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THE EFFECTIVENESS OF THE EXERCISE OF JURISDICTION BY THE INTERNATIONAL CRIMINAL COURT: THE ISSUE OF COMPLEMENTARITY

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CONTENTS

ABBREVIATIONS

ICC	International Criminal Court
ICJ	International Court of Justice
ICTY	International Criminal Tribunal for the Former Yugoslavia
ICTR	International Criminal Tribunal for Rwanda
ILC	International Law Commission
IMT	International Military Tribunal at Nuremberg
IMTFE	International Military Tribunal for the Far East at Tokyo
UN	United Nations
UNWCC	United Nations War Crimes Commission

Foreword

The establishment of a permanent international criminal tribunal has been lingering on the international agenda since the conclusion of the Nuremberg trials. Various abortive drafting efforts were undertaken, but they were frustrated by the lack of a genuine desire on the part of states to assign jurisdiction in relation to certain crimes to the international level of governance. However the emergence of violent ethnopolitical strife in the former Yugoslavia and in Rwanda, and the establishment of *ad hoc* international tribunals addressing those two cases, finally generated a strong impetus towards the creation of a permanent International Criminal Court at the turn of the century.

This renewed interest in international criminal jurisdiction coincided with the consolidation in international law of several related legal concepts. The increasing acceptance of genuine universality of jurisdiction in relation to certain crimes with international implications, the acceptance of a greater international interest and role in the prosecution and suppression of practices like ethnic cleansing and genocide and the greater use of national courts to pursue suspected offenders extraterritorially all contributed to a climate that made the establishment of a permanent court possible.

The Rome Statute for an International Criminal Court that emerged is, however, not free of contradictions and tensions, revealing the still ambiguous views of governments in relation to the international exercise of jurisdiction in relation to individuals. Ms Farbstein, in her working paper, which is based on a thesis submitted in the University of Cambridge, provides for the first time a comprehensive analysis of one of the main areas where this governmental unease became most manifest in the negotiations: the issue of complementarity.

Through her close analysis of the different stages of the drafting process leading up to the adoption of the Rome Statute, Ms Farbstein reveals not only the underlying tension between governmental pretensions of sovereign rights and the need to establish a truly independent and effective international court. This work also illuminates the opportunities and obstacles that the Tribunal will face when it comes into operation.

In view of the strong interest of ECMI in the suppression of practices that have characterized recent ethnopolitical conflict in Europe, also through international criminal law, the Centre is particularly pleased to have been given the opportunity to publish this highly original contribution as a working paper. It is hoped that a consolidated and finalized version, amended in the light of comments that might be engendered, will appear in the *European Yearbook of Ethnopolitics and Minority Issues* in due course.

Marc Weller
ECMI Director
1 August 2001

THE EFFECTIVENESS OF THE EXERCISE OF JURISDICTION BY THE INTERNATIONAL CRIMINAL COURT: THE ISSUE OF COMPLEMENTARITY[1]

Susan Hannah FARBSTEIN

INTRODUCTION

The prevalence of collective violence and the agony of mass atrocity may prove to be the twentieth century's most distressing and enduring legacies. From Germany to Uganda, from Cambodia to Sierra Leone, from the Former Yugoslavia to Rwanda, the past hundred years are replete with examples of terrifying violations of human rights and humanitarian law committed against diverse groups of people. Limited attempts to unveil the truth about past horrors, to hold individuals responsible, and to deter future offenses have repeatedly proven inadequate. A dearth of satisfactory moral and legal responses to these crimes often left victims suffering without any sense of reconciliation, while perpetrators routinely enjoyed impunity rather than facing justice.

Mass atrocity and violations of human rights present such deliberate and pervasive affronts to human dignity that standard moral assessment and the application of criminal law may seem both inappropriate and inadequate. Hannah Arendt eloquently questioned the possibility of defining the Nazi defendants at Nuremberg as "criminally guilty" because, as she wrote, the crimes seemed to "explode the limits of the law; and that is precisely what constitutes their monstrousness. For these crimes, no punishment is severe enough. It may well be essential to hang Goring, but it is totally inadequate. That is, this guilt, in contrast to all other criminal guilt, oversteps and shatters any and all legal systems."[2] Yet over the past century, the response to war crimes, genocide, and violations of human rights has often been an attempt to prosecute those deemed culpable. In these cases, a desire to protect State sovereignty and national criminal jurisdiction frequently clashed with

[1] The author gratefully acknowledges the support and guidance of her academic supervisor while at the Centre of International Studies in the University of Cambridge, Mr Marc Weller.

[2] Letter from Hannah Arendt to Karl Jaspers, quoted in Gary Jonathan Bass, "War Crimes and the Limits of Legalism," *Michigan Law Review*, Vol. 97, no. 6, May 1999, p. 2104.

the impetus to hold genuine international prosecutions. Consequently, although selected perpetrators were tried for their offenses in World Wars I and II, a permanent International Criminal Court was never established. However, with the end of the Cold War and the erosion of State sovereignty, the rapidly changing international environment led to shifts in public opinion and State policy. This facilitated the creation of two *ad hoc* international tribunals under United Nations auspices to try individuals accused of crimes committed in the Former Yugoslavia and Rwanda. Increasingly, the morally heinous nature of genocide, war crimes, and violations of human rights led the international community to claim a collective right to prosecute the perpetrators. An international system cognizant of a shared interest in seeking justice offered the opportunity to establish a permanent International Criminal Court to prosecute and punish individuals responsible for these atrocious crimes.

This thesis will explore the controversial issue of complementarity and the related tension between the International Criminal Court and national jurisdictions through a detailed analysis of the negotiations preceding, States' positions regarding, and the final language of the Rome Statute adopted in 1998. The critical question of complementarity exposes a major underlying rift in international law, between establishing meaningful collective jurisdiction over the most serious crimes of international concern, and the competing desire to maintain and protect State sovereignty. Until the twentieth century, States claimed competence to exercise supreme sovereignty over all subjects inside their territory, and many powerful States did so without the risk of external intervention. No constraints restricted this authority beyond those freely contracted into by the State. However, in the final decade of the twentieth century, a post-modern international constitutional approach emerged that privileges collective community interests favoring justice over State sovereignty. Traditional views of State sovereignty were increasingly deemed inappropriate or irrelevant to many pressing issues in international relations. As a result, States are no longer understood to be the sole repository for public authority. Instead, it may be more pertinent to envision a layering of authority at different levels of the international system.[3] A central issue for international criminal law has therefore become at what level the functions and duties of the international community will be exercised. Thus, the struggle over the definition and application of

[3] Credit for this idea is due to discussions with Marc Weller.

complementarity in the Rome Statute of the International Criminal Court can be interpreted as a response to the question of where authority will reside in the international system.

Within this context, four different approaches to the issue of complementarity, as embodied in various draft Statutes for an International Criminal Court, can be differentiated. The first position, reflecting a classical view of State sovereignty, minimizes the role of international society and community interests in criminal justice. From this perspective, if an International Criminal Court were created, it could only exist with the explicit consent of States and under rigid limitations imposed by States, and would function as an organ of those States specifically affected. Thus, an International Criminal Court would not so much complement national jurisdictions, in the sense of working in tandem with them to render justice, but would rather be a direct extension of national jurisdictions and function under their control and on their behalf. A second approach adopts an intermediate view. While the primary layer of authority continues to reside with States, an international constitutional interest in investigating and prosecuting fundamental crimes is simultaneously recognized. Thus, an international court would function when States prove unable or unwilling to fulfill their obligations to deliver justice. In this sense, an International Criminal Court would complement national systems when they fail to render justice, and would supplement and complete, rather than impose upon, national efforts. A third, broader approach, acknowledges core crimes of such horrendous character that the international community has an overwhelming interest in punishing the perpetrators. These core crimes would certainly include genocide, and might be extended to include war crimes, crimes against humanity, and aggression. For such crimes, authority could be exercised and justice rendered either at the national level by States or at the international level by a permanent criminal court. Therefore, an international court would complement national systems to the extent that while primacy would rest with national courts, justice for core crimes could be delivered at either the national or the international level. Finally, a fourth approach locates primary authority for international criminal justice at the international layer. This configuration already exists, for limited circumstances, in the form of the *ad hoc* tribunals for the Former Yugoslavia and Rwanda. Under such a jurisdictional regime, national systems complement international courts, rather than the reverse.

Complementarity manifests itself through three primary issues in the draft Statutes and Rome Statute of the ICC. Each will be analyzed in subsequent chapters in order to better understand the evolution of complementarity and the jurisdictional regime of the Court. The first emanation of complementarity is subject matter jurisdiction, which defines the crimes that the Court will be granted authority to prosecute. Throughout the Statute drafting process, the broadness of the Court's subject matter jurisdiction was highly contested. Predictably, willingness to permit the Court greater reach in its subject matter jurisdiction often generated resistance from States attempting to preserve national primacy. In the Rome Statute, the ICC was granted limited subject matter jurisdiction over the most serious crimes of international concern, specifically genocide, war crimes, and crimes against humanity, as well as the crime of aggression. Narrowing the Court's subject matter jurisdiction was considered necessary in order to create a regime of complementary jurisdiction. Although States retain primacy in international criminal prosecutions, the Court can intervene in cases of grave violations of international concern.

Complementarity also emerges in the preconditions to the exercise of jurisdiction by the Court, specifically the mechanisms for triggering ICC jurisdiction. Throughout the drafting process, divergent views were offered about whether States Parties, the Security Council, an independent Prosecutor, or some combination thereof should be allowed to initiate proceedings. Although it was generally agreed that any State Party could trigger jurisdiction given the serious nature of the crimes, some States feared that permitting the Security Council to trigger the Court's jurisdiction would politicize the Court and make it little more than a tool manipulated by the great powers. In contrast, others argued that the only way to assure an active role for the Court was to allow the Security Council to trigger the ICC's jurisdiction when individual States proved unwilling. Similarly, some States worried that an overzealous or politically motivated Prosecutor might lead to abuses of power. Others asserted that granting the Prosecutor independence would secure a viable and effective Court, as State complaints and Security Council referral might prove insufficient to allow the ICC to operate on behalf of the entire international community. Unless the Prosecutor could trigger the Court's jurisdiction, the reluctance of State Parties to make complaints and a potential Security Council veto might hinder referrals of appropriate cases. Thus, establishing preconditions to the exercise of jurisdiction by the Court would become a necessary step in creating a

regime of complementarity that could successfully balance concerns for State sovereignty against the imperative of meaningful international justice.

Complementarity also appears in the methods for State consent and acceptance of the Court's jurisdiction**.** Three different models for State acceptance were considered throughout the drafting process. The broadest is a constitutional model for all crimes within the subject matter jurisdiction of the Court, based upon universal jurisdiction. Under this regime of State consent, even if only a few States sign the treaty bringing the ICC into existence, the Court is still understood to have objective personality over all States. Because each State, individually, has the right to try core crimes without the consent of any other State, this right could be pooled and collectively granted to the ICC. Thus, the Court might exercise its jurisdiction in any given case without the specific consent of States. A variation of this model would apply universal jurisdiction only to the crime of genocide based upon the terms of the Genocide Convention, which specifically outlines the creation of an International Criminal Court to try perpetrators of genocide. A second approach to the issue of State consent is inherent jurisdiction. Under this system, a State would automatically accept the jurisdiction of the Court over core crimes by becoming Party to the Statute through ratification. This approach was often considered in tandem with a categorization of States whose consent would be required for the ICC to investigate and prosecute. Although delegations disagreed as to whether this list should be disjunctive or conjunctive, types of States on the list variously included the territorial State, the State of nationality of the accused, the State of nationality of the victim, and the custodial State. Thus, if one or a combination of these States were a Party to the Statute, under inherent jurisdiction the Court could act without securing any additional specific State consent. The third and most restrictive model for State acceptance is a specific consent model, also known as an "opt-in" regime. Like inherent jurisdiction, this regime would work in conjunction with categories of States that must accept the Court's jurisdiction. However, in the case of specific consent, even after a State ratifies the treaty it would still have to specifically accept the Court's jurisdiction either *ad hoc* on a case-by-case basis, or once to accept ICC jurisdiction over a restricted category of crimes. Thus, the question of what model of State consent to adopt was crucially linked to the regime of complementarity that would emerge. Although States feared handicapping the Court by creating requirements for State acceptance that were unduly restrictive, they simultaneously

worried that accepting a constitutional approach might grant the Court excessive authority to act independently of States, rather than complementing national jurisdictions.

The widely divergent interpretations and approaches to these interconnected issues demonstrate the importance of the struggle over the meaning and practical implementation of complementarity, which may determine whether the International Criminal Court becomes a powerful tool in the search for international criminal justice, or merely a weak and inactive institution. Will complementarity allow the Court to effectively detain, prosecute, and convict the most horrendous violators of human rights and humanitarian law at the international level? Or will the specter of State sovereignty compromise or even incapacitate the operation of the ICC, sabotage its ability to render meaningful justice, and thus undermine the rule of international law itself? Such crucial questions can only be answered with reference to the Court's jurisdictional regime based upon complementarity. This thesis therefore explores the principle of complementarity as it developed and was finally enshrined in the Rome Statute. The first chapter outlines the relevant historical background to the permanent Court by examining prior twentieth century international tribunals. The second chapter then traces the evolution of the provisions regarding complementarity by considering chronologically four different draft Statutes for the ICC. The third chapter evaluates complementarity as enshrined in the Rome Statute through a detailed analysis of the drafting process and the final language of the relevant articles. Finally, the conclusion summarizes significant implications for justice in the current international system that can be derived from this examination of complementarity.

