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North Korea and the Non-Proliferation Treaty. By Assia Dosseva.

The fourth session of the six-party talks in Beijing ended with what many in the American and international community considered a breakthrough in the Korean peninsula crisis. The September 19 North Korea-U.S. Joint Statement presented an agenda for the complete, verifiable, and irreversible elimination of all plutonium and uranium programs in North Korea, as well as the Democratic People’s Republic of Korea’s (DPRK) return to the Non-Proliferation Treaty (NPT) and compliance with International Atomic Energy Agency (IAEA) safeguards.¹

There are a host of general problems related to the transformation of the six-party talks into an agreement with “binding force,”² and enforcement of such an agreement in view of North Korea’s dismal compliance record.³ Additionally, a number of legal difficulties surround North Korea’s departure and return to the NPT, and the accompanying IAEA safeguard requirements. There are two key questions governing the DPRK’s possible return to the NPT: First, did North Korea leave the treaty in compliance with the treaty’s withdrawal terms? Second, are there provisions in the treaty that clarify the steps necessary for repeated accession, and are there requirements that may preclude the DPRK from returning to the treaty in a legally sound manner?

In view of these problems, there are three possible scenarios for Pyongyang’s relationship with the NPT: (1) North Korea’s return to the treaty before full and verifiable denuclearization; (2) North Korea’s failure to return to the treaty; or (3) North Korea’s return to the treaty after full and verifiable denuclearization. The third option would best meet the objectives of the six-party talks and the security interests of the international community.

Article X of the Nuclear Non-Proliferation Treaty provides for the right of every sovereign nation to withdraw from the Treaty upon “notice of such withdrawal to all other Parties to the Treaty and to the United Nations Security Council three months in advance.”⁴ After North Korea denied the IAEA access to suspected nuclear waste sites in early 1993, the Agency asked the UN Security Council for special ad hoc inspections. As a result, in March

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4. NPT, supra note 3, art. X.
1993 the DPRK announced its intention to withdraw from the NPT. After "intense bilateral negotiations with the United States," North Korea agreed to suspend its withdrawal. In 2002, the DPRK government admitted to possessing a highly-enriched uranium program, leading to economic sanctions by the United States. As a result, in January 2003, Pyongyang declared its withdrawal from the NPT. The DPRK claimed the withdrawal was effective immediately because eighty-nine days had elapsed since 1993 when North Korea had first announced its intention "before suspending its intention to withdraw from the treaty." 

The second requirement for a country's legitimate use of Article X of the NPT is the presence of "extraordinary events, related to the subject matter of this Treaty, [that] have jeopardized the supreme interests of its country." Upon examination of the events between 1985, when Pyongyang ratified the NPT, and 2003, when it withdrew, there is no evidence that any such "extraordinary event" took place. In fact, when Pyongyang failed to ratify the IAEA safeguards agreement in the time allocated to it by the Treaty, it demanded instead that the United States withdraw its nuclear weapons from South Korea and that Washington and Seoul terminate their joint military exercises, known as "Team Spirit." Though these requests had no legitimate basis, in September 1991, President George H.W. Bush declared that the United States would not maintain nuclear weapons in South Korea. In December 1991, President Rho Tae Woo affirmed that South Korea was free of nuclear weapons.

With the exception of the Security Council's orders requiring Iraq to end its nuclear weapons proliferation and to agree to IAEA inspections after the 1991 Gulf War and again in 2002, no past decisions of the Security Council related to NPT enforcement resulted in an order that required an offending country to discontinue activities related to nuclear weapons production. Even after the IAEA's Board of Governors had reported North Korea's noncompliance to the Security Council, and North Korea had given its withdrawal notice from the NPT in 1993, the Security Council was divided. The Council's only point of agreement was its demand that North Korea permit IAEA inspections, which North Korea then refused to do. In view of North Korea's dubious compliance with the waiting period requirement and

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6. Id.
7. NPT, supra note 3, art X.
8. Although North Korea signed the NPT in 1985, it did not sign the IAEA's safeguards agreement until January 1992. The period for compliance with IAEA's safeguards after signing the NPT is eighteen months. In North Korea's case, because of mistake in documentation on IAEA's part, North Korea was given another eighteen months to comply, but still failed to ratify the agreement before 1992.
10. North Korea Profile, supra note 5.

Article IX, section 1 of the NPT states that a country “which does not sign the Treaty before its entry into force in accordance with paragraph 3 of this Article, may accede at any time.”\footnote{13. NPT, supra note 3, art. IX.} In spite of existing doubts, if we assume that Pyongyang withdrew from the NPT in a legal manner, it would seem sufficient for North Korea to go through the motions necessary for accession to the NPT, as would any new candidate for membership.\footnote{14. It is worth examining North Korea’s violations of the NPT prior to its withdrawal as a possible legal hindrance to rejoining the treaty. However, at the 2005 Review Conference of the NPT, proposals by Germany and France for amendments to provide for such instances did not manage to garner the necessary support. See supra note 12.}

The NPT imposes different types of obligations on countries defined under the treaty as nuclear and non-nuclear-weapon states.\footnote{15. See NPT, supra note 3, art. I (“Each nuclear-weapon State Party to the Treaty undertakes not to transfer to any recipient whatsoever nuclear weapons or other nuclear explosive devices or control over such weapons and explosive devices directly, or indirectly; and not in a way to assist, encourage, or induce any non-nuclear-weapon State to manufacture or otherwise acquire nuclear weapons or other nuclear explosive devices, or control over such weapons or explosive devices.”); id. art. II (“Each non-nuclear-weapon State Party to the Treaty undertakes not to receive the transfer from any transferor whatsoever of nuclear weapons or other nuclear explosive devices or of control over such weapons or explosive devices directly, or indirectly; not to manufacture or otherwise acquire nuclear weapons or explosive devices directly, or indirectly; not to manufacture or otherwise acquire nuclear weapons or other nuclear explosive devices; and not to seek or receive any assistance in the manufacture of nuclear weapons or other nuclear explosive devices.”).}

On the other hand, Article IX, Section 3 of the NPT defines a nuclear-weapon state as one “which has manufactured and exploded a nuclear weapon

or other nuclear explosive device prior to January 1967.”\(^\text{17}\) Therefore, North Korea is, by definition, precluded from rejoining the treaty as a nuclear-weapon state.

