and its determination that the SC's relationship with an international tribunal was effective.

Mr. Lahiri's official statement regarding the final adoption of the Rome Statute made the following points: he was dismayed that the SC would have the power to refer (under Article 13(b)), the power to block (under Article 16), and the power to bind non-States Parties; The Vienna Convention on the Law of Treaties (hereinafter the "VCLT") explicitly states that no state can be forced to accede to a treaty or be bound by a treaty that it has not accepted. Mr. Lahiri feared that non-States Parties, working through the SC (e.g. The United States) could bind other non-States Parties to the jurisdiction of the ICC.[78]

India was the most vocal opponent of Article 13(b) of the Rome Statute and formally moved to have the final proposal of the Diplomatic Conference amended by

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[76] *See, Id.* Ms. Li Ting's (China) comment advocated a similar position in which she stated that, "it was essential that the SC be empowered to refer a cases to the [ICC] since otherwise it might have to establish a succession of *ad hoc* tribunals in order to discharge its mandate under the [UN] Charter."

[77] 31st Meeting of the Diplomatic Conference (9 July 1998) at A/CONF.183/C.1/SR.31., 335. IN *supra* footnote 71, at 335. { Reproduced in Accompanying Notebook at Tab 24}.

[78] *See,* "Explanation of Vote by Mr. Dilip Lahiri, Head of Delegation of India, on the Adoption of the Statute of the ICC," accessed at: www.un.org/icc/speeches/717ind.htm. { Reproduced in Accompanying Notebook at Tab 25}.

deletion of the article.[79] The amended proposal was defeated by a "strong majority vote in favour of a no action motion"[80] and Article 13(b) remained in the Rome Statute. While there was some dissention about the scope of Article 13(b) during the RDC, by the time the Rome Statute was adopted, the disagreement disappeared.[81] The final draft of the Rome Statute should be taken to represent a determination that the SC has the power to make referrals and its mandate is enforceable regardless of whether a third state[82] has ratified the Rome Statute. The fact that there was such strong support for continuing the SC's role in the ICC firmly suggests that it should be a non-issue at this point.

In 2000, the UN and the ICC confirmed the majority holding of the RDC in a draft agreement governing the relationship between the two bodies.[83] The ICC and the UN "recognized the responsibilities of the UN under the [UN] Charter, in particular in the fields of international peace and security," and agreed to "cooperate" – especially when the SC makes a 13(b) referral pursuant to Chapter VII of the UN Charter.[84] This

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[79] *See,* Morten Bergsmo, *The Jurisdictional Regime of the International Criminal Court (Part II, Articles 11-19),* 6/4 European Journal of Crime, Criminal Law and Criminal Justice 36 (1998). { Reproduced in Accompanying Notebook at Tab 47}.

[80] *Id.*

[81] *See,* Hans Corell, *supra* footnote 51, at 7. Corell indicates that the issue of SC 13(b) referrals was "not the subject of much controversy during the negotiation process [of the RDC]." An increasing minority of delegates were pushing for SC non-involvement as the Conference progressed. { Reproduced in Accompanying Notebook at Tab 60}.

[82] *See,* Art. 34 of The VCLT, 1155 UNTS 331. A "third state" is understood by the Vienna Convention to be a state that "a treaty does not create either obligations or rights [for it] without its consent." { Reproduced in Accompanying Notebook at Tab 4}.

[83] *See generally,* Draft Relationship Agreement Between the UN and the ICC, at U.N. Doc. PCNICC/2000.WGICC-UN/L.1 (9 August 2000). { Reproduced in Accompanying Notebook at Tab 5}.

[84] *Id.* at Articles 2 and 4.

document codifies the expressed opinions of the RDC delegates and is demonstrative of the consensus after 1998.

Of particular interest to the current SC referral of the situation in Darfur, is the Sudanese statement made at the 30th Meeting of the Diplomatic Conference. Mr. Mayang D'Awol explicitly stated that "the inherent jurisdiction of the [ICC] should cover genocide and certain other categories of crime" and that "the SC had a special role in matters relating to the question of aggression."[85] Thus, the Sudanese themselves were willing to concede that the core crimes of Article 5 of the Rome Statute should be adjudicated by the ICC and that the SC, as defined by the UN Charter, had a significant and special role in determining when these crimes had been perpetrated. Perhaps hinting at their future decision not to ratify the Rome Statute, the Sudan also made the comment that "the States whose acceptance was needed as a precondition to the exercise of jurisdiction should be confined to the State on whose territory the act took place and the State which had custody of the person suspected of the crime."[86] The position is not very well articulated, but seems to stand for the proposition that; if an act, in violation of Article 5 of the Rome Statute occurred in the sovereign territory of a state not party to the Statute, then the ICC should not be allowed to exercise jurisdiction unless the state has accepted it. This is the position that is still held by the Sudanese government today concerning the SC's referral of the situation in Darfur to the ICC. The Sudan feels that this referral should have no binding power over it because it has not ratified the Rome

[85] 30th Meeting of the Diplomatic Conference (9 July 1998) at A/CONF.183/C.1/SR.30., 324, IN *supra* footnote 71, at 324. { Reproduced in Accompanying Notebook at Tab 23}.

[86] *Id.*

Statute and has not agreed to its jurisdiction. However, the consensus on the language and intention of the final draft of the Rome Statute makes this position irrelevant.