CHAPTER ONE: THE LONG ROAD TO ROME

Introduction

The Rome Statute of the International Criminal Court was adopted on July 17, 1998 with a non-recorded vote of 120 states in favor, seven opposed, and 21 abstentions.[4] Over the preceding five weeks, 160 countries, 33 intergovernmental organizations, and 236 non-governmental organizations participated in discussions, drafting, and debates which led to the formulation of the Rome Statute, which will come into force when 60 States ratify the Treaty.[5] However, the development of a permanent International Criminal Court was a process which extended for over a century, and which moved in fits and starts towards the current incarnation of the Court.

Laying the Foundation: Leipzig, Nuremberg, and Tokyo

Between 1919 and 1994, there were five *ad hoc* international investigative commissions,[6] four *ad hoc* international criminal tribunals,[7] and three internationally mandated national prosecutions arising out of World Wars I and II.[8] However, in most of these cases the aim of pursuing justice by independent, effective, and fair methods was compromised in deference to realpolitik goals. From the turn of the century through 1945, the major obstacles to a permanent International Criminal Court were assumptions about State sovereignty supporting the exclusive competence of States over criminal matters, and a lack of consensus about whether such a Court could help prevent war. As a result, the consensus necessary to fully develop a functioning system of international justice was lacking.

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[4] Although the vote was not recorded, it is widely agreed that those voting in opposition were China, Iraq, Israel, Libya, Qatar, the United States, and Yemen.

[5] As of July 15, 2001, there are 139 signatories and 35 ratifications.

[6] Commission on the Responsibility of the Authors of War and on the Enforcement of Penalties (1919), United Nations War Crimes Commission (1943), Far Eastern Commission (1946), Commission of Experts Established Pursuant to Security Council Resolution 780 to Investigate War Crimes and Other Violations of International Humanitarian Law in the Former Yugoslavia (1992), Independent Commission of Experts Established Pursuant to Security Council Resolution 935 to Investigate Grave Violations of Humanitarian Law in the Territory of Rwanda (1994).

[7] International Military Tribunal at Nuremberg (1945), International Military Tribunal at Tokyo (1946), International Criminal Tribunal for the Former Yugoslavia (1993), International Criminal Tribunal for Rwanda (1994).

[8] Prosecution by the German Supreme Court Pursuant to Allied requests on the Treaty of Versailles (1921-23), Prosecution by the Four Major Allies in the European Theater Pursuant to Control Council Law Number 10 (1946-55), Military Prosecution by Allied Powers in the Far East Pursuant to the Directives of the Far Eastern Commission (1946-51).

At the end of World War I, the Commission on the Responsibility of the Authors of the War and on the Enforcement of Penalties, established by the victorious Allies, investigated and reported upon the culpability of the defeated nations. The Commission determined that individuals, regardless of their rank, could be tried for violations of the laws and customs of war and the laws of humanity. As such, the Commission proposed an international tribunal to prosecute "all enemy persons alleged to have been guilty of offenses against the laws of war, customs of war, and laws of humanity."[9] Article 227 of the Treaty of Versailles thus provided for the creation of a special *ad hoc* tribunal to try Kaiser Wilhelm II for "the supreme offense against international morality and the sanctity of treaties"[10] committed by initiating the war, while Articles 228 and 229 provided for prosecution before Allied military tribunals of German military personnel accused of violating the laws and customs of war. However, the Netherlands refused to extradite the Kaiser, thereby blocking his trial. The German government objected to the list of alleged war criminals submitted by the Allies, and eventually assumed jurisdiction to prosecute at Leipzig. The results were unsatisfactory because Allied political will to pursue justice quickly faded, as did public interest in prosecutions, and domestic political concerns as well as the future of peace in Europe were prioritized over justice for past atrocities. In the final analysis,

> [t]he Allies' pursuit of German war criminals invited disaster: it made the Allies look vindictive and weak; it divided America and Britain and France from each other; it showed that Germany could get away with failing to comply to the Treaty of Versailles; it kept wartime passions from cooling; and worst of all, it galvanized the German right and thus helped to undermine democracy in the Weimar Republic.[11]

Those responsible for the killing of 600,000 Armenians in Turkey during the war also went unpunished. In 1923, the Treaty of Sevres called for the trial of perpetrators of this crime against humanity, but debates about whether to prosecute a crime which

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[9] Leila Sadat, "The Establishment of the International Criminal Court: From the Hague to Rome and Back Again," *Journal of International Law and Practice*, Vol. 8, no. 1, Spring 1999, p. 103 [hereinafter Sadat].
[10] Sadat p. 103.
[11] Gary Jonathan Bass, *Stay the Hand of Vengeance: The Politics of War Crimes Tribunals* (Princeton, NJ: Princeton University Press, 2000) pp. 104-105 [hereinafter Bass].

some Allies perceived as not clearly established in international law prevented the adoption of the treaty. The Bolshevik Revolution in Russia prompted fears among the Allies that Turkey would also be lost to the Communism, and the subsequent Treaty of Lausanee granted clemency to those responsible for the atrocities to regain favor in the region.[12]

During the interwar period, interest in creating a permanent International Criminal Court grew, as did enthusiasm for the notion that individuals could be held accountable for violating international law. The original concept for the League of Nations' Permanent Court of International Justice included a proposal for a parallel High Court of International Justice to try individuals for international crimes "constituting a breach of international public order or against the universal law of nations."[13] Although the International Law Association debated proposals for the creation of this court, no final conclusions or recommendations were reached. In 1937, the Convention for the Prevention and Punishment of Terrorism was paired with the first general multilateral agreement for the creation of an International Criminal Court. Yet with World War II looming when the convention was adopted, the treaty to establish a court was never ratified by the signatories.[14]

Efforts to create international tribunals continued with the Second World War and proved significantly more successful. As early as 1941, the London International Assembly called for the creation of an international court to prosecute war criminals. The Allies outlined their goals in the Saint James Declaration of 1942, which noted that "the sense of justice of the civilized world" required "the punishment, through the channel of organized justice, of those guilty or responsible" for the crimes of World War II.[15] In 1943, the United Nations War Crimes Commission was created to investigate crimes and propose the format of a court.[16] As victory grew imminent, the Allied leaders declared that Germans who were "responsible for, or have taken a consenting part in the...atrocities, massacres, and executions, will be sent back to the

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[12] Matthew D. Peter, "The Proposed International Criminal Court: A Commentary on the Legal and Political Debates Regarding Jurisdiction that Threaten the Establishment of an Effective Court," *Syracuse Journal of International Law and Commerce*, Vol. 24, Fall 1997, pp. 181-182.
[13] Paul D. Marquardt, "Law Without Borders: The Constitutionality of an International Criminal Court," *Columbia Journal of Transnational Law*, Vol. 33, no. 1, 1995, p. 80 [hereinafter Marquardt]. Bryan F. MacPherson, "Building and International Criminal Court for the 21st Century," *Connecticut Journal of International Law*, Vol. 13, no. 1, Winter 1998, p. 7 [hereinafter MacPherson].
[14] Marquardt pp. 80-81.
[15] MacPherson p. 8.
[16] Marquardt p. 81.

countries in which their abominable deeds were done in order that they may be judged and punished according to the laws of these liberated countries and of the free governments which will be created therein."[17] Although many within the United States, Britain, and the Soviet Union initially called for summary executions of German war criminals, in the end a legal approach led to the creation of the International Military Tribunal at Nuremberg.

Justice Robert Jackson, in his opening statement at Nuremberg, underlined the significance of the effort when he noted, "That four great nations, flushed with victory and stung with injury, stay the hand of vengeance and voluntarily submit their captive enemies to judgment of the law is one of the most significant tributes that Power has ever paid to Reason."[18] Although the tribunal is often remembered as a product of Allied horror and outrage about the Holocaust, in fact "America and Britain, the two liberal countries that played major roles in deciding what Nuremberg would be, actually focused far more on the criminality of Nazi aggression than on the Holocaust."[19] The tribunal was constituted by an international agreement, the London Accord, signed by the four Allied powers. The purpose was to try "war criminals whose offenses have no particular geographic location, whether they be accused individually or in their capacity as members of organizations or groups."[20] The subject matter jurisdiction included crimes against peace or waging a war of aggression, war crimes, and crimes against humanity, based upon the assumption that these were crimes of international concern. The justices themselves noted that the Charter establishing the tribunal was

> not an arbitrary exercise of power on the part of victorious nations, but in the view of the Tribunal... it is the expression of international law existing at the time of its creation.... The Signatory Powers created this Tribunal, defined the law it was to administer, and made regulations for the proper conduct of the trial. In doing so, they have done together what any one of them might have

[17] Bass p. 149.
[18] Telford Taylor, *The Anatomy of the Nuremberg Trials* (Boston, MA: Little, Brown, and Company, 1992) p. 167.
[19] Bass p. 148.
[20] Sadat p. 105.

> done singly; for it is not to be doubted that any nation has the right thus to set up special courts to administer law.[21]

The justices at Nuremberg thus perceived themselves to be exercising universal jurisdiction over "acts universally recognized as criminal, which [are] considered a grave matter of international concern and for some valid reason cannot be left within the exclusive jurisdiction of the State that would have control over it under ordinary circumstances."[22] The Tribunal was also grounded upon territorial jurisdiction, in that it was created by the occupying powers at a time when they had assumed the sovereign functions of the German State under the terms of unconditional surrender. It also rested on a type of extraterritorial jurisdiction, as many of the accused were tried for crimes committed abroad.[23]

One crucial legacy of Nuremberg was the decision that individuals, including heads of State and those acting under orders, could be held criminally responsible under international law. As the judgment noted, "crimes against international law are committed by men, not by abstract entities, and only by punishing individuals who commit such crimes can the provision of international law be enforced."[24] By establishing individual accountability for these crimes, the justices at Nuremberg explicitly rejected the argument that State sovereignty can be used as a defense for unconscionable acts, even when those actions are cloaked by the authority of the State. The judgment additionally affirmed the primacy of international law over national law, asserting

> that international law imposes duties and liabilities upon individuals as upon States has long been recognized.... The very essence of the [Nuremberg] Charter is that individuals have international duties which transcend the

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[21] Virginia Morris and Michael P. Scharf, *An Insider's Guide to the Criminal Tribunal for the Former Yugoslavia* (Irvington-on-Hudson, NY: Transnational Publishers, Inc., 1995) pp. 37-38 [hereinafter Morris and Scharf].

[22] Christopher C. Joyner, "Arresting Impunity: The Case for Universal Jurisdiction in Bringing War Criminals to Accountability," *Law & Contemporary Problems*, Vol. 59, no. 4, 1996, p. 167 [hereinafter Joyner].

[23] Michael P. Scharf, "The International Criminal Court's Jurisdiction Over the Nationals of Non-Party States," *The United States and the International Criminal Court: National Security and International Law*, Sarah B. Sewall and Karl Kaysen, eds. (New York, NY : Rowman & Littlefield Publishers, Inc., 2000) pp. 228-229 [hereinafter Scharf].

[24] Marcus R. Mumford, "Building Upon A Foundation of Sand: A Commentary on the International Criminal Court Treaty Conference," *Journal of International Law and Practice*, Vol. 8, no. 1, Spring 1999, p. 159 [hereinafter Mumford].

> national obligations of obedience imposed by the individual state. He who violates the laws of war cannot obtain immunity while acting in pursuance of the authority of the State, if the State in authorizing action moves outside its competence under international law.[25]

The fact that actions were permitted or even required under domestic law provided neither excuse nor justification for a violation of international law. Nazi leaders were tried for acts committed against their own citizens as well as for atrocities committed as an occupying power. This was the first clear legal demonstration that both individuals and States are responsible under international law for acts that may fall within a State's national jurisdiction. Additionally, the charge of waging an aggressive war brought a traditionally sovereign right of States under the purview of international criminal law.[26] In contrast to the strong legacy of Nuremberg, the Far Eastern Commission and Tokyo Tribunal that followed World War II were highly politicized. Unlike the Nuremberg Charter, this tribunal was based upon a military order issued by the commanding officer of the Allied armed forces. The tribunal itself was fraught with procedural irregularities and marred by abuses of judicial discretion. Defendants were chosen on the basis of political criteria rather than criminal behavior, and their trials were generally perceived to be unfair.

The trials held at the conclusion of both World Wars demonstrate the benefits and weaknesses of international prosecutions, as well as the difficulty of establishing a tribunal to confront gross violations of human rights and humanitarian law. At the conclusion of World War I, political considerations undermined moral and legal obligations, resulting in embarrassing impunity for perpetrators. Although interest in creating a permanent criminal court grew during the interwar period, political realities and the desire to protect State sovereignty superceded legalist aspirations. The Nuremberg Tribunal after World War II, based upon universal jurisdiction over crimes which shocked the conscience of mankind, set a new standard for future international criminal prosecution by establishing individual criminal responsibility for heinous violations of international law. But despite such notable progress, no permanent tribunal resulted from the legacy of Nuremberg. In fact, the world would

[25] Sadat p. 106.
[26] Marquardt p. 82.

wait over half a century before another *ad hoc* international criminal tribunal was convened.

Choosing Justice After Atrocity: The International Criminal Tribunals for the Former Yugoslavia and Rwanda

With the end of the Cold War and the intensification of globalization, more universal norms concerning fundamental human rights emerged and were clearly articulated as worthy of protection. As consensus began to form supporting standards that States should uphold within their own borders and with respect to their own population, State sovereignty was necessarily weakened. In the waning years of the twentieth century, intense and detailed media coverage of atrocities, combined with new support within the UN Security Council, fueled the imperative for justice in cases of massive violations of human rights. After nearly fifty years without an international criminal prosecution, the ethnic cleansings committed in the Former Yugoslavia and Rwanda over the first half of the 1990s, and the international community's inadequate response to these atrocities, provided the impetus for the formation of two new international criminal courts.

