ARTICLE 13 (B): INTENTIONALLY LEFT UNRESOLVED BY THE ROME STATUE? AN ON-THE-SPOT FOCUS ON DARFUR'S SITUATION

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Article 13 (b): Intentionally Left Unresolved by the Rome Statute? - An On-the-spot Focus on Darfur's Situation

By SONG, Jianqiang[1]

Abstract: There have been numerous ambiguities and loopholes on certain crucial issues in the *Rome Statute*, including the one stipulated in Article 13 (b). The International Criminal Court (ICC) has admitted four cases, and among them only the Darfur case was referred by the UN Security Council. Debates have existed throughout the normative interpretations of the Article, including the intention approach of interpretations. While facing the volatile facts, all these interpretations turn vague. Why does the UN Security Council refer the case? What on earth are the big powers' intentions? How does the ICC Prosecutor operate? How does the academia evaluate the case? Is the Darfur case a progress or a setback? This article presents some interesting observations.

Introduction

Article 13 of the *Rome Statute* stipulates three triggering mechanisms regarding jurisdiction, including the mechanism of referral by the Security Council acting under Chapter VII of the UN Charter, which was stipulated in Paragraph (b) of the Article. The Darfur case is initiated with this mechanism. There was no explanation on the differences of this trigger mechanism compared with the other two in the Article. Article 14 and Article 15 of the Statute offered further provisions in the other two triggering mechanisms, which made Article 13 (b) appear more simplistic. The issues here are: firstly, whether the Security Council referral has to meet the other admissibility criteria (e.g. Article 17 and others); secondly, whether the Security Council referral has to respect the complementarity principle (e.g. Article 1 and others). Schabas quoted Ruth B. Philips' 1999 observation saying that it was an "intentionally left unresolved issue at the Rome Conference."[2] And Rosanna Lipscomb indicated that many scholars shared this view.[3]

Besides the above-mentioned two issues that could be combined into one, there is another more important issue: whether the Security Council's referral has to comply with Article 12 of the Statute (indicating the efficacy of the Statute). Paragraph 1 of Article 12 stipulates that the Statute applies only to the State Parties; Paragraph 2 of the Article does not apply to the Security Council referral; Paragraph 3 of the Article provides for the voluntary acceptance of ICC jurisdiction by the non-signatory states, which does not apply to the Security Council referral either. As Sudan did not accept the jurisdiction stipulated by the Statute, and is not a State Party of the Statute, can the ICC exercise jurisdiction over it? It has been obvious that the answer is absolutely no. From the above analysis we could almost predict that the only means by which the ICC could exercise jurisdiction is by a Security Council referral. However, with Security Council's referral of the situation, is the ICC meeting the requirements of Article 12? Only after solving this problem, can we continue our discussion on the applicability of the "complementarity principle", while the study of the on-site records may reveal similar answers at the same time.

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[2] Please see William A. Schabas, *An Introduction to International Criminal Court*, Cambridge University Press 2004, p. 123.

[3] Please see Rosanna Lipscomb, "Restructuring the ICC Framework to Advance Transitional Justice: a Search for a Permanent Solution in Sudan", in 1 *Columbia Law Review* 107 (2006), p. 201-202.

Just as the ICC Prosecutor Luis Moreno-Ocampo has stated: ICC has entered a new era of creating laws, after admitting four cases.[4] However, the Darfur case is the most unique one: the Security Council has been dealing with it for years without success. Many observers agree that since the United States has opposed the ICC for a long time, it is a big shock to the international community that the Security Council could refer the Darfur situation to the ICC.[5] Besides clarifying numerous complex procedural issues, the ICC has to explain the related ambiguous stipulations that are crucial for its operations and are intentionally left unresolved by the negotiators at the Rome Conference.[6] The Darfur case is a kaleidoscope, which is just as Schabas observed, "combating state manipulated atrocities against helpless civilians and minorities is indeed the goal of establishing the ICC, and the Darfur situation is very close to a sample case." However, the referral of the situation to the ICC is conducted through a Security Council resolution plagued with loopholes. There has been a significant trend of ignoring these loopholes, which will definitely undermine the prosecution operations, if they are not resolved early.[7] This article presents discussion in a reverse order: it first discusses the operations of front-line prosecutors, then analyses the most eye-catching positions of both the United States and China. It continues to talk about the UN Security Council Resolution 1593 (UNSCR 1593), and finally arrives at Article 13 (b) of the *Rome Statute*. There may be some references back and forth among the above-mentioned four parts. As the Darfur case has been well reported, this author will go directly to the discussions on the four parts in order to save space.