2.) Opinions Regarding Article 13(b) and the SC's Role in the ICC.

The SC's Article 13(b) referral power has inspired some scholarly debate following the 1998 RDC. The primary issues discussed are: can SC referrals be subject to the principle of complimentary; can States not party to the Rome Statute nevertheless still be bound by the ICC's jurisdiction for violations of customary international law; should the principle of universal jurisdiction apply in regards to violations of customary international law; is the judicial independence of the ICC maintained when the SC, a political body, has influence, and; would the alternative to SC involvement in the ICC, a continuation of *ad hoc* International Tribunals, defeat the primary purpose of the ICC.

a.) Chapter VII and Article 12 of the Rome Statute

Article 12 of the Rome Statute specifically delineates when the ICC may exercise jurisdiction over a state and supersede the principle of complementarity.[87] Jurisdiction is preconditioned upon a state's acceptance of the Rome Statute (Article 12(2)) or by acceptance of the ICC's jurisdictional primacy over Non-States Parties (Article 12(3)).[88] Article 12 does not; however, explicitly provide for the ability of states to accept jurisdiction in situations referred by the SC.[89] By negative inference, since there is no mention of the principle of complementarity applying to SC 13(b) referrals in Article 12

[87] *See generally,* Article 12 of the Rome Statute. { Reproduced in Accompanying Notebook at Tab 2}.
[88] *Id.*

[89] *See,* Gennady M. Danilenko, "ICC Statute and Third States," In THE ROME STATUTE OF THE ICC: A COMMENTARY (EDS.) ANTONIO CASSESE *ET AL.* (2002), at 1875. { Reproduced in Accompanying Notebook at Tab 42}.

of the Rome Statute, it cannot block the SC when acting pursuant to Chapter VII of the UN Charter.[90]

According to Article 12(3) of the Rome Statute, third states, not party to the Rome Statute, may choose when to employ the jurisdiction of the ICC.[91] However, many scholars argue that the principle of complementarity, and the employment of domestic jurisdiction, should not apply when the SC has referred a Chapter VII situation to the ICC.[92] A SC referral to the ICC has its competence vested in Chapter VII and, "irrespective of whether or not states are Parties to the [Rome] Statute,"[93] the Court will be able to exercise jurisdiction.[94] Without the hindrance of the principle of complementarity, a UN Member is bound to cooperate with the SC's mandate regardless of whether this could stymie domestic judicial sovereignty and a refusal to do so may

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[90] *See,* Michael A. Newton, *supra* footnote 26, at 49. "The obligations of all states to accept and carry out the decisions of the [SC] effectively nullifies [the] right of complementarity." { Reproduced in Accompanying Notebook at Tab 52}.

[91] *Id.* at 26. The principle of complementarity does not apply to irresponsible states that refuse to prosecute nationals.

[92] *See generally,* Morten Bergsmo, *Occasional Remarks on Certain State Concerns about the Jurisdictional Reach of the ICC, and Their Possible Implications for the Relationship Between the Court and the SC,* 69 Nordic Journal of International Law 87, 100 (2000). { Reproduced in Accompanying Notebook at Tab 46}.

[93] Roy S. Lee, "Creating an International Criminal Court – Of Procedures and Compromises," *supra* footnote 25, at 149. { Reproduced in Accompanying Notebook at Tab 44}.

[94] *See,* Mahnoush H. Arsanjani, "Reflections on the Jurisdiction and Trigger Mechanism of the ICC," *supra* footnote 25, at 59. { Reproduced in Accompanying Notebook at Tab 38}.

result in a violation of a member state's obligations under the UN Charter which supersedes the validity of any treaty obligations.[95]

The mandatory character of a SC referral, even though it "remains subject to the judicial supervision of the Pre-Trial Chamber and to the review of the Appellate Chamber," places it outside of the restraints of Article 12 of the Rome Statute.[96] While third states in many instances can claim exemption from the mandatory jurisdiction of the ICC under Article 12, this clearly does not apply when the SC has made a referral. The United States, which is not party to the Rome Statute, has been particularly wary of the ICC extending jurisdiction over nationals[97] and superseding its domestic courts.[98]

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[95] *See,* Arts. 25 & 49 of the UN Charter which requires UN Member States to provide assistance and cooperation to all SC determinations stemming from Chapter VII. { Reproduced in Accompanying Notebook at Tab 3}. *See also,* Gennady M. Danilenko, *supra* footnote 87, at 1889. { Reproduced in Accompanying Notebook at Tab 42}.

[96] M. Cherif Bassiouni, THE LEGISLATIVE HISTORY OF THE ICC: INTRODUCTION, INTRODUCTION ANALYSIS, AND INTEGRATED TEXT OF THE STATUTE, ELEMENTS OF CRIMES AND RULES OF PROCEDURE AND EVIDENCE, VOL. 1 (2005), 131. { Reproduced in Accompanying Notebook at Tab 39}.

[97] *See, e.g.,* 22 U.S.C.A. 7421-3 (West 2005) in which the United State's expresses its fundamental objections to the jurisdiction of the ICC. { Reproduced in Accompanying Notebook at Tab 33}. *See also,* U.N.G.A. Press Release, "Consensus Agreement on Two Texts Said to Augur Well for Functioning of International Criminal Court," at U.N. Doc. GA/L/3149 (2000). The U.S. did imply that it wanted to be a "good neighbor to the [ICC]" and that it would be willing to accept the primacy of 13(b) referrals over the principle of complementarity. { Reproduced in Accompanying Notebook at Tab 10}.