Hence, the only way in which North Korea would be able to rejoin the NPT in a legally acceptable manner would be to dismantle its nuclear programs completely and verifiably before rejoining the treaty under a non-nuclear-weapon state classification. This option would require that North Korea denuclearize in good faith and independently of IAEA inspections.

In considering the alternative developments in the DPRK’s future relationship with the NPT, it is important to review the objectives of the six-party talks statement: first, the DPRK’s complete and verifiable denuclearization “by credible international means,” and second, rejoining the NPT and coming into “full compliance with IAEA safeguards.”\(^\text{18}\) As there is currently no prospect of a binding agreement, the issue of whether the denuclearization of North Korea would take place before or after re-accession to the NPT, or without any undertaking to rejoin the NPT at all, remains open. In view of that, there are three possible variations on North Korea’s future relationship with the NPT.

First, as discussed previously, if North Korea decides to return to the NPT, it will have to do so as a non-nuclear-weapon state. Nevertheless, if the DPRK ratifies the treaty as such before it has denuclearized, it will immediately be in violation of Article II of the NPT, which holds that “[e]ach non-nuclear-weapon State Party to the Treaty undertakes . . . not to manufacture or otherwise acquire nuclear weapons or other nuclear explosive devices . . . .”\(^\text{19}\) It is possible that the United States and the international community would decide to turn a blind eye to this discrepancy in order to bring North Korea back under the supervisory authority of the IAEA and the reach of the United Nations Security Council. However, such an action would constitute a considerable gamble with the objectives of the six-party talks. Even if North Korea denuclearizes after rejoining the NPT in a complete and verifiable manner, and to the satisfaction of the IAEA’s safeguards and regulations, the authority of the NPT treaty would be further undermined by allowing a former member with a record of violations against the treaty to rejoin the NPT in immediate violation of the same.

Worse still, if North Korea rejoins the NPT before denuclearizing, it may subsequently refuse to dismantle its nuclear programs. Article IV of the NPT, which protects “the inalienable right of all the Parties to the Treaty to develop research, production and use of nuclear energy for peaceful purposes without discrimination and in conformity with Articles I and II of this Treaty,”\(^\text{20}\) presents a convenient loophole for continued nuclear weapon proliferation under the treaty. Thus, a nuclear-weapon state may opt to accede to the NPT as a non-nuclear-weapon state in order to legalize the continued use and development of its existing nuclear technologies under the “for peaceful purposes” provision of Article IV. Once it becomes impossible to

\(^{17}\) NPT, supra note 3, art. IX.

\(^{18}\) Press Statement, supra note 1.

\(^{19}\) NPT, supra note 3, art. II.

\(^{20}\) NPT, supra note 3, art. IV.
conceal the primary purpose of its nuclear technology, the state in question may leave the treaty legally if it is in compliance with Article X.\textsuperscript{21} Similar violations of the NPT, both by North Korea before its withdrawal from the treaty and by Iran on a regular and ongoing basis within the framework of NPT and IAEA regulations, have not been sanctioned.\textsuperscript{22} In view of the latter, an outcome devastating to both objectives of the six-party talks seems likely.\textsuperscript{23}

In the second scenario, North Korea may refuse to rejoin the Nuclear Non-Proliferation Treaty altogether. Although Pyongyang would remain outside of the framework of NPT and IAEA regulations, this scenario does not predetermine the result of North Korea’s denuclearization process. The DPRK may dismantle its nuclear weapons program under pressure from the United States and/or major Northeast Asian actors such as China and Japan. The DPRK’s denuclearization may also occur as a result of economic and political incentives. If successful, this alternative will satisfy the denuclearization objective of the six-party talks, but will not contribute to the strengthening of the NPT. However, considering the history of bilateral and multilateral negotiations, sanctions, and incentive initiatives between North Korea and the United States, South Korea, and the international community, this scenario is highly unlikely.\textsuperscript{24}

Pyongyang’s failure to join the NPT and to denuclearize would lead to collapse of the main objectives of the six-party talks and would completely undermine the negotiations process aimed at the resolution of the Korean peninsula crisis. Though such a development would be highly unproductive and unreasonable, experts across the political spectrum consider such an outcome not improbable.\textsuperscript{25}

The third scenario would call for the DPRK’s denuclearization in good faith and independently of IAEA inspections, prior to, and as a condition for, its return to the NPT. After rejoining the treaty, thorough inspections by the IAEA should be allowed in order to verify the satisfactory outcome of the dismantling process. If successful, this option would satisfy both objectives of the six-party talks—North Korea’s denuclearization and its rejoining the NPT in a legal manner.