II. Factual Interpretation Two: Intentions of Big Powers

2.2 Intention of China

China's position is precisely revealed in its ambassador's explanatory remarks after the vote on Resolution (UNSCR 1593).[8] China had no reservations on the "political settlement" plan under the African Union's co-ordination, factual determination on severe violations of human rights, and "bringing the pertinent perpetrators into justice". China's reservation is only about "what are the most effective and feasible means" (see Paragraph 2 of the Remarks). China's position is that "in dealing with the impunity issue", "ensuring judicial justice", "punishing the perpetrators", "settling the Darfur issue" and "the political talks", "facilitating national reconciliation", "preserving the hard-earned peace process between the North and South of Sudan" must be given consideration at the same time (see Paragraph 3). With regard to judicial justice, China recommends "trials by Sudanese judicial institutions", which could demonstrate "respect for national sovereignty of justice". If Sudanese judicial system is suspected of any insufficiency, "the international community could provide appropriate technical assistance and necessary supervision." And "the proposal of an 'African judicial justice and reconciliation trials task force' raised by the Nigerian Representative on behalf of the

[4] Please see Statement by Luis Moreno-Ocampo, Prosecutor of the International Criminal Court, Forth Session of the Assembly of the States Parties, 2005-11-28 – 12-03, The Hague, 2005-11-28.
[5] Please see Rosanna Lipscomb, "Restructuring the ICC Framework to Advance Transitional Justice: a Search for a Permanent Solution in Sudan", in I *Columbia Law Review* 107 (2006), p. 185.
[6] Please see William A. Schabas, "First Prosecution at the International Criminal Court", in 1-4 *Human Rights Law Journal* (HRLJ) 27 (2006), p. 39-40.
[7] Please see William A. Schabas, "First Prosecution at the International Criminal Court", in 1-4 *Human Rights Law Journal* (HRLJ) 27 (2006) , p. 39-40.
[8] Please see WANG, Guangya, "Explanatory Remarks by Ambassador WANG Guangya at UN Security Council on Sudan Darfur Draft Resolution 1593", 2005-03-31, at the Ministry of Foreign Affairs of the People's Republic of China website: www.china-un.org/chn/fyywj/jy2005/t189774.htm. Last visited on 2007-01-17. To save space, parts of the remarks will be quoted as citations in text.

African Union (AU) could be a way out as well" (see Paragraph 4). As to the referral of the situation to ICC, because "the Sudanese judicial institutions have conducted actions against the accused recently", the referral "without the Sudanese government's consent" will "not only drastically complicate the early political settlement of the Darfur issue, but may create unpredictable consequences to the peace process between the North and South of Sudan" (see Paragraph 4). "China is not a State Party of the *Rome Statute*, and has serious reservations on some stipulations of the Statute". "We can not accept the situation that the ICC exercises jurisdiction against a non-signatory state's will, and we can hardly consent that the Security Council authorise the ICC to exercise this right" (see Paragraph 5). Therefore, China must "abstain on the draft resolution proposed by the United Kingdom" (see Paragraphs 1 and 6).

Now let us summarise those arguments. With regard to the solutions on the Sudan situation, we could easily obtain China's position ranking: firstly, political talks and reconciliation prevail over political, military, economic, and judicial "pressure" and "sanctions".[9] In other words, carrots are better than sticks. The major reason is that simplistic and violent methods could not resolve the complex and difficult issues. Of course, the position is also related to Chinese cultural traditions.[10] "The Chinese side has all along adopted a prudent attitude towards sanctions, and has abstained on Resolutions 1556 and 1564." "We have to rely on the sincerity and resolution of all parties involved in the political talks to resolve the fundamental problems", and we "have to abstain on Resolution 1591" (see Paragraphs 1 and 4), because we "have serious reservations on the resolution" (see Paragraph 1).

Secondly, political reconciliation and judicial sanctions have to be given considerations at the same time. In conjunction with the previously discussed first point, we could easily draw such a conclusion: judicial sanction should yield to political reconciliation. In other words, judicial operations have to yield to political needs. Judicial operations are supplementary, and should not obstruct politics. Thirdly, should "political reconciliation" fail and it is unavoidable to resort to judicial means, "the most effective and feasible means" should never be the referral to ICC, but "the Sudanese judicial institutions", next comes the referral to the "African judicial justice and reconciliation trials task force". In other words, "national judicial sovereignty" prevails over regional judicial institutions, and regional judicial institutions prevail over international judicial institutions.