[98] *But see,* 27 March 2003 transcript of a speech given by Ambassador David Scheffer at Vanderbilt University School of Law, at David Scheffer, *Advancing U.S. Interests With the ICC,* 36 Vand. J. Transnat'l L. 1567, 1573 (2003). Ambassador Scheffer made the comment, that while the United States does have substantial domestic legislation that could be used to prosecute and investigate individuals (*See, e.g.,* the Alien Torts Claims Act, 28 U.S.C.A. 1350 (West 2005). { Reproduced in Accompanying Notebook at Tab 34}.), pending amendment by S. Res. 1874, 109th Cong. (2005)), this legislation is "limited" and presents a "weakness in the American system" which could leas the ICC to "seize the case." Scheffer advocates a change in the legislation so that it is "directly in

However, the United States demonstrated that it will support SC referrals to the ICC and will not attempt to block them.[99]

The principles of complementarity and state sovereignty do not supersede a UN Member State's obligations to the UN Charter. While the Sudan is not a party to the Rome Statute and could argue that they have not accepted the ICC's jurisdiction in accordance with Article 12(3),[100] it is still a member of the UN and obligated to cooperate with any determination made by the SC pursuant to Chapter VII. This holds true in any third state where the SC has made the determination that a referral to the ICC is necessary to uphold its mandate and the past experiences with the ICTY and ICTR demonstrate that States are generally very willing to aid an international criminal tribunal when their domestic courts or laws are incapable of adequate prosecution.[101]

c.) The Principle of Universal Jurisdiction and Complementarity

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line with the standards set by the ICC." { Reproduced in Accompanying Notebook at Tab 55}.

[99] *See,* U.N.SCOR, 60th Sess., 5158th mtg., at U.N. Doc S/pV.5158 (2005). Mrs. Patterson (United States) commented that, the United States "decided not to oppose the SC resolution [1593] because of the need for the international community to end the climate of impunity in the Sudan" and that SC referrals could supersede third State's application of the principle of complementarity. { Reproduced in Accompanying Notebook at Tab 19}.

[100] *See,* Article 12(3) of the Rome Statute. { Reproduced in Accompanying Notebook at Tab 2}.

[101] *See, e.g., The Prosecutor of the Tribunal v. Elizaphan Ntakirutimana*, Case No. ICTR 96-17-T, Amended Indictment (7 July 1998). { Reproduced in Accompanying Notebook at Tab 32}. *See also,* "Surrender of Rwandan to War Crimes Tribunal Sets Precedent," Human Rights First Media Alert at www.humanrightsfirst.org/media/2001_1996/ntakirut100.htm. { Reproduced in Accompanying Notebook at Tab 63}. Defendant was living in Texas and taken into custody by U.S. officials after the ICTR determined that he had perpetrated crimes against humanity in Rwanda. His subsequent transfer to the custody of the ICTR is demonstrative of the U.S. supporting the primacy of the tribunal and in effect the SC's Chapter VII mandate instead of attempting to conduct investigations and prosecutions domestically.

During the RDC, Germany, along with a group of other states, argued that universal jurisdiction over the core crimes articulated in Article 5 of the Rome Statute was well established.[102] The German proposal was rejected during The RDC because other delegates regarded universal jurisdiction as too broad and impinging upon state sovereignty and the principle of complementarity set forth in Article 12 of the Rome Statute.[103] However, if the ICC lacks universal jurisdiction over Article 5 core crimes, any individual State still retains the right to try individuals in breach of customary international law. Individuals "run a much greater risk of being tried for the same crimes by domestic courts [situated] in individual [States] of the international community,"[104] and multiple judicial systems could result in inconsistent decisions whereas the ICC promotes uniformity and there is no guarantee that a domestic court could try individuals as effectively as the ICC.[105] The application of the principle of universal jurisdiction in the ICTY and the ICTR suggests that any referral made by the SC should be "unbounded by geography" and can be applied by the SC to "all the human beings in the world" - arguably this concept is also applicable to the ICC.[106]

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[102] *See e.g.,* Danilenko, *supra* footnote 87, at 1876. { Reproduced in Accompanying Notebook at Tab 42}.

[103] *Id.*

[104] *Id.*

[105] *See,* Hans Corell, *supra* footnote 51, at 15. { Reproduced in Accompanying Notebook at Tab 60}.

[106] Leila Sadat & S. Richard Carden, *The New International Criminal Court: An Uneasy Revolution,* 88 Geo. L.J. 381, 410 (2000). { Reproduced in Accompanying Notebook at Tab 54}.

The application of customary international law, such as the 1948 Convention on the Prevention and Punishment of the Crime of Genocide (hereinafter the "Genocide Convention") is unaffected by the principle of complementarity. The Genocide Convention established "genocide [as] a crime under international law, contrary to the spirit and aims of the UN and condemned by the civilized world."[107] Violations of the Genocide Convention are justiciable in any valid and legitimate forum. This suggests that, the ICC could retain universal jurisdiction over Article 5 core crimes, regardless of whether a state has accepted its jurisdiction or ratified the Rome Statute, since these are crimes prosecutable in *any* legitimate and unbiased court.[108] .

d.) The Judicial Independence of the ICC

Another issue raised at the RDC was whether, the SC, as a political body, could unduly influence the independent judicial nature of the ICC. However, the "objections raised at the Conference" could also be viewed as "purely political" and do not really add any credence to the politicization argument.[109] The SC has had ample opportunity to exert political influence over the *ad hoc* tribunals and this has yet to occur.[110] The SC

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[107] The Genocide Convention Preamble, 72 UNTS 277. *See also,* The Genocide Convention Art. 1. { Reproduced in Accompanying Notebook at Tab 1}.
[108] *See,* Danilenko, *supra* footnote 87, at 1878. { Reproduced in Accompanying Notebook at Tab 42}.