The International Criminal Tribunal for the Former Yugoslavia was established in 1993,[27] and the International Tribunal for Rwanda in 1994.[28] Both were created through UN Security Council Resolutions as *ad hoc* organs in response to specific threats to international peace and security, and both have a limited territorial and temporal jurisdiction.[27] [28] [29] These tribunals constitute international judicial interventions and enforcement mechanisms under Chapter VII of the UN Charter. Dual legal bases supported the Security Council in establishing these tribunals. In both cases, the Security Council recognized the existence of a threat to international peace and security under Article 39 of the UN Charter. Additionally, the Security Council found that, in the terms of Articles 2(7) and 41 of the UN Charter, the establishment of subsidiary organs to perform judicial functions was necessary to

[27] Security Council Resolution 827, UN SCOR, 48th Sess., 3217th mtg., UN Doc. S/RES/827, 1993.
[28] Security Council Resolution 955, UN SCOR, 49th Sess., 3453rd mtg., UN Doc. S/RES/955, 1994.
[29] The ICTY can investigate and prosecute conduct occurring since January 1, 1991 in the territory of the Former Socialist Federal Republic of Yugoslavia, while the ICTR can examine breaches of international humanitarian law that occurred in Rwanda between January 1, 1994 and December 31, 1994.

maintain and restore international peace and security.[30] Some critics believe that the creation of these tribunals under Chapter VII "means that the legal justifications for the establishment of the Tribunal rests not on the inherent value of enforcing the law or upholding justice, but on the decision of the Council that the creation of the Tribunal will contribute to the restoration of international peace and security."[31] Yet establishing the tribunals through Security Council Resolutions offered important advantages. It provided an expeditious method avoiding time-consuming negotiations and ratification of a treaty. The Security Council was able to act relatively quickly on the basis of reports by the Secretary-General, and the decision to form a tribunal under Chapter VII became effective immediately and created binding obligations for all UN Member States, as outlined in Articles 25 and 103 of the UN Charter.[32] Moreover, by establishing *ad hoc* tribunals through Security Council Resolutions, Member States emphatically asserted an emerging international consensus supporting international criminal jurisdiction for the grossest violations of human rights. Like the Nuremberg Tribunal, the ICTY and ICTR represent a collective exercise of the universal jurisdiction of States, which in creating the tribunals "acted not as individual States on their own behalf, but as Member States of the UN Security Council acting on behalf of the international community." [33]

Both *ad hoc* tribunals are based upon a system of concurrent jurisdiction between national and international courts. As UN Secretary-General Kofi Annan explained, "it was not the intention of the Security Council to preclude or prevent the exercise of jurisdiction by national courts with respect to such acts. Indeed, national courts should be encouraged to exercise their jurisdiction in accordance with the relevant national laws and procedures."[34] The Security Council noted that "the aim was solely to stimulate national courts to exercise their existing jurisdiction."[35] The primacy of the *ad hoc* tribunals does not prevent national courts from exercising

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[30] Catherine Cisse, "The International Tribunals for the Former Yugoslavia and Rwanda: Some Elements of Comparison," *Transnational Law and Contemporary Problems*, Vol. 7, no. 1, Spring 1997, p. 106 [hereinafter Cisse].
[31] J. Oppenheim and W. van der Wolf, *Global War Crimes Tribunal Collection, Volume II: The Yugoslav Tribunal* (Nijmegen, The Netherlands: Wolf Global Legal Publishers, 1999) p. 15 [hereinafter Oppenheim and van der Wolf].
[32] Morris and Scharf p. 42.
[33] Scharf p. 225.
[34] Immi Tallgren, "Completing the International Criminal Order," *Nordic Journal of International Law*, Vol. 47, no. 2, 1998, p. 117 [hereinafter Tallgren].
[35] Tallgren p. 117.

jurisdiction, but rather grants the international tribunals the authority to decide whether to supercede a national court in a given case. Thus, concurrent jurisdiction outlined in ICTY Article 9 and ICTR Article 8 is subject to the primacy of the international tribunal. At any stage, the international tribunal may request that national courts defer to the *ac hoc* tribunal's competence in order to assure that minimum standards of justice and impartial adjudication will be met.

> The term "primacy" was used in an attempt to convey a somewhat complicated notion of jurisdictional hierarchy in which States were encouraged to assume a substantial portion of the responsibility for the prosecution and the trial of the apparently large number of perpetrators of reported atrocities, while at the same time preserving the inherent supremacy of the jurisdiction of the International Tribunal which may need to be asserted for various reasons in particular cases—not in the usual sense of reviewing the decisions of "lower" courts but rather to exercise jurisdiction in the first instance as a trial court.[36]

The primacy of the ICTY and ICTR is thus a discretionary power to be exercised by the tribunals, not an obligation. Although the primacy of the ICTY and ICTR does compromise State sovereignty, this was tolerated because the *ad hoc* tribunals were created in response to specific threats to peace and security and are temporary institutions with a strictly limited reach. "All cases within the jurisdiction of the *ad hoc* tribunals involve fundamental humanitarian interests of concern to the international community as a whole.... Each of the *ad hoc* tribunals was created to address a threat to international peace and security—the maintenance of which is the primary purpose of the UN."[37] Primacy was also accepted because of its advantages in potentially providing more uniformity in the legal process and because the jurisdiction of all States would be subject to the same limitations. The statutes of the ICTY and ICTR, which recognize that national courts have concurrent jurisdiction but endow the international tribunals with primacy, thus represent the "high water mark for the priority of international criminal tribunals over national courts."[38]

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[36] Morris and Scharf p. 126.

[37] Bartram S. Brown "Primacy or Complementarity: Reconciling the Jurisdiction of National Courts and International Criminal Tribunals." *The Yale Journal of International Law*, Vol. 23, no. 2, Summer 1998, pp. 407-408 [hereinafter Brown].

[38] Brown p. 385.

However, the *ad hoc* tribunals have been criticized on various grounds, including the fact that as creations of the Security Council, they are subject to political vagaries that influence that body. Thus, "no matter how successful the *ad hoc* tribunals may be at dealing with specific crisis situations, their selective creation and narrow focus creates an impression of unfairness and unequal treatment."[39] Many observers view the ICTY and ICTR as politically biased institutions because of their origins and dependence upon the world's great powers for support. This is perhaps the tribunals' greatest weakness, as demonstrated by the difficulty of arresting indicted criminals and a lack of meaningful recourse when States refuse to participate. The critical problem lies in "the reluctance of the Security Council and its key members to take stronger action to arrest indictees and to sanction states that fail or refuse to cooperate" with the tribunals.[40]

Despite these shortcomings, the very existence of these tribunals sends "a powerful message. Their Statutes, rules of procedure and evidence, and practice stimulate the development of the law. The possible fear by States that the activities of such tribunals might preempt national prosecutions could also have the beneficial effect of spurring prosecutions before national courts for serious violations of humanitarian law."[41] Moreover, although the tribunals are a Security Council creation, they are not instruments designed to render victors' justice. The ICTY and ICTR were established by the world's great powers, rather than by the military or political victors of the conflicts. Thus, one may question the fairness of establishing tribunals to try the criminals in these conflicts while neglecting to pursue perpetrators in, for example, Cambodia or Sierra Leone, due to political considerations. However, the integrity of the tribunal processes in the pursuit of justice is not so easily criticized. In fact, the demonstrable fairness of the trials helped mitigate fears about an overreaching permanent ICC. "Rules of precedent and procedure bounded ICT actions almost to a fault... but proved that an international tribunal could exercise 'ordinary law in extraordinary circumstances.' "[42] Although the ICTY and ICTR have

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[39] Brown p. 386.
[40] Brown p. 433.
[41] Theodor Meron, "International Criminalization of Atrocities," *American Journal of International Law*, p. 555 [hereinafter Meron].
[42] Sarah B. Sewall, Carl Kaysen, and Michael P. Scharf, "The United States and the International Criminal Court: An Overview," *The United States and the International Criminal Court: National Security and International Law*, Sarah B. Sewall and Karl Kaysen, eds. (New York, NY : Rowman & Littlefield Publishers, Inc., 2000) p. 6 [hereinafter Sewall, Kaysen, and Scharf].

suffered from delays which result from the genuine exercise of due process, they have been strictly managed by rules of precedent and procedure, thereby supporting legalism**.** Yet this moral strength has also proven a practical weakness:

> While the Allies in World Wars I and II sat in judgment because of the morally arbitrary fact of having won a war, their wartime anger and bitterness could as a matter of crude politics be translated into a resolute desire to punish the war criminals, to translate change into right. No so for the ICTY. None of the great powers in 1993 were seriously committed to the punishment of ex-Yugoslav war criminals. The punishment of Axis war criminals was a matter of first order for the Allies; the punishment of ex-Yugoslav war criminals weighed heavily on Bosnian minds, but not on those of American and European diplomats. So the Hague tribunal was more pure than its predecessors, but also far weaker.[43]

Thus, the very existence and limited successes of the ICTY and ICTR, coupled with their *ad hoc* character and Security Council creation, and the difficulty of recruiting prosecutors and judges, securing facilities, financing their activities, and obtaining custody of suspects, emphasized the need for a permanent court.

The Road to Rome

The road to the Rome Conference of 1998 extends back fifty years, to the conclusion of World War II. In 1948, with the recent Nuremberg experience as an impetus, the Convention on the Prevention and Punishment of the Crime of Genocide demanded the creation of an international tribunal to try persons charged with genocide. If the accused could not be prosecuted before a court of the State in which the act was committed, they would be judged "by such international penal tribunals as may have jurisdiction with respect to those Contracting Parties which shall have accepted its jurisdiction."[44] That same year, the UN General Assembly requested the International Law Commission undertake a study of the desirability and feasibility of

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[43] Richard J. Goldstone and Gary Jonathan Bass, "Lessons from the International Criminal Tribunals," *The United States and the International Criminal Court: National Security and International Law*, Sarah B. Sewall and Karl Kaysen, eds. (New York, NY: Rowman & Littlefield Publishers, Inc., 2000) p. 51.

[44] Jelena Pejic, "Creating a Permanent International Criminal Court: The Obstacles to Independence and Effectiveness," *Columbia Human Rights Law Review*, Vol. 29, no. 2, Spring 1998.

establishing a permanent International Criminal Court. The ILC concluded in 1950 that an International Criminal Court was both possible and potentially valuable, prompting the General Assembly to establish a Committee on International Criminal Jurisdiction. This committee, composed of 17 Member States, was charged with preparing concrete proposals for such a Court, and in 1951 submitted a first draft Statute, which was revised and amended in 1953.

However, the draft Statute was never adopted due to a lack of political consensus.

Throughout the 1950s, numerous States objected to an International Criminal Court fearing it would undermine national sovereignty, interfere with domestic affairs of Member States in violation of UN Charter Article 2(7), and infringe upon the role of the International Court of Justice as well as the Security Council.[45] [46] The 1953 draft Statute was tabled until a Draft Code of Offenses over which the proposed court would have jurisdiction could be considered. Although this document was submitted in 1954, it failed to define the crime of aggression, so the process was again postponed until aggression could be precisely delimited. Four separate committees considered the question of aggression between 1952 and 1974, and a definition was eventually adopted by the General Assembly in 1974.[46] However, the process again stalled due to lack of political will among UN members. The unique circumstances that made Nuremberg possible, most notably a broadly supported coalition that decisively defeated an obvious aggressor who had violated the laws of war and humanity, never recurred, which minimized the opportunities for creating a new Court. Throughout the latter half of the twentieth century, the establishment of an International Criminal Court was seen as a threat to national security and State sovereignty in the context of the Cold War, and gross abuses of innocent civilian populations were therefore generally ignored in international legal arenas due to pragmatic political considerations.[47]

In 1989, a General Assembly request for a report on international criminal jurisdiction over drug trafficking was creatively expanded by the ILC to address the creation of an International Criminal Court.[48] The ILC provisionally adopted a draft

[45] Marquardt p. 85.
[46] M. Cherif Bassiouni, "From Versailles to Rwanda in 75 Years," *Harvard Human Rights Journal*, Vol. 10, Spring 1999, p. 53 [hereinafter Bassiouni].
[47] Morris and Scharf p. 14.
[48] Sadat p. 111.

Code of Crimes in 1991, thereby circumventing potential controversy by disconnecting the draft Code of Offenses Against the Peace and Security of Mankind from the proposed Court. The project gained momentum after the creation of the ICTY and ICTR, which emphasized the need for and potential government support of a permanent Court. An Ad Hoc Committee was thus established to critique the ILC draft and prepare a report that would become the basis for the work of the Preparatory Commission for the Establishment of an International Criminal Court. The PrepComm was open to all UN members, and by 1997 prepared a consolidated text to be considered by a conference of the plenipotentiaries. This document was issued in April 1998, and provided the basis for the negotiations at Rome that led to the expeditious adoption of the Rome Statute. After this long, circuitous route, a Statute for a permanent International Criminal Court was finally adopted.