Fourthly, the referral to the ICC is not even an "expedient" choice, but a permanently undoable plan. The legal reason is that the Sudanese judicial institutions have taken actions, and the Sudanese government does not consent on ICC's intervention. Therefore, the ICC has no jurisdiction over this. The political reason is that it is detrimental to the political talks and peace process, and China's consistent positions towards ICC has not changed. Fifthly, the Security Council should not authorise. The sentence has two possible indications: one is that ICC has never any legal jurisdiction powers; and the other is that as long as the Security Council adopts an "authorisation" resolution, ICC then obtains the jurisdiction power. Namely, the existence of the authorised power is not problematic, but the exercise of the authorised power may be problematic. As one of the "five permanent members" of the

[9] Please see WANG, Guangya, "Explanatory Remarks by Ambassador WANG Guangya at UN Security Council on Sanctions against Sudan Draft Resolution", 2005-03-29, at the Ministry of Foreign Affairs of the People's Republic of China website: www.china-un.org/chn/fyywj/jy2005/t189380.htm. Last visited on 2007-01-17. To save space, parts of the remarks will be quoted as citations in text.

[10] With regard to this issue, scholars of our country have had considerable discussions. Please see LU, Jianping, "The Cultural Orientation of China's Accession to the International Criminal Court", ZHAO, Bingzhi and CHEN, Hongyi, *Special Probe into International Criminal Law and International Crime*, Chinese People's Public Security University Press, 2003, p. 325-331. This author posits that there are indeed some incompatibilities between the two subjects (Chinese culture and ICC principle).

Security Council, it is impossible for China to regard "the existence of the authorised power as problematic".

Therefore, China is indeed opposed to the Resolution, and its decision to abstain does not mean ambivalence. This is completely different from the American decision to abstain. If the United States has been the chief opposition "vanguard" in the process of the *Rome Statute*'s norm building and institutional growth, China, as a soaring permanent member of the Security Council, may replace the US for its title in ICC's actual operations and development. What on earth does it mean? This may be what the topics of the Forum are aiming at.

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V. Academia's Actual Feedback: Progress or Setback

The intention approach only represents the history, and can not replace the vivid coverage of the actual case. The first case referred by the Security Council has generated much writing by the academia, particularly Western scholars. These concerns are multifarious, but are in general supportive of the ICC's jurisdiction over this case. With regard to the significance of UNSCR 1593, its loopholes, and its implementation, it is unavoidable to have debates.

Professor Robert C. Johansen rendered detailed and in-depth analyses and critiques on American policy positions concerning the ICC. As mentioned in the previous sections of this article, he offered highest praises for the historic significance of the "referral", and he also pointed out that the United States is leaning towards an ad hoc international tribunal. However, this motion is out of the question: the costs incurred in setting an ad hoc tribunal exceed the ICC option; the establishing and operating time will be quite long; the prolonged conclusion of trials facilitates the sheltered individuals to escape justice, while the ICC option is free of those disadvantages. If the United States vetoes the Resolution, the country's reputation will be further damaged, and Bush's efforts in mending ties with Europe in his second term will be undermined. The United States has finally compromised, but has injected some poison into the Resolution as well. Some countries demonstrated serious reservations on the Resolution: Denmark declared that it is not bound by the Resolution in exercising its universal jurisdiction. The Resolution also mentioned bilateral immunity agreements, but the mentioning only indicates the existence of those agreements, and is not detrimental to the Statute's integrity. Most importantly, the congruence of the human rights groups, European Union governments, other progressive governments sharing same values and goals, international civil societies, and the UN institutions is far more powerful than the United States. Washington can not control the internationalisation of those Jus Cogens norms, neither can it confine the implementation means and methods of these norms by the international community.[11] Therefore, America's forced compromise and Security Council's referral could be deemed as a considerable victory of the international rule of law over the international rule of the powerful.

When the American judge-scholar Patricia M. Wald closely observes "ICC's stormy adolescence", she raised some critical issues. With regard to the Darfur case, there was no special exemptions for

[11] Please see Robert C. Johansen, "The Impact of US Policy towards the International Criminal Court on the Prevention of Genocide, War Crimes, and Crimes against Humanity", in 28 *Human Rights Quarterly* (2006), p. 301-331.