\begin{enumerate}
\item See, e.g., Bunn, supra note 11; Jonas, supra note 21.
\item Additional concern in this scenario is not only what North Korea could or would do with nuclear weapons, but also its potential to sell “weapons-grade fissile material or nuclear weapons to other states and non-state actors, including terrorist groups.” Jean Du Preez & William Potter, North Korea’s Withdrawal from the NPT: A Reality Check, CTR. FOR NONPROLIFERATION STUD., Apr. 10, 2003, http://cns.miis.edu/pubs/week/030409.htm.
\item See, e.g., O’HANLON, supra note 16, at 87-89; Nicholas Eberstadt, Alternative Scenarios for the Korean Peninsula, in STRATEGIC ASIA 2004-05: CONFRONTING TERRORISM IN THE PURSUIT OF POWER 109 (Ashley J. Tellis & Michael Wills, eds., 2004); Wolfsthal, supra note 16.
\item See, e.g., Barbara Demick et al., N. Korea Sets Condition on Nuclear Pact; The Day After Pledging To End Its Arms Program, the Regime Puts the Deal in Doubt by Demanding That the U.S. First Provide It with a Light-Water Reactor, L.A. TIMES, Sept. 20, 2005, at A1; Nicholas Eberstadt, A Skeptical View, WALL ST. J., Sept. 21, 2005, at A26; Barbara Slavin, N. Korea, U.S. Both Bend a Bit For a Deal, USA TODAY, Sept. 20, 2005, at 5A.
\end{enumerate}
If we assume North Korea's willingness to proceed with this option, there are two cases that may provide guidance in the process: South Africa's voluntary denuclearization prior to its accession to the NPT in July 1991 and Libya's voluntary nuclear dismantling in 2004. Together, these two cases address the steps and actors necessary for a successful independent denuclearization, and the procedure a member state in violation of the NPT would have to follow in order to come into compliance with the NPT's requirements and IAEA's safeguards. While there are significant differences between these cases and North Korea—South Africa was never in violation of the treaty, and Libya never left the treaty—a combination of these two case studies may provide guidance for the process North Korea would have to follow in order to return to the NPT legally.

Although the joint statement of the fourth session of the six-party talks is a step in the right direction, there are several uncertainties in the future implementation and enforcement of its objectives. Considering the failure of past bilateral and multilateral negotiations and programs between North Korea and members of the international community, it would be in the interest of all parties involved to implement the six-party talks objectives. This would not only meet the goal of denuclearizing North Korea in a complete and verifiable manner, but would also uphold the authority of the Nuclear Non-Proliferation Treaty as a "treaty of continued relevance and indefinite duration given the ongoing need to control the most dangerous technology even invented by humankind."
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Like Mao suits, Nehru jackets, and other fashion trends of the past that have recently made a comeback, quotas are back in style in Europe and America as the preferred way to manage trade in politically sensitive sectors of the economy. The latest outbreak of retro trade policy is in the perennially difficult area of clothing and textiles, where both the United States and the European Community (EC) have been busily slapping quotas on Chinese textile exports.

Exports of textiles from China to the United States surged by 46% in the first eight months following the demise of the Multi-Fiber Arrangement (MFA) on January 1, 2005, which had governed international trade in textiles for forty years through a series of restrictive quotas.1 No sooner had the MFA expired, however, than the United States and the European Community rushed to impose new quota-based "safeguard" measures to protect their geographically concentrated (and thus politically influential) textile industries from the rigors of competing with the efficient Chinese.

Apart from resulting in the build-up of embarrassingly large piles of briefs, brassieres, and other textiles on European and American quaysides, the readiness of the world's two largest economies to resort to naked protectionism to prop up their marginal and declining textile industries does not augur well for the successful extension of rules-based disciplines to other far more contentious economic sectors under the auspices of the World Trade Organization (WTO). This may seem like a grim reading of what is essentially a flap over towels and trousers, but the current quota-based restrictions on Chinese textiles strike at the principle of non-discrimination that, along with national treatment, forms the foundation of the international trade system.

Quota-based trade restrictions have long been a bane of economists because they are opaque, market-distorting, and easily manipulable for political purposes—all of which gave dismal scientists the world over reason to cheer when the General Agreement on Tariffs and Trade (GATT) of 1947 banned their use.2 The textile trade, however, has been an exception to this general rule since at least 1957, when European and American textile producers successfully agitated for quota-based protection against imports from the low-cost producer of the day, Japan.3 Further bilateral and short-term multilateral quota deals in the 1950s and 1960s laid the foundation for the highly discriminatory and much-reviled Multi-Fiber Arrangement (MFA) of 1974, which allowed industrialized countries to limit textile imports from developing countries using quotas while applying GATT's anti-quota rules to textiles imported from fellow industrialized countries.

Killing the MFA was one of the developing world’s top priorities in the Uruguay Round of trade negotiations which began in 1986, and the achievement of a new Agreement on Textiles and Clothing (ATC) that would phase out quotas in the textile trade between 1995 and 2005 was widely regarded as a major victory for these countries. From the outset, however, the American and European reaction to the ATC has been less than enthusiastic, as both successfully managed to have the reductions back-loaded such that 65% of the quotas by volume would be eliminated only at the end of the ten-year transition period. In the case of the United States, which chose to first eliminate its quotas on products where they were not being filled anyway, over two-thirds of its textile imports by volume and some 80% of its imports by value were still subject to quotas on December 31, 2004—the eve of the end of the MFA.

Such procrastination by governments in preparing the ground for the end of quotas in the textile trade is simply inexcusable, and cannot be condemned strongly enough when the chief procrastinator is the country that usually preaches freer trade with missionary zeal abroad. A more gradual phase-out of textile quotas would not have given domestic industries any more time to adjust, but it would have furnished them with stronger incentives to become leaner and meaner, rather than to procrastinate and lobby their way out of their predicament at the last minute, as both the European and American industries ultimately did.

Well before the MFA breathed its last breath on New Year’s Day 2005, petitions from textile producers pleading for safeguards to protect them from a tsunami of low-cost Chinese-made t-shirts began flooding the mailboxes of trade policymakers in Washington and Brussels. Long a part of the measures available to governments to help domestic industries adjust to greater competition after trade barriers have been lowered, both the original GATT and the 1994 WTO Agreement on Safeguards allow countries to impose temporary import restrictions on a product to prevent “injury” to domestic manufacturers of similar products. A host of stringent conditions must be met before safeguards can be imposed, of which five in particular stand out:

- a finding of actual or imminent injury to domestic industry;
- imposition of the minimal safeguards required to avert injury;
- duration of the safeguards for no more than four years at a time, to a maximum of eight years;
- application of safeguards to the product regardless of its source; and

8. Id. arts. 2.1, 4.
9. Id. art. 5.
10. Id. art. 7.
granting of equivalent trade concessions to the countries affected by the safeguards.\textsuperscript{12}