CHAPTER TWO: THE EVOLUTION OF COMPLEMENTARITY

Introduction

A fundamental issue facing the drafters of the Rome Statute was the role the ICC would play relative to national courts. The prevailing view was that the Court should complement rather that supplant national jurisdictions, yet defining this precise relationship would prove both politically sensitive and legally complex. While many States supported establishing a permanent International Criminal Court, they remained reluctant to create any organ that would impinge upon national sovereignty. This tension was especially cogent because under existing international law, the right to prosecute crimes within the Court's subject matter jurisdiction rests with States, many of which resisted challenges by the actions of an international body. However, other States and non-governmental organizations believed the Court should have a broader role, including opportunities to intervene whenever national courts were unable to fulfill their obligations or proved ineffective in rendering meaningful justice. The juxtaposition of these competing visions, one favoring an international constitutional approach that privileges collective community interests, the other favoring State sovereignty in criminal proceedings, defined the on-going debate about complementarity and the meaning of international justice. In order to evaluate these positions, this chapter will trace the evolution of the provisions regarding complementarity by considering chronologically the draft Statute of the 1953 Commission on International Criminal Jurisdiction, the 1994 report and draft Statute of the International Law Commission, the comments of delegations to the Ad Hoc Committee in 1995, and finally the decisions and draft Statute of the Preparatory Committee from 1996 through 1998. These drafts were selected because they represent significant and revealing efforts in the campaign to create a workable Statute for an International Criminal Court. In each phase of the drafting process, the delegations examined complementarity as expressed in subject matter jurisdiction, preconditions to the exercise of jurisdiction, and State consent and acceptance of jurisdiction. Throughout this chapter, the focus will be upon the process and techniques used to manage the tension between demands for genuine criminal justice and the imperative to protect State sovereignty.

The 1953 Commission on International Criminal Jurisdiction

In the aftermath of World War II, and following the success of Nuremberg and the inadequacies of Tokyo, the UN General Assembly realized that "in the course of development of the international community, there will be an increasing need of an international judicial organ for the trial of certain crimes under international law."[49] The Committee on International Criminal Jurisdiction therefore convened to review an existing draft Statute from 1951 for the creation of a permanent International Criminal Court. Member States at the time conceded that

> in the present stage of international relations and international organization, any attempt to establish an international criminal jurisdiction would meet with insurmountable obstacles. As an ultimate objective an international criminal court would be desirable, but at the present time would do more harm than good. The rigid maintenance of criminal justice was likely to endanger the maintenance of peace.[50]

Although the view that justice would contribute to building and sustaining peace eventually prevailed, concerns voiced in 1953 continued to echo throughout the next fifty years. The debate between States favoring an active Court vested with significant authority at the international level, and those preferring a Court that would not impair State sovereignty and national jurisdiction, would be repeated each time the opportunity to create an International Criminal Court arose.

In the 1953 discussions, many Member States not only proved unwilling to sacrifice any degree of sovereignty to international jurisdiction, they also doubted the existence of an international community of States that would support a permanent International Criminal Court. During the drafting stages, it became necessary to clarify explicitly that "no Member, by participating in the deliberations of the Committee and by voting on any principle of draft text, would commit his government to any of the decisions which might eventually be adopted."[51] As this reservation indicates, protection of traditional State sovereignty was a recurrent and

[49] Committee on International Criminal Jurisdiction, Report of the 1953 Committee on International Criminal Jurisdiction, 27 July to 20 August, 1953, UNGAOR, 9th Sess., Supp. No. 12, A/2645, 1954, p. 1 [hereinafter Report of the 1953 Committee on International Criminal Jurisdiction].
[50] Report of the 1953 Committee on International Criminal Jurisdiction p. 3.
[51] Report of the 1953 Committee on International Criminal Jurisdiction p. 3.

central theme. Many States felt the effort to create an effective International Criminal Court was futile:

> Present international law was based on relations among States. The Charter of the UN was also based thereon. International criminal jurisdiction over individuals, therefore, did not fit within the present set-up of the UN. An international criminal court presupposed an international community with the power necessary to operate the Court, and such power did not exist. A surrender of some present State sovereignty would be the condition for the establishment of the Court, and such surrender was highly unlikely. Therefore, the Court would be powerless, and its establishment would be an empty gesture.[52]

Some delegations therefore asserted that the United Nations should proceed no further in attempting to establish a Court, presuming that most States would be unwilling to compromise sufficient sovereignty to create a functional organ for international justice.

> In contrast, other Members emphasized
> that modern international law was beginning to recognize the individual as a subject possessing rights... and also possessing duties. In the judgment of Nuremberg, it was decided that those duties transcended even obligations to the national State. The moral obligation of living up to the principles of the post-war judgments, and the undeniable fact of the existence of a common standard of norms to be applied... made international criminal jurisdiction desirable, and it should be promoted by establishing the possibility of such international criminal jurisdiction as far as present inter-State relations would permit.[53]

Thus, some States did favor establishing a Court, albeit one with jurisdiction dependent upon their voluntary consent. The five essential qualities of stability, permanence, independence, effectiveness, and universality were identified as mandatory for the Court's success. These States recognized that "it was useless and

[52] Report of the 1953 Committee on International Criminal Jurisdiction p. 4.
[53] Report of the 1953 Committee on International Criminal Jurisdiction p. 4.

even dangerous to create a court of inferior quality, which would not have an adequate measure of any of these characteristics.... It was better to have no international criminal court than a second-rate one."[54] But again, in a debate that was to be revisited throughout the next half-century, other States felt that it would be impossible to establish a Court capable of meeting these aspirations and therefore preferred a reasonable compromise. These States thought it "unrealistic to insist upon perfection at the outset. In the present rather primitive stage of inter-State relations, an international criminal jurisdiction which would not reach the level of domestic jurisdictions would be adequate. All legal institutions needed time to grow and develop."[55] Therefore, some maintained that "international criminal jurisdiction, on the basis of a very modest beginning, should be given a chance to grow. It was better to create a court with imperfect powers and limited competence than to create none at all."[56]

Once the Committee decided that it would pursue a draft Statute for an International Criminal Court, questions of subject matter jurisdiction became a central point of contention. For example, one issue was whether to grant the Court jurisdiction over national crimes of international concern. Belgium and France argued "that it would be useful to provide expressly that a State could, if it deemed it appropriate in certain cases of great legal and political complexity, give the international court the jurisdiction which would normally be exercised by domestic courts."[57] However, this proposal was rejected because the concept of "crimes under national law of international concern" was too vague, and "to give the Court power to deal with crimes under national law would make the Statute less acceptable to States which were susceptible on the subject of their domestic jurisdiction."[58] Another controversial question was how to ensure that the Court would not be given jurisdiction over offenses that only one State or a small group of States viewed as international crimes. Some participants argued that the Court should address only crimes that were clearly defined in conventions because customary international law was not sufficiently developed to be applied by the Court. They believed that "only this restriction could ensure that the Court would serve its proper function of trying

[54] Report of the 1953 Committee on International Criminal Jurisdiction p. 4.
[55] Report of the 1953 Committee on International Criminal Jurisdiction p. 4.
[56] Report of the 1953 Committee on International Criminal Jurisdiction p. 4.
[57] Report of the 1953 Committee on International Criminal Jurisdiction pp. 8-9.
[58] Report of the 1953 Committee on International Criminal Jurisdiction p. 9.

offenses which could not be brought before national courts. If the Court were given the possibility of having broader competence conferred upon it... States would be very adverse to creating the Court."[59] Other representatives found such restrictions unnecessary, because the "conferment of jurisdiction [by States] on the Court was a surrender of sovereignty which would not be made lightly or in fields where the law was not developed."[60]

Debate over questions regarding State acceptance of jurisdiction led to a draft Statute that prioritizes State sovereignty above international criminal prosecutions. The Statute envisions the Court acting only when States specifically consent to its jurisdiction, and lacking exclusive jurisdiction over the crimes covered by the Statute. Article 26 of the draft Statute directly addresses the "Attribution of Jurisdiction." Its first paragraph asserts that "Jurisdiction of the Court is not to be presumed,"[61] thus highlighting the fact that no State will be bound by the jurisdiction of the Court unless that State specifically confers jurisdiction upon the Court by means of a convention, special agreement, or unilateral declaration.[62] Automatic conferral of jurisdiction by a State becoming Party to the Statute was not an acceptable option. Rather, "it was agreed that the Court, once created, would have no jurisdiction whatever unless States should confer that jurisdiction by means of an appropriate indication of intent."[63] Moreover, as reflected in the draft Statute, a State is not bound to bring specific cases before the Court after conferring jurisdiction upon it. Instead, a State could still choose to bring cases before its own national courts. As the third paragraph of Article 26 reads, "Conferment of jurisdiction signifies the right to seize the Court."[64] Thus, although the international Court could gain jurisdiction over a particular crime if a State so desires, the mere conferment of jurisdiction will not guarantee this result. Moreover, the phrasing of the article is unambiguously intended "to avoid any implication that if a State conferred jurisdiction on the Court, that jurisdiction would

[59] Report of the 1953 Committee on International Criminal Jurisdiction p. 9.
[60] Report of the 1953 Committee on International Criminal Jurisdiction p. 9.
[61] Revised Draft Statute for the International Criminal Court, Committee on International Criminal Jurisdiction, Report of the 1953 Committee on International Criminal Jurisdiction, 27 July to 20 August, 1953, UNGAOR, 9th Sess., Supp. No. A/2654, 1954, Article 26(1) [hereinafter Revised Draft Statute for the International Criminal Court, Committee on International Criminal Jurisdiction].
[62] Report of the 1953 Committee on International Criminal Jurisdiction pp. 13-14.
[63] Report of the 1953 Committee on International Criminal Jurisdiction p. 13.
[64] Revised Draft Statute for the International Criminal Court, Committee on International Criminal Jurisdiction, Article 26(3).

have to be exclusive rather than concurrent."[65] Paragraph four of Article 26 further dictates that "unless otherwise provided for in the instrument conferring jurisdiction upon the Court, the laws of a State determining national criminal jurisdiction shall not be affected by that conferment."[66] State sovereignty is also favored in Article 27, addressing the "Recognition of Jurisdiction," which reads, "No person shall be tried before the Court unless jurisdiction has been conferred upon the Court by the State or States of which he is a national and by the State or States in which the crime is alleged to have been committed."[67] This statement clearly intends to protect State sovereignty by assuring that no trial involving a review of national policy proceeds without State consent. The article also seeks to prevent conflicts of jurisdiction between the International Criminal Court and national jurisdictions. Although some States argued that this provision is an unnecessary limitation upon the activity of the Court, the Committee judged this requirement an essential safeguard without which the Statute was unlikely to be acceptable to many States. Because the State where a crime is committed has a primary interest in punishment of that crime due to a violation of its peace and order, that State's consent is deemed a necessary precondition for the trial of an accused.[68] Finally, it is assumed that States, rather than the Security Council or an independent Prosecutor, will have authority to trigger the Court's jurisdiction. Article 29, entitled "Access to the Court," outlines that "proceedings before the Court may be instituted by a State which has conferred jurisdiction upon the Court over such offenses as are involved in those proceedings."[69] As the draft Statute existed in 1953, authority to refer a case to the Court rests solely with States themselves, not with the United Nations or with the Court's Prosecutor.

Although the term "complementarity" never appeared in this draft Statute, as early as 1953, the principle that would be known as complementarity in the 1998 Rome Statute was developing. As can be seen in the interrelated articles on the Court's attribution of jurisdiction, recognition of jurisdiction, and access to the Court, an initial effort was underway to reach a functional compromise that could create an

[65] Report of the 1953 Committee on International Criminal Jurisdiction p. 14.
[66] Revised Draft Statute for the International Criminal Court, Committee on International Criminal Jurisdiction, Article 26(4).
[67] Revised Draft Statute for the International Criminal Court, Committee on International Criminal Jurisdiction, Article 27.
[68] Report of the 1953 Committee on International Criminal Jurisdiction p. 15.
[69] Revised Draft Statute for the International Criminal Court, Committee on International Criminal Jurisdiction, Article 29.

institution with both adequate powers and sufficient State support to operate effectively, but not unduly impinge upon State sovereignty. If an International Criminal Court was created at this juncture, it would be an organ of those States affected, who would hold sole authority to refer cases to the Court, and whose specific consent would be required before the Court could exercise its own jurisdiction. Additionally, the Court would require consent of both the State of nationality of the accused and the territorial State before an individual could be tried. Thus, the approach of the 1953 draft Statute reflects an effort to preserve classical notions of State sovereignty. The balance of the proposed articles favors upholding traditional sovereignty at the expense of creating a collective international instrument that might provide a mechanism for prosecuting the most egregious offenders of human rights and humanitarian law. States proved unwilling to compromise their national sovereignty so soon after the Second World War and the creation of the United Nations. Lacking faith in the power of the international community to support an International Criminal Court, States preferred to protect their sovereign rights rather than defer to international criminal proceedings. The Committee on International Criminal Jurisdiction approached the relationship between national and international jurisdiction by maintaining State primacy.

The 1994 International Law Commission

The relationship between national courts and a potential International Criminal Court remained an unresolved issue at the 46th Session of the International Law Commission. Some members envisaged a Court that would "supplement rather than supercede national jurisdiction," while others felt the ICC should serve as an "option for prosecution when the States concerned were unwilling or unable to do so," and yet a third group argued for granting the Court limited inherent jurisdiction over core crimes.[70] Three different approaches to complementarity were thus considered by the ILC. The first mirrors the system created in 1953, with the Court acting as an organ of States and only with their specific consent, reflecting a traditional conception of State sovereignty. A second suggestion offers an intermediate approach that acknowledges an international constitutional interest in seeing crimes prosecuted.

[70] Report of the International Law Commission on the work of its forty-sixth session, 2 May to 22 July, 1994, UNGAOR, 46th Sess., Supp. No. 10, A/49/10, 1994, para. 50 [hereinafter Report of the International Law Commission].