American citizens in the past Court charters. The American position seems like: we support international institutions, as long as they don't apply to us. The United States has super-powerful surveillance technology, and if it refuses to actively participate in and facilitate the ICC's prosecutions, this will be a fundamental loss to the evidence collection work of the Court. "The United States doubts whether the ICC has followed justifiable procedures, but my two years' trial experiences in the Hague reveal to me that all the defendants received basically just trials." Wald's observation is that ICC's major difficulty is the lack of resources.[12] ICC lacks publicised "prosecution exemption" precedents indeed, but whether a political Resolution could evolve into a judicial precedent still awaits the Court's position. From my observation, the US cast a false vote to abstain (out of saving face) that was actually an affirmative one (ad hoc tribunal is after all impractical, plus the exemption terms), therefore, its surveillance resources could be utilised by the Court. As to the situation of the Court's essential resources, it is beyond our discussions here. If such assurance is not in place, the ICC should not be established at all. When the Security Council refers the situation, it seems quite confident in the ICC.

Professor William A. Schabas also conducted comprehensive research on the ICC's four cases. In his discussions on the Darfur case, he posited that according to Article 18 of the *Vienna Convention on the Law of Treaties*, Sudan is beyond the Statute's jurisdiction, as it only signed but not ratified the Statute. The Security Council asked the UN to investigate the Sudan situation, and the Secretary-General set up an "international commission of inquiry" led by Antonio Cassese, who submitted his report to the Secretary-General on January 25, 2005. Different from the US Secretary of State Colin Powell's position, they think the atrocities in Sudan Darfur are not genocide, but crimes against humanity, and suggest the case be referred to the ICC. The US proposed various options of conducting internationalised prosecutions during this period of time. The US "abstain" vote is "a form of tacit acceptance", and its acceptance to the Resolution has been a singular setback from its opposition policy.

Through negotiations, the US still injected some poison into the Resolution: such as Paragraph 7 (expenses shall be borne by the UN and other State Parties) of the Resolution, and particularly Paragraph 6 (exclusive jurisdiction of the contributing states over its own personnel). This is the same with the UNSCR 1497 on Libya, which also excluded other jurisdiction powers, particularly the exemption on the state of which the accused is a national. This directly contravenes the UN treaties binding all its member countries (including the US). The *Vienna Conventions* require all state parties bring those felonies (no matter what nationality) to justice to those state parties' domestic courts, while the Resolution told those countries to do just the opposite. Article 103 of the UN Charter declared the prevalence of Chartered obligations, while the UN Security Council's diluting conducts causes doubts on the jus cogens regulative nature of the *Geneva Conventions*. Beside the legality problem of Paragraph 6 of the Resolution, it definitely contravenes the *Rome Statute*. Uganda referred its situation to ICC in the same mode, but the Prosecutor invalidated the jurisdiction exemption of the accused nationals. The Statute requires the referral of a "situation", not a "case", which is intended to eliminate one-sided referrals, as they may infringe the Court's legality. If Paragraph 6 of the Resolution is illegal and could not be removed, a more serious problem will occur – the complete referral is illegal. Therefore, before proceeding with any prosecutions, this problem should be resolved in the first place.

[12] Please see Patricia M. Wald, "International Criminal Curts – a Stormy Adolescence", in 2 *Virginia Journal of International Law* 46 (2006), p. 319-346.

The Prosecutor may prosecute the exempted individuals in the future, but the question is what to do now (removing this term)? The incumbent Prosecutor could exempt certain individuals, but the Prosecutor could not control the successors. Therefore, the following scenario may occur: after prosecuting the exempted individuals, even after the completion of the prosecution, the Court may determine the legality of Paragraph 6 of the Resolution. Would the Court declare both the Resolution and the "referral" illegal? In other words, would the Court refuse to split the Resolution and remove Paragraph 6, and declare the existence of fundamental flaws within the whole Resolution?

Moreover, Schabas also criticises the Court for its tardy actions in prosecuting and making arrests. Although the situation is referred by the Security Council, there have not been any arrest warrants issued within a year. This is beyond comparison with the Nuremberg Tribunals, the former Yugoslavia International Criminal Tribunals, and the Special Court for Sierra Leone. Deterrence is one of the goals of international criminal justice, and it should be even more so for the ICC that has enshrined this goal. Does the Court really have the deterrent effect? We could clearly identify who has not accepted the deterrence, but it is almost impossible for us to identify who has accepted the deterrence. If the deterrence effects do exist, why has the Court been so slow in its operations? The Court has to speed up its operations indeed.[13] Schabas focuses on the Resolution's serious flaws and its negative effects, which is his normative position. He is especially concerned with the Court's operational efficiency, which could be his operational position. With regard to his normative position, the Resolution extensively violates treaties and laws, which is a serious problem. ICC has to be criticised for its differentiating treatment of all "illegal situation referrals". His above-mentioned positions are relating to different domains of the same issue, and are not conflicting with each other. To summarise, either from an operational position, or from a normative position, he is more critical towards the Darfur case. Having said that, they (including Cassesse) are generally supportive to ICC's processing the case.