The safeguards imposed by the United States and the European Community against imports of textiles from China would be illegal under these conditions, but conveniently for the Europeans and the Americans the last two need not be met when enacting safeguards against products from China. The protocol governing China’s accession to the WTO in 2001 gives members leave to impose safeguards against Chinese products alone without requiring a grant of equivalent concessions to China for the first three years the safeguards are in place.\textsuperscript{13} These discriminatory measures were key to securing the congressional approval needed for China to enter the WTO—albeit as a second-class citizen for the twelve years that the measures will remain in effect.\textsuperscript{14}

Thus, the crux of the current controversy over quotas as safeguards is not whether they are permissible at all, but rather whether the safeguards, as imposed by the Europeans and Americans, are truly necessary to protect their domestic textile producers from “injury.” Chinese skepticism about the need for the quota-based safeguards is due in part to its own proactive measures to ease the adjustment to a quota-free world by imposing a per-item export tax of RMB 0.20 to RMB 0.30 ($0.016 to $0.024) on 148 categories of textiles in late 2004.\textsuperscript{15} Paltry as they may seem, these taxes represent between 6 and 10\% of the cost of production of the items they cover.\textsuperscript{16} As both Europe and the United States began to announce safeguard investigations against Chinese textiles in early 2005, the authorities in Beijing made further attempts to avert a trade spat by raising China’s per-unit export taxes on seventy-four of these categories to RMB 1 ($0.125) on May 20, 2005, under the condition that they would be rolled back if safeguards were imposed.\textsuperscript{17}

The Europeans were quick to take advantage of the breathing room afforded by these taxes to cut a deal with China on June 10, 2005 that will limit the growth of Chinese exports of eight categories of textiles to between 8\% and 12\% per annum for the next three years.\textsuperscript{18} These moves, however, were not enough to prevent the United States from slapping safeguards on six categories of Chinese textiles between May 23 and 27.\textsuperscript{19} This more
confrontational approach complicated American efforts to stitch up a deal with China for some time, though ultimately a deal was reached on November 8 to limit the growth of thirty-four categories of Chinese exports to between 11% and 15% per annum until the end of 2008.\(^{20}\)

The Euro-American import-restricting deals with the Chinese may be strictly legal under WTO rules, but the spectacle of the world’s two greatest economic powers using the strongest measures available to block exports from what is still a developing country is as unseemly as it is unnerving to those who believe in the merits of rules-based trade. While someday there may be a genuine need to apply safeguards against China that would be illegal against any other country, wiser leaders would have reserved this strong medicine for a real crisis and dealt with the textile issue using the standard non-discriminatory safeguards sanctioned by the WTO.

The surge this year in Chinese textile imports may seem dramatic in percentage terms, but this is largely an artifact of the manipulation of the quota phase-outs such that the vast majority of them expired at the midnight hour. Moreover, for all the histrionics of the textile producers, total textile imports into the United States were up only 8% between January and August 2005,\(^{21}\) while in Europe total textile imports actually fell nearly 10% in the first five months of 2005.\(^{22}\) Especially in the case of the United States, where numerous other textile exporters such as India and Bangladesh have also posted double-digit increases in their shipments to the American market this year, singling out China as the source of its textile industry’s woes because it is easy to impose safeguards against it reeks of China-bashing at a time when Sino-American relations are already under strain.

The use of these extraordinary measures against China is made all the more dispiriting by the relative insignificance of the textile industry to both the European and American economies. In the United States, the textile industry employed some 680,000 workers as of January 2005, of which all but 270,000 worked outside the garment sector most affected by the purported import surge.\(^{23}\) The entire textile sector thus represents one half of 1% of the total non-farm employment in the American economy, with the garment sector representing just two-tenths of 1%.\(^{24}\) These numbers must be further placed in the context of an American economy that has generated an average

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\(^{24}\) Author’s calculations using data from id.
of 167,000 net new jobs per month in 2005, despite the effects of the Gulf Coast hurricanes.  

Taken together with the generous adjustment assistance that European and American governments at all levels provide to workers who lose their jobs due to trade liberalization, and the substantial gains that would be achieved in consumer welfare and inflation control by finally allowing free trade in textiles, it is tremendously disappointing that the United States and the European Community have resorted to taking discriminatory measures against China, when both had ten years to prepare for a world without quotas.

It may be better for the Chinese to have the certainty and stability afforded by a three-year agreement rather than to be subjected to the capricious use of discriminatory safeguards by the Europeans and the Americans, but the great Chinese textile flap bodes ill for the successful completion of the Doha Round of trade talks launched in 2001, in which WTO members are attempting to tackle the far trickier issue of liberalizing trade in agriculture. Much more than with textiles during the Uruguay Round, the hopes of the developing world are riding on harnessing their massive natural comparative advantage in this sector to ride their way towards development and prosperity once trade in agriculture is liberalized.

For now, the developing world’s hopes have been delayed by the failure of WTO members to wrap up the round as per the original schedule at the December 2005 ministerial meeting in Hong Kong. These hopes will have been tragically misplaced, however, if the leaders of the world’s richest economies lack the courage to resist the powerful interest groups that will be arrayed against any change in the agricultural trade status quo. The disappointing performance of the two economic superpowers in managing the liberalization of the textile trade thus far does not inspire confidence in their ability to effectuate much greater changes to the fabric of the trade regime, which is unfortunate since confidence, unlike textiles, cannot be cut out of whole cloth.

Sudan’s Courts and Complementarity in the Face of Darfur. By Dawn Yamane Hewett.

On March 31, 2005, the U.N. Security Council made history by referring its first case, the mass atrocities in the Darfur region of Sudan, to the International Criminal Court (ICC). Soon after the ICC Prosecutor announced that he would open an investigation, the Sudanese government responded by establishing special criminal courts to try crimes committed in Darfur. This Recent Development assesses whether creation of these courts by Sudan means that the ICC may no longer try cases of this nature because of the complementarity provision in the Rome Statute. I proceed by reviewing the Darfur atrocities and the principle of complementarity, and conclude by identifying several issues that will be particularly important in determining whether Darfur cases will be tried before the ICC.