While the primary responsibility to act continues to rest with States, the Court can assume jurisdiction when States prove unable or unwilling to proceed. A third, broader approach, recognizes certain crimes for which an overwhelming international interest exists, and therefore grants the Court authority to prosecute through a type of inherent jurisdiction. Paralleling many of the discussions held in 1953, various members of the ILC noted "the care required to draft an instrument that would be generally acceptable to States and provide for the establishment of a viable and effective institution."[71] The ILC hoped to successfully balance the concerns of States against the impetus to create a functional Court. There was considerable debate as to whether the previous draft Statute "was not sufficiently international or universal in its conception of the Court," perhaps granting "too much prominence to inter-State relations rather than a direct relationship between the individual and the international community."[72] In contrast, other States felt the Commission should carefully "take into account current international realities, including the need to ensure coordination with the existing system of national jurisdiction and international cooperation, [and] that the establishment and effectiveness of the Court required the broad acceptance of the Statute by States which might require limiting its scope."[73] The tension between these two opposing views persisted as the ILC attempted to create a Court with sufficient authority to uphold international criminal law, while simultaneously protecting national sovereignty to garner the Court support from numerous States.

Preconditions to the exercise of jurisdiction and State acceptance of jurisdiction remained contentious. As noted in the ILC commentary, Part Three of the draft Statute addressing jurisdiction "limits the range of cases which the Court may deal with, so as to restrict the operation of the Statute to the situations and purposes referred to in the preamble."[74] This was intended to secure the Court broader State support by minimizing threats to national jurisdiction and State sovereignty. The jurisdictional strategy of the ILC draft Statute was to distinguish between participation in and general support for the operation of the Court, versus specific State acceptance of the exercise of jurisdiction. In revising the articles related to jurisdiction, some

[71] Report of the International Law Commission para. 45.
[72] Report of the International Law Commission para. 48
[73] Report of the International Law Commission para. 48.
[74] Draft Statute for the International Criminal Court, Report of the International Law Commission on the work of its forty-sixth session, 2 May to 22 July, 1994, UNGAOR, 49th Sess., Supp. No. 10, A/49/10, 1994, Commentary to Part Three [hereinafter Draft Statute for the International Criminal Court, Report of the International Law Commission].

members emphasized the importance of obtaining consent from the custodial State to ensure the presence of the accused at a trial, as well as the territorial State to facilitate the investigation and collection of evidence. Others felt that this requirement was unduly restrictive and could prevent the Court from functioning and thereby facilitate impunity.[75] With regard to preconditions for the exercise of jurisdiction, the ILC draft departs from previous draft Statutes by distinguishing genocide from all other crimes in Article 21. The Court is granted inherent jurisdiction over genocide when a complaint is brought by a State Party that is also a contracting Party to the Genocide Convention.[76] Thus, the Court will not require consent from other States Parties in order to prosecute the crime of genocide. However, some delegations preferred that authority for criminal justice rest at a national level, and thought the Statute excessive in granting inherent jurisdiction over even genocide because "in the present state of the international community, the Court's jurisdiction should be entirely consensual."[77] Despite such objections, Article 21 is a significant step away from previous arguments privileging State sovereignty, and towards international community efforts to deliver justice for the most egregious violations of international law. The paragraph on genocide demonstrates a new willingness to permit authority for criminal justice to be administered at the international level. However, State sovereignty still remained a powerful force, as evidenced by the fact that with respect to all other crimes, the Court can only act with consent from both the custodial State and the territorial State.[78] Yet some members of the Commission, again willing to compromise a degree of sovereignty in the interests of a more effective Court, expressed dissatisfaction with this consent-based system which they found "likely to frustrate [the Court's] operation in many cases, and even to make the quest for an international criminal jurisdiction nugatory."[79]

With regard to State acceptance of jurisdiction, some members preferred an opt-out approach, questioning the value of becoming a State Party without accepting the Court's jurisdiction. They argued that such a system could create an inefficient

[75] Report of the International Law Commission para. 67.
[76] Draft Statute for the International Criminal Court, Report of the International Law Commission, Article 21(1)(a).
[77] Draft Statute for the International Criminal Court, Report of the International Law Commission, Commentary to Part Three.
[78] Draft Statute for the International Criminal Court, Report of the International Law Commission, Article 21(1)(b).
[79] Draft Statute for the International Criminal Court, Report of the International Law Commission, Commentary to Part Three.

and weak institution.[80] Others favored an opt-in approach that emphasizes the importance of States' voluntary consent to the jurisdiction of the Court by distinguishing acceptance of the Statute from acceptance of the Court's jurisdiction in specific cases or for limited categories of crimes. This approach recognizes the Court's dependence upon State cooperation and the need to limit the Court's jurisdiction to cases where national courts are unable or unwilling to proceed, again reinforcing traditional notions of State sovereignty. The final draft Statute grants jurisdiction in Article 22 under such an "opt-in" system.[81] Jurisdiction is not conferred automatically by a State becoming Party to the Statute, but rather requires a separate declaration, which can be general in character or limited to specific crimes. "A State Party to this Statute may: (a) At the time it expresses its consent to be bound by the Statute, by declaration lodged with the depositary; or (b) At a later time, by declaration lodged with the Registrar; accept the jurisdiction of the Court."[82] If the consent of a non-Party State is required for a given case, that State can submit a declaration granting acceptance of jurisdiction on an *ad hoc* basis. The draft Statute is intended to ensure "that the Court will be complementary to national criminal justice systems in cases where such trial procedures may not be available or may be ineffective."[83] Thus, although the Court will be empowered to act when national jurisdictions fail to fulfill their obligations, the adoption of the opt-in approach clearly demonstrates that State sovereignty remains balanced against calls for international justice.

The principle of complementarity is given a central position in the preamble of the 1994 ILC draft Statute in an effort to resolve some of the persistent tensions between State sovereignty and international criminal justice. The third paragraph of the preamble notes that the Court is "intended to be complementary to national criminal justice systems in cases where such trial procedures may not be available or may be ineffective."[84] The final phrase, "or may be ineffective," clearly emphasizes the ILC's belief that the International Criminal Court's jurisdiction should extend

[80] Report of the International Law Commission para. 61.
[81] Draft Statute for the International Criminal Court, Report of the International Law Commission, Article 22.
[82] Draft Statute for the International Criminal Court, Report of the International Law Commission, Article 22(1).
[83] Draft Statute for the International Criminal Court, Report of the International Law Commission, Commentary to Part Three.
[84] Draft Statute for the International Criminal Court, Report of the International Law Commission, Preamble.

beyond those occasions when national courts simply fail to function, to encompass situations where national jurisdictions might be unwilling to fulfill their obligation to genuinely render justice. As the commentary to this article outlines, the Court is particularly "intended to operate in cases where there is no prospect of those persons being duly tried in national courts. The emphasis is thus on the Court as a body which will complement existing national jurisdictions and existing procedures for international judicial cooperation in criminal matters and which is not intended to exclude the existing jurisdiction of national courts."[85] Although respecting State sovereignty remained a primary goal of the ILC, the principle of complementarity allows the authority of the Court to be expanded. In this context, the role of international society in criminal prosecutions is broadened.

Under the principle of complementarity, the ILC believed that the Court could exercise jurisdiction where a national system failed. This provides the underlying premise of Article 35 of the draft Statute, which addresses the admissibility of cases. According to Article 35, a case may be inadmissible before the ICC

> on the ground that the crime in question:
>
> (a) Has been duly investigated by a State with jurisdiction over it, and the decision of that State not to proceed to a prosecution is apparently well-founded;
>
> (b) Is under investigation by a State which has or may have jurisdiction over it, and there is no reason for the Court to take any further action for the time being with respect to the crime; or
>
> (c) Is not of such gravity to justify further action by the Court.[86]

This article allows the Court itself to decide when a case is admissible, and is based upon the suggestions of States hoping to limit the Court's authority. The first two subparagraphs ensure that the primary layer of responsibility for international criminal justice will be retained by States, and that an international interest in seeing crimes prosecuted only comes into effect when States fail to act. Subparagraph C is explained "in terms of assuring that the Court would deal solely with the most serious

[85] Draft Statute for the International Criminal Court, Report of the International Law Commission, Commentary to the Preamble.
[86] Draft Statute for the International Criminal Court, Report of the International Law Commission, Article 35.

crimes, [and that] it would not encroach on the functions of national courts."[87] As demonstrated by this Article, the ILC approach does provide criteria for the Court's intervention, even in cases where national authorities are acting. However, primacy still rests with States, rather than with the international organ. The responsibility for determining when to assume jurisdiction is placed with the Court in Article 24, which notes that the Court "must satisfy itself that it has jurisdiction in any case brought before it."[88] The presumption is clearly that the Court will defer to national jurisdictions as long as there is no compelling reason to do otherwise. However, by allowing the Court to determine when a case will be admissible before it, a measure of State sovereignty is compromised in order to better ensure the delivery of international justice.

It is important to note the complex interrelationship between the different articles in this draft Statute, and the way in which the articles work together to create a regime of complementarity that limits the Court's jurisdiction. The preamble emphasizes that the Court is intended to exercise narrow jurisdiction "only over the most serious crimes of concern to the international community as a whole," and is to be "complementary to national criminal justice systems in cases where such trial procedures may not be available or may be ineffective."[89] The remainder of the Statute, most specifically Part Three concerning jurisdiction, works to assure these terms are met. Article 20 grants the Court subject matter jurisdiction over genocide, aggression, war crimes, crimes against humanity, and treaty crimes that "constitute exceptionally serious crimes of international concern."[90] By carefully restricting subject matter jurisdiction exclusively to core crimes, the preconditions to the exercise of jurisdiction can be made slightly more flexible. The provisions in Article 21 consequently grant jurisdiction to the Court over genocide without the specific consent of any interested State. However, an important constraint is placed on the Court in this context, because the Court can exercise its jurisdiction over genocide only if "a complaint is brought under Article 25, paragraph 1."[91] According to this

[87] Report of the International Law Commission para. 50.
[88] Draft Statute for the International Criminal Court, Report of the International Law Commission, Article 24.
[89] Draft Statute for the International Criminal Court, Report of the International Law Commission, Preamble.
[90] Draft Statute for the International Criminal Court, Report of the International Law Commission, Article 20.
[91] Draft Statute for the International Criminal Court, Report of the International Law Commission, Article 21(1)(a).

article, "a State Party which is also a Contracting Party to the Convention on the Prevention and Punishment of the Crime of Genocide of 9 December 1948 may lodge a complaint with the Prosecutor alleging that a crime of genocide appears to have been committed."[92] Before the Court can exercise its jurisdiction with regard to genocide, this draft Statute requires that a State Party that is also a Party to the Genocide Convention must lodge a complaint. Therefore, despite the Court's authority to act in the case of genocide without specific State acceptance of jurisdiction, many additional limitations still restrain the Court to assure it complements, rather than supercedes, national jurisdictions.

A similar network of criteria limits the Court's exercise of jurisdiction over crimes other than genocide and reinforces a commitment to State sovereignty. Article 21 outlines procedures for crimes other than genocide. The Court can exercise its jurisdiction only when "a complaint is brought under Article 25, paragraph 2, and the jurisdiction of the Court with respect of the crime is accepted under Article 22: (i) By the State which has custody of the suspect with respect to the crime; (ii) By the State on the territory of which the act or omission in question occurred."[93] It is noteworthy that this draft of Article 21 omits any requirement that the State of the nationality of the accused grant its consent. The Court must instead earn the acceptance of both the custodial and the territorial State. First, a complaint must be brought under Article 25(2), which requires that "a State Party which accepts the jurisdiction of the Court under Article 22 with respect to a crime may lodge a complaint with the Prosecutor alleging that such a crime appears to have been committed."[94] Thus, only a complaint brought by a State Party that accepts the Court's jurisdiction over the crime in question will free the Court to exercise its jurisdiction. Additionally, acceptance of jurisdiction as outlined in Article 22 is not inherent but rather depends upon a specific declaration by the State expressing its consent to be bound by the Statute.[95] Finally, even if all the terms of Article 21 granting the Court the authority to exercise its jurisdiction are satisfied, the Court must still convince itself that the case is admissible

[92] Draft Statute for the International Criminal Court, Report of the International Law Commission, Article 25(1).
[93] Draft Statute for the International Criminal Court, Report of the International Law Commission, Article 21(b).
[94] Draft Statute for the International Criminal Court, Report of the International Law Commission, Article 25(2).
[95] Draft Statute for the International Criminal Court, Report of the International Law Commission, Article 22.

under the terms of Article 35. As is clearly demonstrated by this regime, there may exist situations where the Court is able to exercise jurisdiction when national Courts prove unable to act. However, the primary responsibility for international criminal justice continues to rest with States, and the Statute is drafted to ensure that the Court cannot supercede national jurisdictions.

Complementarity as envisioned in 1994 by the ILC began to increase the prospects for international criminal prosecutions by allowing the Court to act when national jurisdictions fail to render meaningful justice. A more intermediate approach to complementarity is adopted by the ILC in this draft Statute, which acknowledges an international constitutional interest in seeing core crimes prosecuted. While the primary responsibility for criminal justice still rests with States, another layer of authority, at the international level, exists when States prove unable or unwilling to investigate and prosecute.