[109] *See,* Berman, *supra* footnote 25, at 175. { Reproduced in Accompanying Notebook at Tab 40}.

[110] *See, supra* footnote 71, at 183. Commentary made by Ms. Wilmshurst (United Kingdom) at 10th meeting of the RDC. She stated: "no one had accused the SC of interfering with the independence of the [ICTY or ICTR], which had already been in operation for some time" and "was somewhat puzzled by the fears expressed by some of the delegations that [SC referrals to the ICC] would interfere with the independence of the Court simply because the SC was a political body." { Reproduced in Accompanying Notebook at Tab 22}.

merely mandated the establishment of the ICTY and ICTR and has not attempted influence judicial proceedings.

While the SC has the political initiative and power to determine if it, acting pursuant to Chapter VII, wants to make a referral to the ICC, its "political" influence does not extend any further. The SC is not involved in any of the judicial proceedings of the ICC and all investigatory work is done by the Prosecutor and the Court itself.[111] The Prosecutor, States Parties to the Rome Statute and the SC may all make referrals to the ICC. The SC alone is not the only body entrusted with this power and therefore it seems fallacious to infer that it has undue political influence when it is clearly the case that many other parties may refer situations to the ICC.[112] Furthermore, Article 13(b)[113] gives the SC the power only to refer a *situation* and not a case to the ICC. This language was chosen precisely to preserve the judicial independence of the ICC. A 'case' itself only arises after investigatory proceedings have been commenced by the ICC.[114]

The ICC Prosecutor has considerable power and can check any perceived politicization. He may initiate any investigations by the Court *propio motu* on the basis of a violation of an Article 5 crime[115] and he is given the power to investigate and conclude if there is any reasonable basis to commence proceedings in the ICC if the

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[111] *See generally,* M.M. El Zeidy, *The Principle of Complementarity: A New Machinery to Implement International Criminal Law,* 23 Mich. J. Int'l L. 869, 957-8 (2002). { Reproduced in Accompanying Notebook at Tab 49}.

[112] *See,* Antonio Cassese *et al,* "The Rome Statute: A Tentative Assessment,", IN *supra* footnote 87, at 1907. { Reproduced in Accompanying Notebook at Tab 41}.

[113] *See,* Art. 13(b) of the Rome Statute. { Reproduced in Accompanying Notebook at Tab 2}.

[114] *See, supra* footnote 108, at 959. { Reproduced in Accompanying Notebook at Tab 22}.

[115] Art. 15(1) of the Rome Statute. { Reproduced in Accompanying Notebook at Tab 2}.

situation is referred by any other source.[116] The fact that the SC is not the only body capable of referring situations to the ICC, the role of the Prosecutor in determining what cases will actually be heard in the ICC, and the absence of the SC politicizing the proceedings of the ICTY and ICTR should alleviate any lingering concerns about the undue political influence of the SC in the ICC's affairs.

e.) The Alternative to the SC Possessing the Power to Refer Situations to the ICC – A Continuation of the *Ad Hoc* Tribunals

If the SC were not allowed to effectively employ the ICC as its forum to aid in the restoration of international peace and security, does retain the power to establish new *ad hoc* tribunals. This power is vested in the SC by virtue of Chapter VII and the precedence of the ICTY and the ICTR even after the adoption of the Rome Statute.[117] By allowing the principle of complementarity to apply to Chapter VII referrals, the ICC would essentially act in contravention to the will of the UN because there is a strong possibility, in deferring to a domestic judiciary body, that cases would go unprosecuted and the threat to international peace and security would be unresolved. Allowing the principle of complementarity to thwart SC 13(b) referrals would result in greater

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[116] Art. 15(3) of the Rome Statute. *See generally,* Arts. 15 and 53 of the Statute. { Reproduced in Accompanying Notebook at Tab 2}.

[117] *See,* Morten Bergsmo, *supra* footnote 90, at 110. { Reproduced in Accompanying Notebook at Tab 46}. *See generally, Tadic* (Decision on the Defense Motion for Interlocutory Appeal on Jurisdiction) *supra* footnote 50 { Reproduced in Accompanying Notebook at Tab 27}, supporting the general principle that the SC is inherently allowed to establish *ad hoc* Tribunals pursuant to Chapter VII of the UN Charter. *See also, supra* footnote 71, at 186. { Reproduced in Accompanying Notebook at Tab 22}. Comments made by Ms. Li Ting (China) at the 10th Meeting of the Diplomatic Conference. She stated that it was "essential that the SC be empowered to refer cases to the ICC since otherwise it might have to establish a succession of *ad hoc* tribunals in order to discharge its mandate under the UN Charter."

economic costs to the international community and cause the ICC's image to suffer as it could be viewed as incapable of adjudicating many important cases.