Violence in the impoverished Darfur region has raged since February 2003, when two local groups attacked government forces and installments, citing mistreatment of black African tribes by the Arab-dominated government. Khartoum has responded forcefully with a bloody campaign against civilians. Non-governmental organizations claim that the Sudanese government also sponsors self-organized militias, including the notorious Janjaweed. The violence has resulted in the deaths of an estimated 180,000 people in the first eighteen months and the displacement of approximately two million people throughout the harsh, arid region. Human rights groups have documented widespread rape, torture, murder, looting, and the destruction of entire villages. The United States has termed the campaign genocide. Early in 2004, a U.N. official declared the situation in Darfur the worst humanitarian crisis in the world.

In October 2004, in response to mounting international pressure, U.N. Secretary General Kofi Annan created the International Commission of Inquiry for Darfur to investigate alleged violations of international law and determine whether genocide was occurring. While the Commission declined to label the events as genocide, it reported in January 2005 that the government of Sudan, the Janjaweed, and rebel forces were all responsible for serious violations of law and sent the names of fifty-one individuals to the

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4. See Jeevan Vasagar & Ewen MacAskill, 180,000 Die from Hunger in Darfur, GUARDIAN UNLIMITED, Mar. 16, 2005, http://www.guardian.co.uk/Sudan/story/0,14658,1438471,00.html.
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U.N. Security Council for further action. The Commission further found the Sudanese government unable or unwilling to investigate and prosecute the crimes committed in Darfur, stating that "[t]he measures taken so far by the [Sudanese] Government to address the crisis have been both grossly inadequate and ineffective, which has contributed to the climate of almost total impunity for human rights violations in Darfur."

Building on the findings and recommendations of the Commission, the U.N. Security Council passed Resolution 1593 on March 31, 2005. The resolution invoked Article VII of the U.N. Charter, declaring the situation in Darfur a threat to international peace and security, and officially referred it to the ICC. The resolution further recognized that Sudan was not a State Party to the ICC, but required it nonetheless to "cooperate fully with and provide any necessary assistance to the Court and the Prosecutor pursuant to this resolution." The Sudanese Council of Ministers' reaction was apoplectic, pronouncing its "total rejection" of the ICC. Sudanese President Umar al-Bashir stated that Sudan would not hand over any nationals to the Court and reaffirmed Sudan's sovereignty and independence, its impartiality, and the competence of its judiciary.

After assessing the crimes and admissibility of the Darfur atrocities, ICC Prosecutor Luis Moreno-Ocampo announced on June 6, 2005 that he would open an investigation into crimes in Sudan. One week after this announcement, Sudan countered by establishing a domestic tribunal to try some 160 individuals suspected of war crimes. The Minister of Justice, Ali Mohamed Osman Yassin, declared the Sudanese court "a substitute to the International Criminal Court."

The Rome Statute creating the ICC entered into force on July 1, 2002. The Court began operating in March 2003, and, as of the date of the Darfur referral, had pending investigations in Uganda and the Democratic Republic of the Congo (DRC). The case of Darfur, however, differs significantly from Uganda and the DRC, both of which are State Parties to the Rome Statute and conferred jurisdiction upon the Court through self-referral. In contrast, the ICC obtained jurisdiction over the Darfur case only through the U.N. Security Council referral. Sudan maintains that one reason why the Court lacks jurisdiction is because it has not ratified the Rome Statute. However, under the

10. Id.
12. Id.
17. See National Courts Article, supra note 14.
18. Rome Statute, supra note 1, art. 13.
Rome Statute, U.N. Security Council referral obviated the need for territorial or personal jurisdiction through State Party status.\(^{20}\)

The Rome Statute stipulates that the ICC should be only "complementary to national criminal jurisdictions."\(^{21}\) Moreover, the Preamble of the Rome Statute also declares that "effective prosecution must be ensured by taking measures at the national level" and that "it is the duty of every State to exercise its criminal jurisdiction over those responsible for international crimes."\(^{22}\) Because these complementarity provisions apply to a U.N.-referred situation, the main challenge to the ICC's jurisdiction is Sudan's recent establishment of the special Darfur courts.

The complementarity provision is further codified in articles 17(1)(a)-(c) and 20(3) of the Rome Statute.\(^{23}\) These articles prevent the ICC from assuming jurisdiction over a case if: (1) the state having jurisdiction is investigating or has prosecuted the case; (2) the state has investigated, and then elected not to prosecute, an individual; or (3) the state has already tried the individual.\(^{24}\) However, there are important exceptions to this rule. Articles 17 and 20 further state that the ICC may prosecute if the State is "unwilling or unable" to prosecute "genuinely."\(^{25}\) The Rome Statute does not define what constitutes a "genuine" prosecution, but the drafting history indicates that the term allows for some subjectivity in determining the "unwillingness" of a state to prosecute.\(^{26}\) Section 2 of article 17 and section 3 of article 20 clarify that a state may be considered "unwilling" to prosecute, even if domestic trials are taking place, if the purpose of national proceedings is to shield individuals from criminal responsibility; if there was an unjustified delay in proceedings; if the proceedings were not independent or impartial, or if the proceedings failed to accord with international due process norms.\(^{27}\) Article 17, section 3 notes that a State may be "unable" to prosecute in the case of total or substantial collapse or unavailability of the judicial system.\(^{28}\)

In January 2005, the International Commission of Inquiry reported that Sudan had failed to demonstrate willingness to prosecute, a finding with which the UN Security Council and ICC Prosecutor agreed.\(^{29}\) However, these assessments predated the establishment of the Sudanese special courts in June 2005. Therefore, the Prosecutor must now show to the ICC Pre-Trial Chamber that the efforts by the Sudanese national courts are not genuine and that the ICC therefore may retain its jurisdiction over the case.\(^{30}\)