The 1995 Ad Hoc Committee

The Ad Hoc Committee provided a forum where States could comment upon and critique the ILC draft Statute. The principle of complementarity quickly resurfaced as a major issue and was described as "an essential element in the establishment of an International Criminal Court. It was, however, also viewed as calling for further elaboration so that its implications for the substantive provisions of the draft Statute could be fully understood."[96] States immediately "emphasized that the proposed Court should be established as a body whose jurisdiction would complement that of national courts and existing procedures for international judicial cooperation in criminal matters, and that its jurisdiction should be limited to the most serious crimes of concern to the international community as a whole."[97] Many delegations interpreted the language of the third preambular paragraph on complementarity from the ILC draft "as clearly indicating that the International Law Commission did not intend the proposed Court to replace national courts."[98] These delegations stressed that the principle of complementarity "should create a strong presumption in favor of national jurisdiction," noting that States retained a vital

[96] Report of the Ad Hoc Committee on the Establishment of an International Criminal Court, UNGAOR, 50th Sess., Supp. No. 22, A/50/22, 1995, para. 29 [hereinafter Report of the Ad Hoc Committee on the Establishment of an International Criminal Court].
[97] Report of the Ad Hoc Committee on the Establishment of an International Criminal Court para. 13.
[98] Report of the Ad Hoc Committee on the Establishment of an International Criminal Court para. 29.

interest in remaining "responsible and accountable for prosecuting violations of their laws—which also served the interest of the international community, inasmuch as national systems would be expected to maintain and enforce adherence to international standards of behavior within their own jurisdiction."[99] Other delegations countered that while national courts should retain concurrent jurisdiction, the ICC "should always have primacy."[100] A middle view also emerged, suggesting "it was important not only to safeguard the primacy of national jurisdictions, but also to avoid the jurisdiction of the Court becoming merely residual to national jurisdiction."[101] Thus, a critical question for the Ad Hoc Committee remained where primary responsibility for international criminal prosecution would reside. Some delegations felt that authority rested with States themselves, and asserted that the Court could only act subject to specific State acceptance of jurisdiction, and when States proved unable or unwilling. In contrast, other States, recognizing the shared interest of the international community in prosecuting gross violations of human rights and humanitarian law, argued that authority to intervene could rest at the international level, with less stringent requirements for State consent. The principle of complementarity was thus intimately tied to many highly contested articles of the draft Statute, and to any eventual compromise that would be reached. Discussion focused on the definition of complementarity within the context of the Statute, and the details of how complementarity would function through various articles to balance the tension between national sovereignty and international justice.

The principle of complementarity is directly related to the subject matter jurisdiction of the Court. At the Ad Hoc Committee's first meeting, the great majority of speakers supported the ILC draft proposal granting the Court inherent jurisdiction over genocide, so debate revolved around whether the Court should also possess inherent jurisdiction over other core crimes. The ILC's approach to inherent jurisdiction was criticized as too restrictive, and it was suggested that the sphere of inherent jurisdiction should be broadened to cover war crimes, serious violations of the laws and customs of war, and crimes against humanity. Extending inherent jurisdiction over core crimes was considered necessary for the Court to fulfill its purpose, again showing a new willingness to support greater authority for criminal

[99] Report of the Ad Hoc Committee on the Establishment of an International Criminal Court para. 31.
[100] Report of the Ad Hoc Committee on the Establishment of an International Criminal Court para. 32.
[101] Report of the Ad Hoc Committee on the Establishment of an International Criminal Court para. 33.

justice at the international level. Moreover, the ILC's approach was viewed as lagging behind current international law, since it made possible the exclusion of rules of *jus cogens* character from the Court's jurisdiction.[102] Some delegations thus asserted that "the principle of complementarity required that the draft Statute provide for a single legal system for all crimes within the jurisdiction of the Court."[103] However, such a legal system would be acceptable only if the jurisdiction of the Court was strictly limited to the most serious crimes of concern to the international community as a whole. As a result, restricting the subject matter jurisdiction of the Court to genocide, aggression, crimes against humanity, and serious violations of the laws and customs of war was proposed.

The Ad Hoc Committee, aware of the interrelation between various provisions of the Statute, noted that the acceptance of such a proposal would also simplify the problem of State consent to the exercise of jurisdiction and "promote broad acceptance of the Court by States and thereby enhance its effectiveness."[104] In this respect, many delegations commenting on Article 22 of the ILC draft, regarding the acceptance of jurisdiction, felt that inherent jurisdiction should be favored over an opt-in approach which "leaned too much on the side of conservatism to the detriment of the interests of the international community and might leave the Court with a very narrow field of competence and thus run counter to the general aim of the Statute."[105] Predictably, other delegations still supported an opt-in approach to promote broader acceptance of the Statute and better protect State sovereignty. Parallel disagreements persisted about the preconditions for the exercise of jurisdiction. Some States felt the terms of the ILC's draft Article 21, requiring consent from both the custodial and the territorial State before the Court could exercise jurisdiction over crimes other than genocide, were balanced and consistent with complementarity. Other delegations argued that Article 21 should be limited to consent from just the territorial State, while still others wanted to expand the scope of the article to include the State of nationality of the victim and the State of nationality of the accused.[106]

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[102] Report of the Ad Hoc Committee on the Establishment of an International Criminal Court para. 97.
[103] Report of the Ad Hoc Committee on the Establishment of an International Criminal Court para. 38.
[104] Report of the Ad Hoc Committee on the Establishment of an International Criminal Court para. 54.
[105] Report of the Ad Hoc Committee on the Establishment of an International Criminal Court para. 102.
[106] Report of the Ad Hoc Committee on the Establishment of an International Criminal Court paras. 103-104.

The question of State acceptance of jurisdiction was therefore central to States' reactions the Statute. Under a system of inherent jurisdiction, any State that signs the Statute will automatically accept the Court's power to try an accused for crimes covered under inherent jurisdiction, without additional consent from any State Party. However, some delegations emphasized that "inherent jurisdiction did not mean exclusive jurisdiction and would not strip States Parties of the power to exercise jurisdiction at the national level, and that the question of priority of jurisdiction would have to be resolved by the International Criminal Court on the basis of the principle of complementarity."[107] Not surprisingly, some States objected to the inclusion of inherent jurisdiction as "incompatible with the principle of State sovereignty as embodied in Article 2, paragraph 1 of the Charter of the United Nations."[108] The concept of inherent jurisdiction was also considered "inconsistent with the principle of complementarity, under which the Court was only intended to have jurisdiction where the trial procedures at the national level were unavailable or would not be effective. The point was made in this connection that instead of assuming *a priori* that certain categories of crimes were better suited for trial by an International Criminal Court, it would be preferable to determine the circumstances when trial by such a Court was appropriate."[109] Thus, many States resisted acknowledging an overwhelming international interest in prosecuting core crimes and objected to placing authority with an international organ granted inherent jurisdiction over crimes other than genocide. In contrast to these views, other delegations asserted that

> inherent jurisdiction could not be viewed as incompatible with State sovereignty since it would stem from an act of sovereignty, namely, acceptance of the Statute.. The crimes under consideration were crimes of international concern, the prosecution of which would be of interest to a number of States, if not to the international community as a whole, and... in case the custodial State was unable to prosecute, insistence on sovereignty would affect the legitimate interests of other States.. The alternative solution—subordinating the exercise of jurisdiction by the Court to a declaration of acceptance—would leave the future fate of the Court in the hands of States on whose discretion the ability of the Court to operate would

[107] Report of the Ad Hoc Committee on the Establishment of an International Criminal Court para. 91.
[108] Report of the Ad Hoc Committee on the Establishment of an International Criminal Court para. 92.
[109] Report of the Ad Hoc Committee on the Establishment of an International Criminal Court para. 92.

> depend.... Such an approach, apart from enabling States to manipulate the functioning of the Court, would set aside the interests of the international community—which could not be reduced to the sum total of the States forming part of it—and would prevent the Court from playing its role as the guardian of international public order.[110]

With reference to the argument that inherent jurisdiction interfered with the principle of complementarity, these delegations argued that

> inherent jurisdiction was not exclusive jurisdiction, and that the Court would have concurrent jurisdiction, i.e., would only intervene when it appeared to the Court, on the basis of criteria to be clearly established in the Statute, that national courts could not function adequately..... The effect of the principle of complementarity could only be, at most, to defer the intervention of the Court, whereas rejection of the inherent jurisdiction concept would result in the Courts complete inability *ab initio* to be seized of a case.[111]

Thus, despite the strong impetus to protect State sovereignty, many delegations felt creating a viable Court required accepting inherent jurisdiction over all core crimes. Expanding the sphere of inherent jurisdiction would "have less far-reaching consequences [in impinging upon State sovereignty] than might appear inasmuch as, for the Court to have jurisdiction over the crimes concerned, the complaint State, the territorial State, and the custodial State would all have to be parties to the Statute" under the terms of Articles 21 and 22.[112] Many States thus favored an international constitutional approach through which the Court would acquire authority to act at the international level, rather than placing sole authority for criminal prosecution with States. From this perspective, it was desirable to incorporate all core crimes into a system of inherent jurisdiction due to their gravity and the associated international interest in seeing such crimes prosecuted, as well as "the desirability of including them... if the new institution was to provide an adequate judicial answer to the concerns to which its creation was intended to respond."[113]

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[110] Report of the Ad Hoc Committee on the Establishment of an International Criminal Court para. 93.
[111] Report of the Ad Hoc Committee on the Establishment of an International Criminal Court para. 93.
[112] Report of the Ad Hoc Committee on the Establishment of an International Criminal Court para. 97.
[113] Report of the Ad Hoc Committee on the Establishment of an International Criminal Court para. 97.

The nature of the exceptions to the exercise of national jurisdiction, and the issue of admissibility before the Court, were also debated with vigor. Many delegations felt that the terms "unavailable" and "ineffective" employed to stipulate when the Court could assume jurisdiction were ambiguous, as were the standards for determining when a national system would meet those criteria. In this context, "the observation was made that the commentary to the preamble clearly envisaged a very high threshold for exceptions to national jurisdiction and that the International Law Commission only expected the International Criminal Court to operate in cases in which there was no prospect that alleged perpetrators of serious crimes would be duly tried in national courts."[114] Thus, Article 35 of the ILC draft was criticized as too permissive, and proposals were made to further restrict the ICC's ability to find a case admissible. In this respect, suggestions were offered that "the presumption in Article 35 of the draft Statute should be reversed so that decisions of acquittal or conviction by national courts or decisions by national prosecution authorities not to prosecute were respected except where they were not well-founded."[115] Additionally, States "stressed that the standards set by the Commission were not intended to establish a hierarchy between the International Criminal Court and national courts, or to allow the International Criminal Court to pass judgment on the operation of national courts in general."[116] Thus, while the draft Statute might provide for the possibility that a State voluntarily relinquish its jurisdiction in favor of the international court, States clearly remained deeply concerned about protecting their sovereignty and preventing the ICC from becoming a court of review over national proceedings.[117] As a result, with regard to Article 35, some argued that "the principle of complementarity should be reflected more clearly in the form of a precondition [to the exercise of jurisdiction] to ensure that the Court would not interfere with the legitimate investigative activities of national authorities or exercise jurisdiction when a State was willing and able to do so."[118] It was agreed that when national authorities failed to act with respect to a crime contained within the draft Statute, the Court should be permitted to exercise its jurisdiction. However, several delegations asserted that in all other cases "the decision on whether national jurisdiction should be set aside should be made on a

[114] Report of the Ad Hoc Committee on the Establishment of an International Criminal Court para. 42.
[115] Report of the Ad Hoc Committee on the Establishment of an International Criminal Court para. 42.
[116] Report of the Ad Hoc Committee on the Establishment of an International Criminal Court para. 43.
[117] Report of the Ad Hoc Committee on the Establishment of an International Criminal Court para. 47.
[118] Report of the Ad Hoc Committee on the Establishment of an International Criminal Court para. 109.

case-by-case basis.... While the jurisdiction of an international court was compelling where there was no functioning [national] judicial system, the intervention of the Court in situations where an operating national judicial system was being used as a shield [for the accused] required very careful consideration."[119]

With regard to preconditions to the exercise of jurisdiction, some delegations wanted to expand the category of States able to trigger jurisdiction, such that "any State Party to the Statute should be entitled to lodge a complain with the Prosecutor with respect to the serious crimes under general international law that were of concern to the international community as a whole," specifically crimes within the subject matter jurisdiction of the Court under Article 20.[120] In contrast, others favored restrictions to avoid abuse based upon political considerations, and to limit the jurisdictional reach of the Court in the event that inherent jurisdiction over all core crimes was granted. Thus, some States voiced serious reservations about proposals that the UN Security Council be allowed to refer matters to the Court without any requirement for State consent. Additionally, at this stage it was first suggested that the Prosecutor should have the right to an independent investigation *proprio motu*. "The role of the Prosecutor should be more fully elaborated and expanded to include the initiation of investigation or prosecution in the case of serious crimes under general international law that were of concern to the international community as a whole in the absence of a complaint..This expanded role would enhance the independence and autonomy of the Prosecutor, who would be in a position to work on behalf of the international community rather than a particular complaint State."[121] Thus, some States clearly favored placing greater authority for prosecuting crimes with the Court at the international level, and envisaged the ICC as an institution that would not be rigidly bound by referrals and consent from States.

Although many States represented at the Ad Hoc Committee continued to place great importance upon maintaining State sovereignty, their willingness to discuss the principle of complementarity was clear and significant. In this context, debate focused upon balancing a vision of complementarity that locates responsibility for international criminal jurisdiction with national courts against a conception of

[119] Report of the Ad Hoc Committee on the Establishment of an International Criminal Court para. 45.
[120] Report of the Ad Hoc Committee on the Establishment of an International Criminal Court para. 112.
[121] Report of the Ad Hoc Committee on the Establishment of an International Criminal Court para. 113.

complementarity that vests greater authority at the international level and permits the ICC to act when national systems fail to fulfill their obligations.