With regard to the ICC's model of processing the case, Rosanna Lipscomb has conducted a detailed discussion that is very creative. She recommends the establishment of a hybrid court in Sudan, with its international component as the ICC.[14] Since the subject of the international component is unique (it has never been proposed before), the creativity of this recommendation is considerable. This is not a scholar's academic fantasy, but fairly imbued with factual and legal evidence. First of all, the conflicts in Sudan are complex, with the North-South conflict as the primary one, and the Darfur conflict as the secondary one. This indicates that the individual responsibility and the state responsibility co-exist, but without the condition of setting up an international court - the alternation of regime. Among the "five permanent members" (of the UN Security Council), three have major oil interests in Sudan, four have arms deals with the current regime, all have strong intentions in advancing their own national sovereignty. Therefore, the alternation of regime seems impossible. The pure international procedure is plagued with flaws, and can hardly promote the local judicial capacity building (which is the most important factor). It can hardly overcome the illegality that are caused by distances, procedures, resources, and cultures, and is incapable of arresting the prime suspects. These are not completely the flaws of the ad hoc international tribunal.

[13] Please see William A. Schabas, "First Prosecution at the International Criminal Court", in 1-4 *Human Rights Law Journal* (HRLJ) 27 (2006), p. 25-40.
[14] Please see Rosanna Lipscomb, "Restructuring the ICC Framework to Advance Transitional Justice: a Search for a Permanent Solution in Sudan", in 1 *Columbia Law Review* 107 (2006), p. 183-212.

With the "complementarity principle" as ICC's operational rule, and the situation that the Sudanese government has already initiated prosecutions, the hybrid court has tremendous advantage in mending ICC's flaws.[15] It is noteworthy that Lipscomb explored the legal foundation of the novel hybrid court: Article 3 of the Statute stipulated that "the Court may sit elsewhere, whenever it considers it desirable, as provided in this Statute", and Article 4 Paragraph 2 stipulated that "the Court may exercise its functions and powers, as provided in this Statute, on the territory of any State Party and, by special agreement, on the territory of any other state". Article 38 Paragraph 3 (a) stipulated that "the Presidency shall be responsible for the proper administration of the Court".[16] Therefore, the establishment of a hybrid court at the crime scene is feasible, and the Statute does not need to be modified. The difficulties of establishing this kind of hybrid court should not be under-estimated as well, which may include gaining Sudanese government's co-operation, but this can be overcome by reaching a "pardon agreement".[17] From my point of view, this plan supports the ICC's jurisdiction in general, and suggests that the ICC is capable of institutional innovations according to pertinent laws. It also predicts the difficulties in gaining co-operations from the Sudanese government, which is worthy of compliment.

However, Lipscomb excessively magnified the flaws of the international court, meanwhile excessively magnified the advantages of the hybrid court, and proposed the "pardon agreement" between ICC and the Sudanese government in order to appease the later. This author has "serious reservations" on her arguments, in line with the policy of "punishment for crimes" that are most severe jus cogens ones. It is to this author's surprise that Lipscomb has been referring elegantly back and forth among those conflicting positions, and has demonstrated astonishing capability and flexibility. From my point of view, this "pluralistic" design has more political significance than legal significance. Both China and the US favour an ad hoc tribunal, while China and AU lean towards a regional special tribunal, then China and Sudan prefer a Sudanese domestic court, finally China especially favours the "political reconciliation". Both an ad hoc international tribunal (set up in Africa) and a hybrid court (set up in Africa or Sudan) carry regional and hybrid political orientations. Either it is true opposition against the Resolution, or false opposition against it, the facts are self-evident. There are many opposition factors, including the opposition against the ICC's non-regional and non-hybrid feature. Such design can at least eliminate half or a third of the political factors in the opposition, meanwhile boosts the ICC's institutional innovation. Besides, a permanent international court setting up a temporary hybrid tribunal is somehow ironic by itself.