To have an ICC unavailable to the SC would be "absurd" and "compelling the SC to continue . . . to pursue the *ad hoc* route would [be] impractical and wasteful."[118] It is inefficient to have both new *ad hoc* tribunals and the ICC existing at the same time. The *ad hoc* tribunals are economically burdensome and have adjudicated a relatively small amount of cases. Whereas the ICC is more expedient and is supposed to be readily available to handle situations referred to it.[119] Delegates to the RDC constantly reiterated that "the [ICC] would obviate the need for the creation of *ad hoc* tribunals,"[120] and that the SC's experience and competence with the *ad hoc* tribunals would enhance the effectiveness of the ICC.[121] Having all future Chapter VII situations referred by the SC to the ICC would provide an easier and more effective means to promote uniform interpretations of international law without the burden of multiple concurrent international criminal courts.[122]

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[118] *See,* Berman, *supra* footnote 25, at 175. { Reproduced in Accompanying Notebook at Tab 40}.

[119] *See generally*, Hans Corell, *supra* footnote 51, at 12. { Reproduced in Accompanying Notebook at Tab 60}.

[120] *See, e.g., supra* footnote 71, at 179-80. Commentary from Mr. Nyasulu (Malawi), Mr. Kessel (Canada) and Ms. Blokar (Slovenia) at the 10th Meeting of the RDC. { Reproduced in Accompanying Notebook at Tab 22}.

[121] Arsanjani, IN *supra* footnote 25, at 65. { Reproduced in Accompanying Notebook at Tab 38}.

[122] *See,* Flavia Lattanzi, "The International Criminal Court and National Jurisdictions," In *supra* footnote 37, at 195. { Reproduced in Accompanying Notebook at Tab 43}.

D.) The Application of the Principle of Complementarity in the Darfur

The majority of this memorandum focused on the general relationship between the SC and the ICC. This should read as both an analysis of how the ICC should treat a SC referral, and as a determination that the principle of complementarity should never apply when a situation is referred to the ICC when the SC is acting pursuant to its Chapter VII mandate. The referral of the Darfur situation is the first time that the SC has exercised its Article 13(b) power. Assuming, *in arguendo,* that the principle of complementarity hypothetically applied and the primacy of a SC referral was not at issue, this portion of the memorandum will analyze the nature of Article 17 and its relationship to the situation in the Darfur. [123]

1.) Article 17 of the Rome Statute

Article 17 of the Rome Statute limits the ICC's jurisdiction to cases where a state's domestic courts are unwilling[124] or unable[125] to genuinely carry out the investigation of Article 5 crimes or to prosecute individuals for the commissioning of these crimes.[126] While Article 17 primarily applies to States party to the Rome Statute,

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[123] *See generally,* Art. 17 of the Rome Statute. { Reproduced in Accompanying Notebook at Tab 2}. This memorandum will discuss why the Sudan is unwilling or unable to genuinely prosecute individuals who have breached Art. 5 and assert why this is a persuasive corollary against allowing the principle of complementarity to apply in the Darfur situation *in addition* to the already proposed conclusion of SC Chapter VII referral supremacy.

[124] *Id.* Art. 17(2) defines "unwillingness" as: pretextual domestic proceedings designed to "shield the individual from being prosecuted elsewhere; or an unjustified delay in the proceedings; or proceedings not conducted with impartiality and that are inconsistent with a necessary manner needed to bring an individual to justice. { Reproduced in Accompanying Notebook at Tab 2}.

[125] *Id.* Art. 17(3) defines "inability" as "a substantial or total collapse of a domestic judicial system to the extent that justice cannot be properly served."

or those who have accepted its jurisdiction pursuant to Article 12; arguably, the principle of complementarity should not apply to *any* state that cannot genuinely investigate or prosecute individuals. A SC 13(b) referral is indicative of a situation where peace and security have deteriorated to the point where Article 17 cannot apply. Similarly, a failure to satisfy Article 17 can be used as evidence to support an uncontestable SC Chapter VII referral.

Third State's claims that their domestic courts are willing and able to genuinely investigate and prosecute individuals should be reviewed to determine if they are merely pretextual to shield government officials. If a State claims that it is going to investigate and prosecute but has no intention of doing so, the principle of complementarily serves to prevent the situation from coming to justice. Although, non-States Parties are generally unbound by the Rome Statute if they have not ratified it[127], the interests of international justice and public policy demand that an Article 17 style test still be applied.[128]

If a State cannot meet Art. 17's criteria for complementarity, the case should be "de facto admissible [to the ICC or a genuinely willing and able foreign jurisdiction]."[129] The effective result of preserving the judicial sovereignty of a third state unable to investigate or prosecute would be a disservice to justice. There is nothing to stop the SC

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[126] *See generally,* Art. 17 of the Rome Statute. { Reproduced in Accompanying Notebook at Tab 2}.

[127] *See generally,* Article 34 of the VCLT, *supra* footnote 80. { Reproduced in Accompanying Notebook at Tab 4}.

[128] *See e.g.,* Louise Arbour and Martin Bergsmo, "Conspicuous Absence of Jurisdictional Overreach," IN *supra* footnote 25, at 137. { Reproduced in Accompanying Notebook at Tab 37}.