The 1996-1998 Preparatory Commission

From the start of Preparatory Commission meetings in 1996, it was "generally agreed that a proper balance" between the International Criminal Court and national authorities "was crucial in drafting a Statute that would be acceptable to a large number of States."[122] However, widely divergent views still existed regarding the best method for resolving the tensions. Conscious of State sovereignty, some delegations felt complementarity should expressly reflect the intention that the Court operate "in cases where there was no prospect of persons who had been accused of the crimes listed in the Statute being duly tried in national courts; but such a Court was not intended to exclude the existing jurisdiction of national courts."[123] Thus, establishment of a Court should in no way diminish the responsibility of States to vigorously investigate and prosecute. These delegations urged that complementarity would need

> to be taken into account at each point at which the respective roles of the Court and national authorities can or do coincide. From this perspective, it is not a question of the Court having primary or even concurrent jurisdiction. Rather, its jurisdiction should be understood as having an exceptional character. There may be instances where the Court could obtain jurisdiction quickly over a case because no good-faith effort was under way at the national level to investigate or prosecute the case, or no credible national justice system even existed to consider the case. But as long as the relevant national system was investigating or prosecuting a case in good faith, according to this view, the Court's jurisdiction should not come into operation.[124]

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[122] Report of the Preparatory Committee on the Establishment of an International Criminal Court, Vol. I, Proceedings of the Preparatory Committee during March to April and August 1996, UNGAOR, 51st Sess., Supp. No. 22, A/51/22, 1996, para. 153 [hereinafter Report of the Preparatory Committee on the Establishment of an International Criminal Court, Vol. I].

[123] Report of the Preparatory Committee on the Establishment of an International Criminal Court, Vol. I para. 154.

[124] Report of the Preparatory Committee on the Establishment of an International Criminal Court, Vol. I para. 154.

Most delegations agreed that while the reference to complementarity in the preamble should remain, a more explicit definition of the concept enumerating its constituent elements should also be included. The proposal that was eventually incorporated into the new draft Statute in 1996 added one significant paragraph to the preamble. To reinforce the role of States in upholding international criminal law, this new paragraph read, "Recognizing that it is the primary duty of States to bring to justice persons responsible for such serious crimes."[125] Additionally, the next paragraph was modified to emphasize that the Court "is intended to be complementary to national criminal justice systems in cases where such systems may be ineffective and/or in cases where national jurisdiction is unavailable."[126] By 1998 this preambular paragraph had been refined to declare that the Court "is intended to be complementary to national criminal justice systems in cases where such trial procedures may not be available or may be ineffective."[127] Article 1 was also revised from the ILC draft in order to accentuate the principle of complementarity. The 1996 draft of this article reads, in part, "[t]here is established an International Criminal Court which shall be complementary to national criminal justice systems."[128] By 1998 this had been refined further to highlight that the Court "shall have the power to bring persons to justice for the most serious crimes of international concern, and which shall be complementary to national criminal jurisdictions."[129] Thus, while still enunciating the principle of complementarity, this revision also emphasizes that the subject matter of the Court will be strictly limited.

The Preparatory Committee discussed the issue of State acceptance of jurisdiction again in 1996. While a vocal minority continued to favor an opt-in scheme, a shift had occurred since the ILC deliberations. The majority of delegations now supported inherent jurisdiction over all core crimes, rather than simply genocide, and felt that the treatment of jurisdiction in Articles 21 and 22 of the ILC draft Statute

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[125] Report of the Preparatory Committee on the Establishment of an International Criminal Court, Vol. II, Compilation of Proposals, UNGAOR, 51st Sess., Supp. No. 22A, A/51/22, Preamble [hereinafter Report of the Preparatory Committee on the Establishment of an International Criminal Court, Vol. II].
[126] Report of the Preparatory Committee on the Establishment of an International Criminal Court, Vol. I, Preamble.
[127] Draft Statute for an International Criminal Court, Report of the Preparatory Committee on the Establishment of an International Criminal Court, Preamble.
[128] Report of the Preparatory Committee on the Establishment of an International Criminal Court, Vol. II, Article 1.
[129] Draft Statute for an International Criminal Court, Report of the Preparatory Committee on the Establishment of an International Criminal Court, Article 1.

was insufficient. Willingness to compromise State sovereignty in an effort to grant the Court more authority became evident, as many States favored a regime in which the Court would not require specific State consent to exercise jurisdiction. Instead, the action of becoming Party to the Statute would automatically confer State acceptance of the Court's jurisdiction. Article 21, addressing preconditions to the exercise of jurisdiction, was thus revised and presented as a series of alternative suggestions. In one proposal for Article 21, the Court can exercise its jurisdiction over core crimes when the UN Security Council refers the matter under Chapter VII, when interested States refer the matter in accordance with Article 25, or when the Prosecutor has been notified and determines there exists sufficient evidence for prosecution under Articles 26 and 27. If the Security Council does not refer the case, the relevant States must accept the Court's jurisdiction according to the terms of Article 22, national jurisdictions must be unavailable or ineffective, or the matter must be deferred to the Court by the relevant State.[130] Another option for Article 21 proposes that the Court exercise its jurisdiction only when a complaint is brought under Article 25 and only with the acceptance of both the custodial and the territorial States.[131] A third proposal deletes the independent role of the Prosecutor, stipulating that the Court exercise its jurisdiction only when a referral is made by the Security Council under Chapter VII or by a State Party.[132] Tied to these revisions of Article 21 was a new proposal for Article 22, which differs from the ILC draft by declaring that a State "which becomes a Party to this Statute thereby accepts the inherent jurisdiction of the Court" with respect to core crimes, but still allows for an opt-in regime for treaty crimes if those remain within the Court's subject matter jurisdiction.[133] As noted in the PrepComm report, "this meaning of inherent jurisdiction, some delegations felt, was fully compatible with respect for State sovereignty, since States would have expressed their consent at the time of ratification of the Statute as opposed to having to express it in respect of every single crime listed in the Statute at

[130] Report of the Preparatory Committee on the Establishment of an International Criminal Court, Vol. II, Article 21.
[131] Report of the Preparatory Committee on the Establishment of an International Criminal Court, Vol. II, Article 21.
[132] Report of the Preparatory Committee on the Establishment of an International Criminal Court, Vol. II, Article 21.
[133] Report of the Preparatory Committee on the Establishment of an International Criminal Court, Vol. II, Article 22.

different stages."[134] Other delegations, sensitive to protecting State sovereignty, pointed out that a regime of inherent jurisdiction does not "imply that the Court, in all circumstances, had a better claim than national courts to exercise jurisdiction. It was therefore possible that a case could arise in relations to a crime which was within the Court's inherent jurisdiction but which would nonetheless be tried by a national jurisdiction."[135] Some States expressed extreme reservations about inherent jurisdiction and believed that an opt-in regime was more likely to maximize State participation. "In their view, this approach was also consistent with the principle of sovereignty."[136]

Closely tied to questions of State acceptance of jurisdiction is the trigger mechanism, specifically whether States Parties, the Security Council, or an independent Prosecutor will have power to initiate an investigation by the Court. Some delegations requested deletion of Article 23(1), which reads "the Court has jurisdiction in accordance with the Statute with respect to crimes referred to in Article 20 as a consequence of the referral of a matter to the Court by the Security Council acting under Chapter VII of the Charter of the United Nations."[137] These States argued that Security Council referral would compromise the Court's independence by politicizing a judicial body and "dispense with the requirements of Article 21 [on preconditions to the exercise of jurisdiction] as well as complementarity and the sovereign equality of States."[138] Delegations that favored retaining Article 23(1) believed that the Council's referral should activate mandatory jurisdiction in a manner similar to the *ad hoc* tribunals, and felt such referral "would not impair the independence of the Court because the Prosecutor would be free to decide whether there was sufficient evidence to indict a particular individual for a crime."[139] Thus, with respect to Security Council referral, some States argued that authority for criminal jurisdiction be located at the international layer with the ICC, rather than

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[134] Report of the Preparatory Committee on the Establishment of an International Criminal Court, Vol. I para. 117.
[135] Report of the Preparatory Committee on the Establishment of an International Criminal Court, Vol. I para. 118.
[136] Report of the Preparatory Committee on the Establishment of an International Criminal Court, Vol. I para. 119.
[137] Draft Statute for the International Criminal Court, Report of the International Law Commission, Article 23(1).
[138] Report of the Preparatory Committee on the Establishment of an International Criminal Court, Vol. I para. 132.
[139] Report of the Preparatory Committee on the Establishment of an International Criminal Court, Vol. I para. 133.

with national jurisdictions. With respect to referral by States, some delegations asserted that only the territorial State, custodial State, State of nationality of the accused, and State of nationality of the victim should be able to lodge a complaint to trigger the Court's jurisdiction. Others objected to this rigorous standard for State referral, and noted "that the crimes under the Statute were, by their nature, of concern to the international community as a whole.... The jurisdiction of the Court would only be engaged if some government failed to fulfill its obligations to prosecute an international crime; then, in their view, all States Parties would become interested parties."[140] Again, these States asserted an overwhelming international interest in seeing perpetrators brought to justice at the international level, if necessary. In contrast, other delegations felt that States permitted to lodge a complaint should be Parties to the Statute and also have accepted the Court's jurisdiction under Article 22 with respect to the crime that was being referred, or be parties to the Genocide Convention if referring a case of genocide.[141] The issue of inherent jurisdiction over all core crimes versus only over genocide thus reemerged under this proposal, because if inherent jurisdiction existed with reference to all core crimes, any State Party would be authorized to make a complaint about any crime within the jurisdiction of the Court. This would again grant the Court much greater authority to act. Additionally, many States found the role of the Prosecutor in Article 25 too restricted. Fearing that States or the Security Council "for a variety of political reasons would be unlikely to lodge a complaint," these delegations argued that "the Prosecutor should therefore be empowered to initiate investigations ex officio or on the basis of information obtained from any source."[142] Others could not agree to the notion of an independent Prosecutor authorized to initiate proceedings. In their view, "such an independent power would lead to politicization of the Court and allegations that the Prosecutor had acted for political motives. This would undermine the credibility of the Court."[143] Additionally, some delegations opined "developments in international law had yet to reach a stage where the international community as a whole was prepared to empower

[140] Report of the Preparatory Committee on the Establishment of an International Criminal Court, Vol. I para. 147.
[141] Report of the Preparatory Committee on the Establishment of an International Criminal Court, Vol. I para. 148.
[142] Report of the Preparatory Committee on the Establishment of an International Criminal Court, Vol. I para. 149.
[143] Report of the Preparatory Committee on the Establishment of an International Criminal Court, Vol. I para. 151.

the Prosecutor to initiate investigations. It was unrealistic to seek to expand the Prosecutor's role...if widespread acceptance of the Court was to be achieved."[144] Thus, deeply conflicting views about whether authority to trigger the Court's jurisdiction would rest at the national level with States or at the international level with an independent Prosecutor persisted in 1996.

When the PrepComm draft Statute was again revised in 1998, many of these issues remained unresolved. For example, in draft Article 6, the Court remains able to exercise jurisdiction when a State Party refers a case under the terms of Article 11. However, there was no agreement about Security Council referral under Chapter VII or referral by an independent Prosecutor under Article 12, although these options were incorporated into the draft Article.[145] Similarly, one draft of Article 7, regarding preconditions to the exercise of jurisdiction, outlines that with referral by a State Party or the Prosecutor, the Court can exercise jurisdiction if one or a combination of the following States accepts the Court's jurisdiction: the custodial State, the territorial State, the State that requested the surrender of the accused, the national State of the victim, or the national State of the accused.[146] However, it remained undecided which of these States should be included in a final article, and whether only one or a combination of States would need to consent. Another draft of Article 7 begins with a paragraph declaring "a State which becomes a Party to the Statute thereby accepts the jurisdiction of the Court with respect to the crimes referred to in Article 5"[147] From a premise of inherent jurisdiction, this option then requires consent from, at minimum, the territorial State. This draft Article also considers requiring consent from the custodial State in addition to the territorial State, or solely from either State.[148] With regard to draft Article 9, one version mandates that "a State which becomes a Party to the Statute thereby accepts the inherent jurisdiction of the Court with respect to the crimes referred to in Article 5," or alternatively for only core crimes.[149] Another

[144] Report of the Preparatory Committee on the Establishment of an International Criminal Court, Vol. I para. 151.
[145] Draft Statute for the International Criminal Court, Report of the International Law Commission, Article 6.
[146] Draft Statute for the International Criminal Court, Report of the International Law Commission, Article 7.
[147] Draft Statute for the International Criminal Court, Report of the International Law Commission, Article 7.
[148] Draft Statute for the International Criminal Court, Report of the International Law Commission, Article 7.
[149] Draft Statute for the International Criminal Court, Report of the International Law Commission, Article 9.

option still preserves the opt-in regime, requiring a declaration of either general or limited application to be lodged before a State accepts the jurisdiction of the Court.[150] Moreover, the entirety of Article 12, which considers granting the Prosecutor an ex officio or *proprio motu* power to initiate investigations, is included as an option that might later be deleted.[151] Thus, although many revisions were made in the PrepComm draft Statute in 1998, most were not universally agreed upon. Almost all the articles are presented as multiple options from which to choose, with many articles subject to editing or removal pending the final decisions of the Commission.

The most substantial change adopted by the PrepComm in 1998 was the creation draft Article 15 on issues of admissibility. This article, which replaced ILC Article 35, intends to preserve the principle of complementarity and to protect State sovereignty with regard to criminal justice, and sets very specific and rigorous standards for the admissibility of a case before the ICC. It is notable that this draft article is clean, meaning it has no bracketed clauses inviting additional debate, with the exception of the first paragraph that had not been considered during informal consultations. The need to create a clean draft article highlights the extraordinary difficulty of the issues surrounding admissibility. Many feared the fragile compromises that had been reached would collapse and further efforts to create a workable Statute would terminate without a clean article addressing admissibility.