VI. Conclusion: Extended Discussions on Significance of the Referral

The UN is a "world auditorium", while the UN Security Council represents big powers' politics by judging and executing on "international peace and security" issues. "International peace and security"

[15] However, from my point of view, Lipscomb obviously overlooked the tremendous flaws of the hybrid court, which is its tendency of being kidnapped politically.

[16] From my point of view, the Paragraph 3 of "actions" of the Resolution saying that "Invites that the Court and the African Union to discuss … including the possibility of conducting proceedings in the region", could also be regarded as "quasi-legal base" of this kind of design.

[17] This position co-insides with the Paragraph 5 of "actions" of the Resolution. It is worth mentioning that Andrew A. Rosen applied Game Theory to the propositions such as "Prosecutor's prosecution on international crimes is not absolute", and "the *Rome Statute* creates possibility of pardon for peace by means of four ambiguities and loopholes". Please see Andrew A. Rosen, "D'Amato's Equilibrium: Game Theory and a Re-evaluation of the Duty to Prosecute under International Law", in 1 *Journal of International Law and Politics* 37 (2004), p. 80-160.

also belongs to the regional public international law realm, but is only part of this realm. This political jurisdictional order integrates with the ICC judicial jurisdictional order. Generally speaking, the results of the "integration" should be "consistent", but with a precondition that the integrating subjects have approximately the same nature, such as a nature of a criminal regulation, or a nature of criminal conducts. However, the order of the Security Council is a political one, while the ICC order is a judicial one, and they are of completely different natures. Even though all legal orders are political orders, and are most fundamentally political orders, the legal orders are self-sufficient, and have significant differences from the political orders. This "deduction" seems like a word play.

In the draft, negotiation, revision, and final codification process of the *Rome Statute*, ICC's relationship with the UN has been almost clear-cut, but its relationship with the Security Council becomes the focus of disputes. Why? The reason is simple: the Security Council represents the politics of a few big powers in history, while the ICC represents the justice of most people in smaller countries on a realistic sense. Justice is generated from politics, and there will be no courts if there is no "political will". However, "political will" itself has different natures: "political will" of the rule of the powerful and "political will" of the rule of law. The "political will" of the rule of law determines the just and independent "judicial will". Therefore, from the perspective of judicial "political will", the closer justice is to politics, the more problematic it will be. The distance between the ICC and the Security Council is the major indicator in studying the degree of criminal justice legalisation of the Statute.

There has been quite abundant resources from the legislative and interpretative approaches within and outside China, which will not be accounted in detail here. Undoubtedly the Sudan Darfur case provides us with a dramatically vivid case study, and our theoretical hypothesis (or beautiful vision) is generally like this: firstly, the sudden illumination over the "grey area" between the international rule of law and the international rule of the powerful; secondly, the "illumination" indicates a widening gap between the international rule of law and the international rule of the powerful. Can this theoretical hypothesis be tested and verified in the Sudan Darfur case? I think it has been basically verified. Russia approved the Resolution, and Japan also did so, which makes observers attach great expectations on these two countries' future positions towards the ICC. The United States abstained (to let the Resolution survive) and did not or was unable to vote against it, which is a new development of its national policy adjustment and is comforting to observers. China abstained on the Resolution (which is actually an opposition vote), which is just an "abstain" vote. Even though its opposition position is still eye-catching and it goes upward in the opposition ranking, China's position has been "all along" and "consistent", not like the United States that is capricious and complex. The Resolution was adopted with 11 affirmative votes, which is not a co-incidence. And more importantly there were only four abstain votes and no dissenting votes. It seems that the Prosecutor did not over-emphasise the Security Council referral of the case, and did not regard the impact of Sudanese judicial procedure on the case's admissibility as completely trivial. On the contrary, the ICC Prosecutor has been following closely the feedback from the Sudanese government and its judicial institutions. He did not "immediately" conduct investigation and make arrests according to the list provided by the Security Council, and his operations clearly indicate the independence and prudence of a state prosecutor. The Prosecutor is quite serious about the first "gift" given by the Security Council.

Theoretically, should the Prosecutor be bound by the "admissibility principle"? Our study results indicate a negative answer. The first analytical approach is "obligation contradiction" theory. Sudan is

not a state formally ratifying the Statute, therefore, the Statute does not apply to it, not to mention the "complementarity principle". However, since the Security Council could refer specific situations according to pertinent laws and regulations, and it also represents the UN, as a member country of the UN,[18] Sudan has to comply with the Resolution and accept the jurisdiction according to its "Charter obligation", which is quite clear. However, with the Security Council's referral of the situation, Sudan's "Statute obligation" is unclear – should it voluntarily accept the ICC's jurisdiction? If the answer is positive, this means there are major exceptions in the "complementarity principle". This area has been drastically debated, and is unclear. It seems there is no possibility that "the clear Charter obligation" and "the unclear Statute obligation" could conflict with each other. Therefore, it is almost a foregone conclusion that Sudan has to fulfil its clear Charter obligation and accept the ICC jurisdiction.