[129] *See e.g.,* M.M. El Zeidy, *The Ugandan Government Triggers the First Test of the Complementarity Principle: An Assessment of the First State's Party Referral to the ICC,* 5 International Criminal Law Review 83, 104 (2005). { Reproduced in Accompanying Notebook at Tab 50}.

from creating an *ad hoc* tribunal to adjudicate or another competent foreign jurisdiction seizing the matter. If the SC were blocked by a State's pretextual demand to employ the principle of complementarity, the efficacy of the ICC as an international judicial enforcement body would be irreparably hindered.[130]

2.) The Sudan and Article 17 of the Rome Statute

In addition to the situation in the Darfur necessitating a SC referral pursuant to its Chapter VII mandate,[131] the Sudan is a third state incapable of satisfying Article 17 of the Rome Statute.[132] This is yet another reason why it should not be allowed to prevent the ICC from exercising jurisdiction by employing the principle of complementarity. The recent history of the situation in the Darfur and the UN's intervention demonstrate that the Sudan is not genuinely willing or able to investigate or prosecute individuals in its domestic courts and allowing it to do so would be a thwarting of justice.

a.) UN Actions Prior to the ICC Referral

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[130] *See e.g.,* Arsanjani, IN *supra* footnote 25, at 70. { Reproduced in Accompanying Notebook at Tab 38}.

[131] *See,* U.N.S.C. Res. 1593, *supra* footnote 6. { Reproduced in Accompanying Notebook at Tab 20}.

[132] *See, e.g.,* Chidi Anselm Odinkalu, *Back to the Future: The Imperative of Prioritizing for the Protection of Human Rights in Africa,* 47 Journal of African Law 1, 2. Odinkalu states that "the fulfillment of the responsibilities implied by the primacy of domestic jurisdiction in international law requires functional states to be able to provide basic protections to their inhabitants." He implies that this is a situation that is not unique to the Sudan alone and that generally, "the post-colonial African State has manifestly been unable to play [this role]." { Reproduced in Accompanying Notebook at Tab 53}.

Prior to the SC's referral to the ICC, the UN gave the Sudan ample opportunity to end impunity and flagrant violations of customary international law. This was the time for the Sudan to demonstrate that Article 17 should still apply to them and that they were genuinely able and willing to prosecute and investigate individuals. When the SC employed its Chapter VII mandate, and made its Article 13(b) referral to the ICC, the Sudan lost all opportunities to argue for the application of the principle of complementarity.

On 3 July 2004, the UN issued a Joint Communique Between the Government of Sudan and the UN[133] (hereinafter the "Joint Communique") urging the Sudanese government to end impunity, immediately investigate and cease all human rights violations, and ensure that individuals and groups accused of violations were brought to justice without delay.[134] The UN allowed the Sudan to practice a "complementarity of self-policing" (i.e. the Sudan's sovereign right to handle situations prior to necessary SC intervention). The Sudan did not adequately respond to the Joint Communique and "widespread human rights violations, including unrelenting attacks on civilians,"[135] continued at an alarming rate.

In response, the SC established the ICID to investigate violations of international humanitarian and human rights law in the Darfur by all parties; both the Sudanese

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[133] Joint Communique Between the Government of Sudan and the UN on the Occasion of the Visit of the Secretary General 29 June -3 July 2004. Accessed at www.unmis.org/english/documents/JC.pdf. { Reproduced in Accompanying Notebook at Tab 6}.

[134] *Id.*

[135] U.N.S.C. Res. 1556, U.N. SCOR, 59th Sess., 5015th mtg., at U.N. Doc. S/RES/1556 (2004). { Reproduced in Accompanying Notebook at Tab 16}.

government and rebel forces.[136] Additionally, if the Sudan failed to comply with the provisions of the Joint Communique, the SC threatened a consideration of additional measures pursuant to Article 41 of the UN Charter.[137]

b.) The Findings of the ICID

The Report of the ICID (hereinafter the "Report") demonstrated that not only were flagrant abuses of international human rights and humanitarian law continuing in the Darfur, but that the Sudanese judicial and penal system was completely unwilling and unable to properly handle the crisis. The findings of the ICID in the Report prompted the SC first to establish the UN Mission in Sudan (hereinafter the "UNMIS") placing 10,000 military personnel and civilian police officers in the Sudan[138] and subsequently to refer the situation to the ICC.[139] The Report unequivocally demonstrated that Article 17 of the Rome Statute was not satisfied and the referral unequivocally demonstrated that the Sudan should not have any opportunity to employ the principle of complementarity at all.

The ICID felt a SC Chapter VII referral was necessary because: the ICC was established to deal with crimes that pose threats to international peace and security; the investigation and prosecution of persons, enjoying prestige and authority in [the Sudan] and wielding control over the State [judicial] apparatus demonstrate that the Sudan is unwilling; only the SC has the power to compel both the government and rebels to submit

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[136] U.N.S.C. Res. 1564, U.N. SCOR, 59th Sess., 5040th mtg., at U.N. Doc. S/RES/1564 (2004). { Reproduced in Accompanying Notebook at Tab 17}.