\(^{20}\) Rome Statute, supra note 1.
\(^{21}\) Id. art. 1.
\(^{22}\) Id. pmbl.
\(^{23}\) Id. art. 17(1)(a)-(c), 20(3).
\(^{24}\) Id.
\(^{25}\) Id.
\(^{27}\) Rome Statute, supra note 1, art. 17(2), 20(3).
\(^{28}\) Id. art. 17(3).
\(^{29}\) Sudan Report, supra note 9.
\(^{30}\) Article 19 of the Rome Statute allows both Sudan and any accused individuals to challenge the jurisdiction of the Court or the admissibility of the case on grounds referred to in article 17. Sudan has made declarations rejecting the Court, but whether Sudan has formally invoked complementarity in the method prescribed by the ICC Rules of Procedure and Evidence is unknown. Additionally, it is unclear which party would bear the burden of proving admissibility of the case.
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When the Sudanese government announced that it would conduct its own investigations, Antonio Cassese, former head of the Commission of Inquiry, asserted that “[t]hese [trials] will have no credibility. The country has no way to conduct proper trials, the whole judiciary is flawed.”

Similarly, human rights groups have been skeptical of Sudan’s motives. The Sudanese government insists that it is committed to the national proceedings. Chief Justice Jalal-Eddin Mohamed Osman of the specialized courts emphasized that the Sudanese judiciary is “capable, willing and committed to shoulder full responsibility in the establishment of justice and restoration of rights.”

The ICC should tread carefully. In judging Sudan’s willingness and ability to prosecute, the Court will be setting its first precedent. Also, one of the ICC’s stated goals is to encourage states to bring the guilty to justice themselves. Most importantly, very little evidence is readily available for a determinative assessment of Sudan’s “unwillingness” or “inability” to prosecute in a genuine manner. This is particularly apparent with respect to several issues that will be central to whether the ICC will retain jurisdiction.

One issue to view critically is the timing of the establishment of Sudan’s domestic courts. There is no question that, for over two years, Sudanese officials declined to act, even in the face of highly publicized reports of appalling atrocities, and that once Moreno-Ocampo made his announcement, the government reacted quickly by creating the domestic tribunal. These two elements—inaction followed by hasty action—may lend credence to the claim that the Sudanese court was only established to shield the accused from liability for their alleged crimes. However, if fair trials are held, one could argue that the ICC has fulfilled its mandate of fostering domestic accountability by prompting Sudan to take prosecution seriously. Consequently, rather than emphasizing the timing, the Prosecutor and Court should look most critically at the procedural and institutional features of the trials as they progress.

For example, because the Commission of Inquiry specifically implicated the current Khartoum government in atrocities committed in Darfur, any court established by this government will naturally be suspected of lacking the crucial elements of independence and impartiality. As an expert paper commissioned by the Office of the Prosecutor noted, “[c]ommonality of purpose between suspected perpetrators and state authorities involved in investigation, prosecution or adjudication . . . constitutes circumstantial

evidence for an inference of non-genuineness.” However, such circumstantial evidence alone will not be sufficient to form the basis of a compelling case for ICC prosecution.

A key factor to watch in determining the willingness to prosecute is the kind of crimes and individuals prosecuted. As of the end of November 2005, the Sudanese courts had convicted at least two Sudanese military members for the murder of a Darfur local whom they accused of complicity in the rebellion. Local groups assert, however, that the courts will only prosecute common law cases rather than crimes against humanity and war crimes. Human rights groups also point to the fact that none of the Sudanese governmental initiatives toward ending impunity for the accused thus far (including a national inquiry, investigatory committee, and the recently established tribunals) has resulted in the suspension, investigation, indictment, or prosecution of any mid to high-level civilian official, military commander, or militia leader.

If, as the prosecutions continue, there is a pattern of indictments for only common law crimes such as murder (rather than war crimes) and only low-level perpetrators, the ICC would have ample grounds for prosecution. In fact, this would be the perfect case of complementary prosecutions, with Sudan prosecuting a lower-level tier of perpetrators and crimes, and the ICC prosecuting select individuals accused of grave atrocities. However, if the Sudanese courts begin to indict high-level officials or prosecute individuals for international crimes, the case for ICC jurisdiction would be more difficult. In this case, the Prosecutor would need to inspect procedural and institutional features of the national trials to ascertain whether they were conducted independently, impartially, in accordance with due process, and without undue delay, political interference, or the express purpose of shielding culpable individuals.

As this is the first case of a Security Council referral of an uncooperative non-State Party to the ICC, there is no case law on complementarity in practice. Further investigations by the Prosecutor as to the institutional and procedural features of the Sudanese courts and their trials are in order. Richard Dicker of Human Rights Watch noted, “[w]ith Darfur, the court has moved into the big league and now the burden is on the prosecutor to produce . . . . Darfur certainly focuses attention in a way that the investigations in the Congo and Uganda have not.” Indeed, all eyes are on the Court.

35. Id. at 29.
37. Id.

On September 29, 2005, the International Criminal Tribunal for the Former Yugoslavia (ICTY) transferred the first mid-level accused war criminal, Radovan Stankovic, from the ICTY in The Hague to the Bosnian War Crimes Chamber in Sarajevo. This transfer, authorized under Rule 11 bis of the ICTY Rules of Evidence and Procedure, represents a landmark for both international criminal law and the national rule of law. The ICTY, one of the most effective supranational courts, particularly when compared to other ad hoc tribunals such as the International Criminal Tribunal for Rwanda, is slated to close its doors in 2010, before all of the mid- and lower-level accused are tried. The importance of successful transfers under Rule 11 bis is two-fold: these transfers are an integral part of realizing the ICTY’s completion strategy, and a key step in rebuilding the rule of law in a post-conflict situation.