The second analytical approach is the intention interpretation approach. According to Lionel Yee, the legislative target of Article 13 (b) is to avoid a special tribunal by the Security Council.[19] With regard to the "fatigue" of ad hoc tribunals, the Security Council should welcome this provision. Although there were some representatives drastically opposing the Security Council's referral power because of their concerns over the independence and the reliability of the Court, the potential issues of discrimination against smaller countries and the exception of big powers, and the lack of judicial powers of the Security Council, most representatives accepted the Security Council's situation referral power according to the existing stipulations of the UN Charter. According to my observation, the referral stipulation is very significant. As the existing "collective security mechanism" can not be significantly changed, the Court has to face Security Council's competition in keeping the international criminal judicial order. The countries still could not solve the fragmentation and contradiction problems that have plagued the international criminal judicial system, even if they adopt radical and simplistic approaches and severed legal ties with the Security Council. The ad hoc tribunal set up by the Security Council will not dramatically change the reality, no matter if the Security Council oversteps its authority or not. The referral stipulation is crucial in the creation and development of international criminal justice, in order to relieve the Security Council from its "fatigue", and to establish a flexible mechanism of "uniform criminal judicial order". To the Security Council, there is no essential difference between the "Security Council situation referral" and the "Security Council ad hoc tribunal", because its general goal is to resort to judicial intervention. According to the practice of "priority jurisdiction" of the ad hoc tribunal, the related states and their representatives could be prosecuted anyway, even without the "consent" of the accused states and their representatives.

The third analytical approach is the universal jurisdiction theory. The four crimes stipulated in the Statute are most severe jus cogens crimes. The international community has the natural power to "react universally" against these crimes. As the Security Council is fully authorised to represent the "international community" on the issues of "world peace and security", there should be no substantive problem for it to conduct this "universal reaction". As to the specific means of reaction, whether it is a request of self-correction through judicial approach, or an ad hoc tribunal, or a collective approach of

[18] Sudan joined the UN on November 12, 1956. Please see www.un.org, last visited on 2007-01-17. The UN now has had 192 member countries by June 28, 2006 (the date of Montenegro's accession to the UN).

[19] Please see Lionel Yee, "The International Criminal Court and the Security Council: Article 13 (b) and 16", in Roy S. Lee edited, *The International Criminal Court: the Making of the Rome Statute, Issues, Negotiations, Results*, Kluwer Law International 2002, p. 143-152. The author (Lionel Yee) was the Representative of Singapore Delegation to the Rome Conference.

the ICC, it is within the Security Council's discretion. If the crimes in non-signatory states could be left alone because of the "complementarity principle" of the Statute, this deviates from the universal justice of jus cogens, even though it keeps an equal distance from the power politics. The deviation is the betrayal of the ultimate goal of the ICC.

The fourth analytical approach is the distribution of Security Council's votes. The United States and China abstained on the Resolution for different reasons, but their similarity is that whenever they face ICC jurisdiction issue, they become hesitant and ambivalent, and their positions basically stay the same. The voting results indicate that the referral of the Sudan situation to the ICC is not a result of certain big powers' "dirty tricks", "pressure", or "threat". On the contrary, it is a result of a "choice-less" and "helpless" reaction. Therefore, the ICC's admission of the case is not a result of power politics or "victor's justice", or even the "choice of justice". In other words, the ICC's admission of the case from the Security Council does not mean the ICC has contracted the virus of being "dependent" and "untrustworthy". The United States declared that the UN and the ICC have to bear the expenses of prosecutions, which says it all (even though it is not fair for the ICC to do so).

The fifth analytical approach is the rule of "principle and exception". It has to be noticed that the Statute has provided jurisdictional power over non-signatory states under certain circumstances,[20] including the Security Council referral of a situation. The existence of a principle is comparative to the existence of a few exceptions. If there are no exceptions, there will be no principles. Therefore, it is inadvisable to reject all the exceptions with a principle. Moreover, the legal exception of the "complementarity principle" could be naturally inferred, and the Security Council referral is not the only exception.