[137] *Id.*

[138] U.N.S.C. Res. 1590, U.N. SCOR, 69th Sess., 5151st mtg., at U.N. Doc. S/RES/1590 (2005). { Reproduced in Accompanying Notebook at Tab 18}

[139] U.N.S.C. Res. 1593., *supra* footnote 6. { Reproduced in Accompanying Notebook at Tab 20}

to an investigation; the ICC is the only body that can fairly conduct a neutral and impartial trial; the ICC can be activated immediately and the establishment of an *ad hoc* tribunal would be unduly slow, and; the institution of criminal proceedings before the ICC would not be necessarily financially burdensome for the international community.[140]

(1) The Sudan is Unwilling to Genuinely Investigate and Prosecute Individuals Domestically

The Report demonstrated that the Sudan was unwilling to genuinely investigate and prosecute individuals and therefore the principle of complementarity should not apply.[141] The Sudan, as a signatory of the Rome Statute is bound to "refrain from acts which would defeat the purpose" of the Statute and therefore cannot claim that does not apply at all because it has not been ratified.[142] The government of the Sudan was put on notice concerning allegations of serious crimes being perpetrated in the Darfur and claimed that it was "acting responsibly and in good faith . . . to put an end to the violations and bring the perpetrators to justice."[143] However, not only was the government continuing to aid militias, but the "distinctions between the police and the [militias and other armed forces were] often blurred."[144] This is indicative of a lack of separation between the government and those committing the atrocities. Additionally,

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[140] *See,* ICID Report, *supra* footnote 12, at ¶ 572. { Reproduced in Accompanying Notebook at Tab 8}.

[141] *See generally,* Art. 17(2) of the Rome Statute. { Reproduced in Accompanying Notebook at Tab 2}.

[142] *See,* ICID Report, *supra* footnote 12, at ¶ 145. { Reproduced in Accompanying Notebook at Tab 8} *See also, supra* footnote 85, Art. 18 VCLT [ratified by the Sudan on 18 April 1990]. { Reproduced in Accompanying Notebook at Tab 4}.

[143] *Id.* at ¶ 419.

[144] *Id.* at ¶ 422.

only one case "relevant to the mandate of the [ICID]" was adjudicated in the Sudan by the end of 2003.[145]

The government aiding of militias, no legitimate police force, and no existence of an independent or effective judiciary in the Sudan,[146] all infer a complete unwillingness to genuinely investigate or prosecute individuals. Pretextual judicial bodies, lacking independence from those in power and whose aim is to shield officials from prosecution, do not meet the requirements of Article 17 necessary to for complementarily.

(2) The Sudan is Unable to Genuinely Investigate and Prosecute Individuals Domestically

Article 17(3)[147] of the Rome Statute requires that a state's judicial system has not substantially or completely collapsed in order for the principle of complementarity to apply and allow domestic jurisdiction over the situation. The ICID Report found that there were serious flaws in the Sudanese judicial system and that it could not act swiftly and appropriately to address violations of international humanitarian and human rights law.[148] A state of emergency has existed in the Sudan since 1999 and important constitutional guarantees are suspended.[149] The criminal code of the Sudan does not

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[145] *Id.* at ¶ 428.

[146] *Id.* at ¶¶ 431-2. The ICID found that citizens lacked confidence in an independent judiciary and that Judges disagreeing with the mandates of the government in Khartoum "often suffered harassment including dismissals."

[147] *See,* Art. 17(3) of the Rome Statute. { Reproduced in Accompanying Notebook at Tab 2}.

[148] ICID Report, *supra* footnote 12, at ¶ 450. { Reproduced in Accompanying Notebook at Tab 8}.

[149] *Id.*

adequately proscribe war crimes and crimes against humanity as prosecutable offenses and the executive is granted substantial immunity.[150] Many crimes have also gone completely uninvestigated and unprosecuted[151] and neither the government nor the rebels in the Darfur have made any significant steps to rectify this.

The lack of constitutional guarantees in the Sudanese judicial system, law that does not provide for punishment of breaches of international humanitarian and human rights law, an inefficient and unproductive judiciary, and a lack of impetus to rectify any of these situations, affirmatively demonstrates that the Sudan is unable to genuinely investigate or prosecute individuals pursuant to Article 17(3) of the Rome Statute. Again, if the principle of complementarity were to apply, it is unlikely that many (if any) individuals would go unpunished for the crimes that they perpetrated – this holds especially true for high level officials who effectively control the domestic courts and are most responsible for the ordering of the commissioning of the most atrocious crimes.

c.) The Situation in the Darfur Subsequent to the Security Council's Referral to the ICC

The official notes from the 5158th meeting of the SC attest to the importance of its first referral to the ICC.[152] The SC determined that the presence of troops and civilian

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[150] *Id.* at ¶ 451.

[151] *Id.* at ¶ 567.

[152] *See,* U.N. SCOR, 60th Sess, 5158th mtg. at U.N. Doc. S/PV.5158 (2005). Sir Parry (United Kingdom) stated that the outcome of the ICC accepting the SC's referral would "serve as a basis for Council Decisions in the future," and Mr. Mayoral (Argentina) said that the SC's referral was "undoubtedly a crucial precedent." Even those abstaining from the vote held that it the situation in the Darfur was necessary to "end the climate of impunity in the Sudan" even if they did not agree with the ICC asserting jurisdiction over the nationals of non States Parties (Mrs. Patterson (United States)). { Reproduced in Accompanying Notebook at Tab 19}.

police officers was (and still is) necessary in the Sudan[153] and that the government has inadequately preserved international peace and security. The referral demonstrates that the SC felt, pursuant to its Chapter VII mandate, that the only way to end impunity in the Sudan would be expedient investigation and prosecution by the ICC. On 21 April 2005 the ICC accepted the SC's referral of the situation in the Darfur and immediately commenced investigation in Pre-Trial Chamber I.[154] The Prosecutor, Mr. Luis Moreno Ocampo, also informed the SC that, in light of the principle of complementarity, there were cases that would be admissible [to the ICC] in relation to the Darfur situation.[155] However, a viewing of a SC referral "in light of the principle of complementarity," should never occur. If the SC's referral is still subject to the principle of complementarity (on a case by case basis),[156] it is inevitable that some criminals will avoid adequate prosecution.