Rule 11 bis of the ICTY Rules of Procedure and Evidence sets forth the specific terms of such transfers to national jurisdictions. A three-judge Referral Bench of the Trial Chambers can refer cases *propr"o motu* or at the request of the Prosecutor to state authorities in three different jurisdictions: the territory where the crime was committed, the territory where the accused was arrested, or another territory that has jurisdiction and is willing to accept the case. The territory where the crime was committed, i.e., the countries of the former Yugoslavia, will likely receive the majority of the transfers, both

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3. ICTY R.P. & EVID. 11 bis.
4. Thus far, ten defendants have been referred to national jurisdictions pursuant to Rule 11 bis, and one request for transfer has been denied (i.e. the “Vukovar Three”). ORG. FOR SEC. AND COOPERATION IN EUROPE, MISSION TO CROATIA, BACKGROUND REPORT ON DOMESTIC WAR CRIME PROSECUTIONS, TRANSFER OF ICTY PROCEEDINGS AND MISSING PERSONS 2 n.4 (2005), available at http://www.osce.org/documents/mc/2005/08/16067_en.pdf. Of these ten, however, only four are currently in detention centers in their national jurisdictions awaiting trial; six are still awaiting decisions of the ICTY Appeals Chamber on their transfer to the War Crimes Chamber in Bosnia.
5. ICTY R.P. & EVID. 11 bis.
6. *Id.* The Appeals Chamber found that there is no hierarchy of transfer within Rule 11 bis for transfers and that states have thus far been unable to establish any sort of hierarchy. “The Appeals Chamber holds that, where there are concurrent jurisdictions under Rule 11 bis (A)(i)-(iii) of the Rules, discretion is vested in the Referral Bench to choose without establishing any hierarchy . . . . A decision of the Referral Bench on the question as to which State a case should be referred (vertical level, i.e. between the International Tribunal and individual States) must be based on the facts and circumstances of each individual case in light of each of the prerequisites set out in Rule 11 bis (A) of the Rules.” Prosecutor v. Jankovic, Case No. IT-96-23/2-AR11bis.2, Decision on Rule 11 bis Referral, ¶ 33, (Nov. 15, 2005). Larry Johnson raises the question of fairness with respect to the trial of an accused under Rule 11 bis (A)(iii): “[I]t has also been asked whether it would be fair to subject an accused indicted by the Tribunal and arrested in the former Yugoslavia to a jury trial in a common law country, especially if neither the accused nor his counsel has any familiarity with that system.” Larry Johnson, *Closing an International Criminal Tribunal While Maintaining International Human Rights Standards and Excluding Impunity*, 99 AM. J. INT’L L. 158, 170 (2005).
because this will allow the citizens of the former Yugoslavia to observe justice firsthand and because the internationalized War Crimes Chamber is located in Sarajevo.

The Referral Bench will authorize a Rule 11 bis transfer only if it has received assurances that "the accused will receive a fair trial and that the death penalty will not be imposed or carried out," the "gravity of the crimes charged" is limited in geographic and temporal scope, and the "level of responsibility of the accused" is of the mid- or lower-level.\(^7\) To ensure a fair trial, Rule 11 bis allows the Referral Bench to revoke a transfer order, provided that the relevant national court has not reached a final decision.\(^8\) The standard of review for a competent national jurisdiction and for the determination of seniority have been set forth in two slightly different ways. While Rule 11 bis calls for a determination of a competent national jurisdiction prior to a determination of seniority, the ICTY Completion Strategy resolutions first assess the rank of the accused and then determine the competent national jurisdiction.\(^9\) In determining the existence of a competent national jurisdiction after assessing seniority, the Completion Strategy implicitly assumes that a competent national jurisdiction does, in fact, exist. Structurally, all of the Referral Bench decisions adopt this approach, determining seniority first, then jurisdiction, and then assessing the applicable laws.

The ICTY Referral Bench handed down its first Rule 11 bis decision in the case of Prosecutor v. Stankovic on May 17, 2005\(^10\) and a subsequent Appeals Chamber decision on September 1, 2005.\(^11\) The two-fold purpose of Rule 11 bis was reflected in the notably comprehensive decisions. First, the Referral Bench invoked established principles of international criminal law to confirm the legality of and procedures for Rule 11 bis transfers. This in-depth treatment should prevent future appeals on the same question, and allow the ICTY to continue trying only the senior-most accuseds. Second, the Bench set forth non-binding guidelines on the applicable laws in the domestic courts. These guidelines should strengthen the credibility of the first domestic decisions on war crimes, and facilitate the entrenchment of the rule of law in the Balkans. As Stankovic's trial at the War Crimes Chamber has not yet commenced, I focus here on the legality and requirements of Rule 11 bis.

The first critical step in establishing a solid legal foundation was the Appeals Chamber's review of Rule 11 bis's legality. The Appeals Chamber

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8. In particular, ICTY Rule 11 bis (F) stipulates that "[a]t any time after an order has been issued pursuant to this Rule and before the accused is found guilty or acquitted by a national court, the Referral Bench may, at the request of the Prosecutor and upon having given to the State authorities concerned the opportunity to be heard, revoke the order and make a formal request for deferral within the terms of Rule 10." ICTY R.P. & Evid. 11 bis (F).
concluded that the amendment to the ICTY Rules of Procedure and Evidence to include Rule 11 bis provided the necessary legal basis for transfer to national jurisdictions, relying on the established international law doctrines of functionalism and implied powers.\(^\text{12}\)

In the analysis of the Rule's legality, the Appeals Chamber did not have to decide on its power of self-review; this power is located in the principle of "kompetenz-kompetenz" as introduced in *Prosecutor v. Tadic.*\(^\text{13}\)

This power, known as the principle of "Kompetenz-Kompetenz" in German, is part, and indeed a major part, of the incidental or inherent jurisdiction of any judicial or arbitral tribunal, consisting of its “jurisdiction to determine its own jurisdiction.” It is a necessary component in the exercise of the judicial function and does not need to be expressly provided for in the constitutive documents of those tribunals.\(^\text{14}\)

Prior to the 1995 *Tadic* decision, *kompetenz-kompetenz* had traditionally been invoked by arbitral institutions in determining their authority. But since *Tadic*, the *kompetenz-kompetenz* principle has been applied or cited as precedent in numerous ICTY decisions and referenced in international criminal law literature.\(^\text{15}\) The decision in *Tadic* had the immediate effect of settling the question of the ICTY's jurisdiction and the long-term effect of establishing *kompetenz-kompetenz* as the principle that would enable self-review by international organizations. The impact of the *Tadic* decision on the *Stankovic* Appeals Chamber jurisdictional decision is clear: the Appeals Chamber was able to quickly conclude that it could review its own competence, and move to the issue of the implied power granting the Tribunal the right to transfer cases under Rule 11 bis.