Certain scholars in our country also adopted systematic analysis approach in observing Article 13, 14, 15, 17, 19, and 53 of the Statute, and drew a conclusion that during the Security Council's referral of a situation, "complementarity principle" also applies. In practice the "unwillingness and inability" of a state may be determined or inferred beforehand, therefore, the complementarity principle generally does not apply to this state.[21] This looks self-contradictory, but actually the two aspects are in different domains: the unwillingness and inability issue is in a normative domain, while the applicability of complementarity principle is in a practical sense. The issues in different domains may look contradictory. With regard to this case, two domains of the issue are concerned, namely, the norm and the practice. To the norm side, it seems the Prosecutor did not offer excessive descriptions, but he did briefly declare his basic position. To the practice side, the Prosecutor's actions sufficiently proved everything. The conclusion of our studies is: from both the norm domain and the practice domain, the Prosecutor's position and actions are amazingly consistent and patient – "complementarity principle" must apply. It seems the Prosecutor's position and actions are most prudent. With regard to the case referred by the Security Council, the Prosecutor demonstrated outstanding professionalism in staying so prudent.

[20] For example, the accused is a national of a non-signatory state, while the crime scene is in a state party; or the crime scene is in a non-signatory state, while the accused is a national of a state party; or the non-signatory state voluntarily accepts jurisdiction; or the situation that has been referred to ICC by the Security Council. This view is shared by other scholars as well. Please see YANG, Lijun, "Legal Issues of the Security Council's Referral of Darfur Situation to ICC", in *Global Legal Review*, No. 4, 2006.

[21] Please see YANG, Lijun, "Legal Issues of the Security Council's Referral of Darfur Situation to ICC", in *Global Legal Review*, No. 4, 2006. This interpretation is the same with Lipscomb's version.

It may be necessary to add some remarks on the "complementarity principle". It is widely understood that "complementarity principle" is the corner stone of the ICC, and is related to national sovereignty. Without the principle, the Statute could not be adopted and implemented into force. This author regards the above understanding as rigid. The above understanding is most advantageous in facilitating the enforcement of the Statute; while the opposite understanding is most conducive in opposing the Statute. This author believes that the normative sense of a modern international criminal justice treaty has to be ambiguous and pluralistic, sometimes even inconsistent,[22] if the treaty is comprehensively implementing jus cogens concepts and upholding its orientation of human rights (but not that of national sovereignty). Otherwise it would never encounter hostility from the United States and Israel, opposition from China, indifference from Japan, and continuous hesitation from Russia, and is especially detested by numerous smaller countries that have a political culture of the rule of the powerful.

Here we just briefly stop over the final adjudication on the issue of "unwillingness and inability". The Sudan situation is a typical example: Sudan has never stopped proving itself "willing and able", while the Prosecutor can never rest assured how Sudan can be "willing and able". As far as the procedure is concerned, the Prosecutor's sense of justice should not be doubted, because he has the right of final adjudication. The final adjudication indicates who has the authority to determine the case, which is of crucial importance. There is no need to elaborate on the design. Bassiouni once asserted that without the state's policy incentive and support, both the four major crimes in the Statute and the other 20 secondary international crimes will not constitute international crimes in real sense.[23] If there is no polity or regime change, how will the state judicial machine become "willing and able" to try itself? Therefore, in a certain sense, accession to the Statute means the ruler is confident enough to bet: at least we ourselves will never commit those atrocities, otherwise we will submit ourselves to the ICC's punishment. This is an entrust of punishment against certain atrocities, to stop the state itself from oppressing its citizens, and stop other states from oppressing citizens of this state. The ICC is the keeper of the punishment, and the individuals, not the state, are the assigners of the punishment. The state should not withhold or abuse the punishment, and the power of absolution remains in the hands of citizens. After several rounds of analyses in his same work, Bassiouni finally reached such insightful "international contract theory".[24] This research approach coincides with John Rawls' contractarian approach in *the Law of Peoples*.

[22] It is unavoidable that the Statute may be inconsistent, since each part of the Statute was drafted, discussed, and revised by different individuals from different institutions, who have been working in short times and rushing through the voting process. Maybe the haste and disorganisation are smart choices to reveal the value of pluralism.

[23] Please see M. Cherif Bassiouni, *Introduction to International Criminal Law*, translated by WANG, Xiumei, Law Press (2003), p. 75-154.

[24] Please see M. Cherif Bassiouni, *Introduction to International Criminal Law*, Transnational Publishers, Inc., 2003, p. 676-677, p. 690-691, p. 693-694, p. 698-704, and p. 729-731.