The ICID determined that the Sudanese judicial system was fraught with corruption, non-independent judicial bodies, and supported by laws which do not meet international standards. Even if some investigations and prosecutions were left to the Sudan, they could hardly be called adequate. A look at the Sudan's Embassy to the United States webpage indicates that the Sudanese government is still not taking

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[153] *See, e.g.,* U.N.S.C. Res. 1627, 60th Sess., 5269th mtg. at U.N. Doc. S/RES/1627 (2005). The SC extended the mandate of Res. 1590 and determined that it was necessary to have the presence of peacekeeping troops in the Sudan extended. { Reproduced in Accompanying Notebook at Tab 21}.

[154] *See,* Letter dated 21 April 2005 from Mr. Philippe Kirsch to Mr. Luis Moreno Ocampo. { Reproduced in Accompanying Notebook at Tab 61}.

[155] *See,* Statement of the Prosecutor of the ICC, Mr. Luis Moreno Ocampo, to the SC on 29 June 2005 Pursuant to UNSCR 1593 (2005). { Reproduced in Accompanying Notebook at Tab 26}.

[156] *Id.*

responsibility for the situation in the Darfur.[157] This is not demonstrative of a government that is genuinely willing and able to hold criminals accountable. Unfortunately, as only time will tell, if dual proceedings (in the domestic courts of the Sudan and the ICC) are permitted because the principle of complementarity is applied, they could prove to be inadequate or to produce non-uniform outcomes, the SC could very well establish a third, *ad hoc* tribunal to ensure that its mandates under Chapter VII of the UN Charter were met. Surely, this is a result that the ICC should avoid at all costs.

III.) Conclusions

A.) The Principle of Complementarity Should Never Apply to Security Council Referrals Pursuant to Chapter VII of the UN Charter

The SC enjoys a responsibility unique among all international organizations, that of preserving international peace and security world-wide. As demonstrated by the establishment and full UN acceptance of the ICTY and the ICTR, the SC can and should be able to employ international criminal courts to fulfill its Chapter VII mandate. Not only are judicial bodies a preferable means to military action in situation resolution, but they can influence the establishment of uniform human rights and humanitarian protections. The SC's employment of Chapter VII to establish the *ad hoc* tribunals does not differ from the use of Chapter VII to make 13(b) referrals to the ICC that are not subject to the principle of complementarity.

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[157] News articles with titles such as, "No Evidence Sudan's Government Involved in Darfur Raid: HRC Official," and, "The Guardian: Darfur Wasn't Genocide and Sudan is not a Terrorist State," were prominently posted on the Embassy's webpage when accessed on 9 November 2005. Accessed at www.sudanembassy.org. { Reproduced in Accompanying Notebook at Tab 59}.

It is essential that the ICC is representative of an evolution from the ICTY and the ICTR and that it is the judicial body most capable of restoring international peace and security. In allowing the principle of complementarity to apply in Chapter VII situations, most, if not all crimes could be improperly investigated and prosecuted. The ICC would be giving a green light to those individuals who want to perpetrate heinous crimes with the small possibility that they will actually be tried for their actions.

Finally, if the SC is continually thwarted by the principle of complementarity after it has made a referral to the ICC; there is nothing to stop it from establishing new *ad hoc* tribunals. If this were to occur, the legitimacy of the ICC would never recover and the Court itself might completely loose any relevance. The ICC must demonstrate that it is the prime forum for adjudication of breaches of customary international law – this is the best method to ensure that States, such as the United States,[158] will sign and ratify the Rome Statute because the ICC is perceived as the most legitimate and effective judicial forum to investigate and prosecute individuals.

B.) Applying the Principle of Complementarity to the Situation in the Darfur Could Prove to Have Irreparable Ramifications

The situation in the Darfur is getting worse by the day and the perpetuation of impunity must be ended. The ICID's findings demonstrate that the Sudan is completely incapable of genuinely prosecuting or investigating any individuals. To allow the principle of complementarity would, from a public policy standpoint, be akin to supporting the commissioning of atrocities. Essentially, a non-action (the ICC allowing

[158] *See,* 148 Cong. Rec. S3946-01 (2002), in which the U.S. "unsigned" the Rome Statute. { Reproduced in Accompanying Notebook at Tab 35}. *See also,* U.N. SCOR, 57th Sess., 4568th mtg., at U.N. Doc. S/PV.4568 (2002), in which UN delegates expressed their confusion and concern regarding the U.S.'s unorthodox method to absolve its obligations to the Rome Statute. { Reproduced in Accompanying Notebook at Tab 15}.

the Sudan to investigate and prosecute some individuals) has the same result as an implied support of crimes perpetrated in the Darfur. If the principle of complementarily is applied, and the Sudan is allowed to employ its domestic jurisdiction, the ICC is sending a message to the world-community that, "some times Article 5 crimes will be investigated and prosecuted by us, while other times they will not." Not only will this diminish the legitimacy of the ICC as a judicial body, but it will allow impunity to go unpunished.