The Appeals Chamber provided ample evidence that Rule 11 bis referrals were within the scope of the Tribunal's legal mandate and implicitly approved by the UN Security Council.\(^\text{16}\)

And even if the explicit authority to conduct such transfers from the Tribunal to national jurisdictions is not given to the Tribunal by the Statute itself, the interpretation of Article 9 of the Statute... has been backed by Security Council resolutions... The Tribunal judges amended Rule 11 bis to allow for the transfer of lower or mid-level accused to national jurisdictions pursuant to the Security Council’s recognition that the Tribunal has implicit authority to do so under the Statute.\(^\text{17}\)

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12. *Id.* ¶ 14-17. The concept of implied powers was first introduced in the International Court of Justice's 1949 *Reparation for Injuries* advisory opinion, which stated: "Under international law, the Organization must be deemed to have those powers which, though not expressly provided in the Charter, are conferred upon it by necessary implication as being essential to the performance of its duties." *Reparations for Injuries Suffered in the Service of the United Nations, Advisory Opinion, 1949 I.C.J. 174, 182, 184 (Apr. 11).

13. This was the first case tried before the ICTY and the first time that the principle of *kompetenz-kompetenz* was applied to a jurisdictional decision in an international criminal law tribunal.


Although the Security Council did not explicitly endorse the creation of Rule 11 bis in any of its resolutions, it has consistently recognized the transfer strategy and its various components (including Rule 11 bis transfers). This consistent recognition provides legal grounds for the transfer of cases; there was no need to explicitly modify the rules. The Chamber’s emphasis on this recognition was necessary in order to prevent future appeals on these same grounds.

The concept of implied powers, which enables international organizations to exercise rights that are not expressly enumerated in their founding charters, assumed even greater importance in the Appeals Chamber’s ruling on the boundaries of the Referral Bench’s powers. The boundaries of implied powers are central to the determination of responsibilities allocated between the Prosecutor and the Referral Bench. This determination hinges on a practical analysis of reasonableness and necessity. The Appeals Chamber gives the Referral Bench fairly wide discretion in its activities as long as they are “reasonably related” and necessary to achieving the end goal of transferring accuseds to domestic jurisdictions under Rule 11 bis.

Employing this test, the Appeals Chamber found that the Referral Bench can order the Prosecutor to report in six months on case developments, but that it cannot order the Prosecutor to enter into agreements with international organizations for trial monitoring. The Chamber distinguishes between these two tasks via the argument that the latter exceeds necessity and reasonableness. The Prosecutor has the inherent authority to decide whether or not to enter into agreements with international organizations, and, according to the Chamber, there is no reasonable justification for the Referral Bench to tread into this authority. This decision, however, risks being criticized as arbitrary. An argument can easily be made that ordering the Prosecutor to enter into trial monitoring agreements is necessary for the determination of whether the trial is fair prior to transfer of the accused.

The resolution of these jurisdictional and implied powers questions in the first Rule 11 bis case raises key questions for future referrals. All of the other Rule 11 bis referral decisions—with the exception of the joint indictment of Rahim Ademi and Mirko Norac—have been appealed. How will these appeals affect the Completion Strategy? At a practical level, they will delay decisions of the Appeals Chamber regarding senior-level accuseds being tried at the ICTY. On a theoretical level, they could further complicate the fair trial of accuseds and the successful execution of the Completion Strategy.

When the Referral Bench stipulates the court to which the accused should be transferred, it does so after concluding that the court will provide a fair trial for the accused. However, what happens if the accused is then extradited or transferred to a different state, and no ruling as to a fair trial is

18. A number of UN resolutions request updates on the status of Rule 11 bis transfers, see, e.g., S.C. Res. 1534, supra note 7, ¶ 6, and both Carla del Ponte and Ted Meron have addressed the Security Council on the ICTY’s progress in executing the Completion Strategy. There has never been any objection to Rule 11 bis transfers as a means of delegating part of the ICTY caseload.

made? If the ICTY is still in operation, the Tribunal can exercise its Chapter VII primacy and request that the accused be returned to The Hague pursuant to Rule 11 bis and Article 10 of the Statute. But this would have the effect of delaying the scheduled closure of the ICTY past 2010 and delaying the establishment of the rule of law in the former Yugoslavia.

Taking this one step further, what happens if these events unfold after the ICTY has been shut down? The ICTY can invoke authority under its Chapter VII-based primacy and return the case to the ICTY, but no national court—not even the War Crimes Chamber—has any authority to request that a case be returned to the War Crimes Chamber if it is transferred elsewhere.

It is now abundantly clear that the Referral Bench and Appeals Chamber decisions that led to Stankovic’s transfer closed the door to inquiries about the validity of transfer and the scope of the Referral Bench’s powers, only to open the door to some very difficult questions. Does the ICTY have the power to transfer cases to national jurisdictions? If so, from where is this power derived? How are implied powers allocated between the Prosecutor and the Referral Bench? The challenge now is for these questions to be promptly answered by the Appeals Chamber so that the transfer and trial of accuseds may proceed smoothly. In many respects, the continued success of the ICTY and the prospects for internationalized domestic courts depend on meeting this challenge.

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