From the beginning of the PrepComm stage, ILC definitions for admissibility based upon situations in which national jurisdictions "may not be available or may be ineffective" were criticized as both overly obscure and intrusive.[152] Some States feared that "without specifying clear exceptions to the concept, complementarity would render the Court meaningless by undermining its authority."[153] These delegations believed that requiring the Court to prove the admissibility of every case

> would reduce it to a mere residual institution, short of necessary status and independence. In this context it was noted that while national authorities and courts had the primary responsibility for prosecuting the perpetrators of the

[150] Draft Statute for the International Criminal Court, Report of the International Law Commission, Article 9.
[151] Draft Statute for the International Criminal Court, Report of the International Law Commission, Article 12.
[152] Draft Statute for the International Criminal Court, Report of the International Law Commission, Preamble.
[153] Report of the Preparatory Committee on the Establishment of an International Criminal Court, Vol. I para. 157.

> crimes listed in the Statute, the Court was an indispensable asset in enhancing the prevention of impunity, which too often had been the reward for violators of human rights and humanitarian law. While attempts should be made to minimize the risk of the Court dealing with a matter that could eventually be dealt with adequately on the national level, it was, according to this view, still preferable to the risk of perpetrators of serious crimes being protected by sympathetic national judiciaries or authorities.[154]

Thus, Article 35 of the ILC draft was denounced as too narrow, and proposals were offered to expand the article to cover cases that had been or were in the process of being prosecuted at the national level. According to this logic, the ICC should be able to intervene when national efforts are clearly sham trials intended to protect, rather than prosecute, the perpetrators. In contrast, other delegations felt that the subjectivity of the proposed criteria would infringe upon State sovereignty, and emphasized the difficulty of assessing when national procedures are unavailable or ineffective.[155] These delegations requested that an additional requirement for the Court to establish jurisdiction be added to the complementarity article. Thus, it was proposed that the article be re-titled "Concurrent jurisdiction," and outline the occasions when the Court would have no jurisdiction under the Statute.

At the same time, most delegations recognized that failing to include the concept of "unwillingness" could allow States to obstruct the Court's jurisdiction by initiating investigations and prosecutions intended to lead to impunity for the accused. As the definition of unwillingness was clarified, States grew more comfortable with the approach likely to be adopted. With regard to the definitions of "inability" and "unwillingness," some delegations believed the matter of being unable to prosecute entirely self-evident. They argued that while various factors might contribute to a State's inability to prosecute, if a State failed to exercise its jurisdiction by initiating an investigation that would provide adequate basis for permitting the ICC to act. Others feared this argument would give the Court dangerously wide discretion, thus leading to the necessity of fully defining the term "inability." The most important

[154] Report of the Preparatory Committee on the Establishment of an International Criminal Court, Vol. I para. 157.
[155] Report of the Preparatory Committee on the Establishment of an International Criminal Court, Vol. I para. 166.

factor relevant to a State's ability to act was determined to be the partial or complete collapse of the national judicial system. This includes the extent to which the State is exercising effective control over its territory, and the existence of a functioning law enforcement mechanism that allows the State to secure the accused as well as necessary evidence and testimony. These criteria became the basis for establishing "inability." Defining unwillingness proved more complex because many delegations were sensitive to the fact that the ICC might function as a court of appeal over national proceedings. Because States argued strongly against any subjective definitions, the phrase "apparently well-founded" used by the ILC to describe the nature of national prosecutions was deemed unacceptable, as were alternatives including "effectively," "good faith," and "diligently." The term with the most objective meaning was deemed to be "genuinely," and this was the adverb adopted.[156] In order to determine whether a national trial is not genuine, the Court needs to establish that the proceedings are undertaken "for the purpose of shielding the person," or that there is an "undue delay... inconsistent with an intent to bring the person concerned to justice."[157]

The result of these lengthy debates about complementarity and admissibility was the creation of draft Article 15. This article reads, "having regard to paragraph 3 of the preamble" which outlines that the Court must complement national jurisdictions, the Court shall determine a case is inadmissible where

(a) The case is being investigated or prosecuted by a State which has jurisdiction over it, unless the State is unwilling or unable genuinely to carry out the investigation or prosecution;

(b) The case has been investigated by a State which has jurisdiction over it and the State has decided not to prosecute the person concerned, unless the decision resulted from the unwillingness or inability of the State genuinely to prosecute;

(c) The person concerned has already been tried for conduct which is the subject of the complaint, and a trial by the Court is not permitted under paragraph 2 of Article 18;

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[156] Draft Statute for an International Criminal Court, Report of the Preparatory Committee on the Establishment of an International Criminal Court, Articles 15(1)(a) and (b).
[157] Draft Statute for an International Criminal Court, Report of the Preparatory Committee on the Establishment of an International Criminal Court, Article 15(2).

(d) The case is not of sufficient gravity to justify further action by the Court.[158][159]

To further guarantee that the ICC will only act to supplement, rather than supplant, national jurisdictions, this article also defines how the Court is to determine unwillingness and inability. A State will be considered unwilling if

(a) The proceedings were or are being undertaken or the national decision was made for the purpose of shielding the person concerned from criminal responsibility for crimes within the jurisdiction of the Court as set out in Article 5;

(b) There has been an undue delay in the proceedings which in the circumstances is inconsistent with an intent to bring the person concerned to justice;

(c) The proceedings were or are not being conducted independently or impartially and they were or are being conducted in a manner which, in the circumstances, is inconsistent with an intent to bring the person concerned to justice.[159]

In order to determine inability, the Court is instructed to consider whether "due to a total or partial collapse of or unavailability of its national justice system, the State is unable to obtain the accused or the necessary evidence and testimony or otherwise unable to carry out its proceedings."[160] However, several qualifying provisions were still needed to build a workable consensus. A text box was placed at the beginning of the draft article to explain its origins, which reads, in part, "The content of the text represents a possible way to address the issue of complementarity and is without prejudice to the views of any delegation. The text does not represent agreement on the eventual content or approach to be included in this article."[161] Clearly, the issues of admissibility embodied in this article remained controversial and unresolved. As a

[158] Draft Statute for an International Criminal Court, Report of the Preparatory Committee on the Establishment of an International Criminal Court, Article 15(1).
[159] Draft Statute for an International Criminal Court, Report of the Preparatory Committee on the Establishment of an International Criminal Court, Article 15(2).
[160] Draft Statute for an International Criminal Court, Report of the Preparatory Committee on the Establishment of an International Criminal Court, Article 15(3).
[161] Decisions Taken by the Preparatory Committee, August 4 to 15, 1997, A/AC.249/1997/L/L.8/Rev.1, 1997, annex 1 [hereinafter PrepComm Decisions].

result, a number of footnotes were inserted to explain the drafting methods, and many refer to the fact that provisions of the final version depend upon the outcome of negotiations about other sections of the Statute. Additionally, another proviso is included at the end of the draft article, which notes as an alternative that "the Court shall not have the power to intervene when a national decision has been taken in a particular case. That approach could be reflected as follows: The Court has no jurisdiction where the case in question is being investigated or prosecuted, or has been prosecuted, by a State that has jurisdiction over it."[162] This option again reinforces the persistence of arguments that favor vesting authority for international criminal justice at a national level.

Therefore, the draft Statute presented by the Preparatory Commission to the Rome Conference took significant steps towards defining the principle of complementarity in the context of the Court's jurisdiction. State sovereignty was compromised in key articles in order to grant the Court more authority, yet support for the terms of the draft Statute remained relatively strong. Yet the passionate and combative nature of the debate over these issues, as well as the challenge of reaching a universally accepted compromise on complementarity, signaled that much work was still needed to create a Statute that could eventually be adopted.

[162] PrepComm Decisions, annex 1.

CHAPTER THREE: COMPLEMENTARITY IN THE ROME STATUTE

Introduction

The most contentious issue at Rome was how to assure primary responsibility for criminal prosecution remained with national courts yet still grant the ICC sufficient authority to assume jurisdiction over crimes of international concern when States prove unable or unwilling to act. At times, divergent views on many of the central provisions of the Statute appeared irreconcilable. The complexity of the interrelated jurisdictional issues defied a simple solution. However, by balancing the tension between State sovereignty and international criminal jurisdiction, complementarity made compromise possible and allowed the Statute to be adopted. This chapter will therefore examine the principle of complementarity as it emerges in various articles of the Rome Statute.

Complementarity in the Preamble

The principle of complementarity first appears in the preamble of the Rome Statute. This mirrors the ILC draft, which emphasizes in the second preambular paragraph that the Court "is intended to exercise jurisdiction over only the most serious crimes of concern to the international community as a whole," and in the third paragraph mentions complementarity "to national criminal justice systems in cases where such trial procedures may not be available or may be ineffective."[163] In 1995, the Ad Hoc Committee also included a reference to complementarity, noting that the third preambular paragraph clarifies that the ILC "did not intend the proposed Court to replace national courts."[164] The Preparatory Committee was also well aware of the dispute over the principle of complementarity, and proposed language for the preamble stating "that it is the primary duty of States to bring to justice persons responsible for such serious crimes."[165] The delegations at the Rome Conference were cognizant of the legal significance and political importance of the language defining complementarity in the preamble. The ILC had previously noted, in its 1994 commentary, that the preamble will "assist in the interpretation and application of the

[163] Draft Statute for the International Criminal Court, Report of the International Law Commission, Preamble.
[164] Report of the Ad Hoc Committee on the Establishment of an International Criminal Court p. 6.
[165] Report of the Preparatory Committee on the Establishment of an International Criminal Court, Vol. II pp. 20-21.

Statute, and in particular in the exercise of the power conferred by Article 35" which addresses issues of admissibility.[166] The Ad Hoc Committee also recognized that the terms of the preamble form "part of the context in which the Statute as a whole was to be interpreted and applied."[167]

Thus, although the preamble is not an operative part of the Rome Statute, it nevertheless introduces the main purposes of the Statute and reiterates both the obligations of States and the role of the Court. Paragraph six of the preamble, which reads "recalling that it is the duty of every State to exercise its criminal jurisdiction over those responsible for international crimes,"[168] affirms that States Parties have a duty to undertake national investigations and prosecutions for the most serious crimes in international law. It reminds the international community that without action by States, the duty to prosecute will be transferred to the Court under complementarity. The tenth preambular paragraph provides the first explicit reference to complementarity, "emphasizing that the International Criminal Court established under this Statute shall be complementary to national criminal jurisdictions,"[169] thus demonstrating that complementarity is an essential component of the Court's jurisdictional system. This paragraph also lays the foundation for further development of complementarity in Article 17, which clarifies that national jurisdictions will hold primacy and the ICC will only supplement these efforts when a State is unable and unwilling to proceed. Primary responsibility for enforcing international law therefore rests with States Parties, not the Court. The first article of the Statute, outlining the Court's establishment, also reflects the principle of complementarity, stating that the Court "shall be a permanent institution and shall have the power to exercise its jurisdiction over persons for the most serious crimes of international concern, as referred to in this Statute, and shall be complementary to national criminal jurisdictions."[170] Although the concept of complementarity is not expanded upon in this article, the principle is addressed in greater detail in Articles 12 through 15 and 17 through 18.

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[166] Report of the International Law Commission, Commentary to the Preamble.
[167] Report of the Ad Hoc Committee on the Establishment of an International Criminal Court para. 37.
[168] Rome Statute of the International Criminal Court, adopted and opened for signature 17 July 1998, United Nations Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court, A/CONF.183/9, 17 July 1998, Preamble [hereinafter Rome Statute].
[169] Rome Statute, Preamble.
[170] Rome Statute, Article 1.

Complementarity in Article 12: Preconditions to the Exercise of Jurisdiction

Preconditions to the exercise of jurisdiction are addressed in Article 12, and are fundamental to creating an effective Court under a regime of complementarity.[171] Not surprisingly, this article was one of the most controversial negotiated at Rome. It is closely tied to Article 5 on subject matter jurisdiction, Article 13 on the exercise of jurisdiction, and Article 17 on admissibility, which together confront the related jurisdictional issues before the Court and attempt to protect State sovereignty while preserving the Court's ability to take necessary action. From the ILC to the PrepComm and throughout the Rome Conference, a fundamental question was whether, in cases not referred by the Security Council acting under Chapter VII, the ICC would be granted inherent jurisdiction over core crimes listed in the Statute. A related issue was whether specific State consent would be a precondition for the exercise of jurisdiction, and if so, which States' acceptance would be required.

The drafting history of Article 12 demonstrates the diversity of views regarding State consent and inherent jurisdiction. The 1994 ILC draft Statute focuses on creating a Court that would operate on a restrictive consent basis, and under strict Security Council control. The ILC approach clearly favors State sovereignty by allowing the Court to intervene only with specific consent from interested States, rather than whenever required to protect the interests of the greater international community. As a result, the ILC was criticized for creating a regime that, in its deference to State sovereignty, could completely cripple the proposed Court. Although the crimes under ICC jurisdiction were broader than those encompassed under the Rome Statute, inherent jurisdiction was granted only in the case of genocide.[172] In the case of war crimes, crimes against humanity, and aggression, the

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[171] This Article reads,

1. A State which becomes a Party to this Statute thereby accepts the jurisdiction of the Court with respect to the crimes referred to in Article 5.
2. In the case of Article 13, paragraphs (a) or (c), the Court may exercise its jurisdiction if one or more of the following States are Parties to this Statute or have accepted the jurisdiction of the Court in accordance with paragraph 3:
   (a) The State on the territory of which the conduct in question occurred or, if the crime was committed on board a vessel or aircraft, the State of registration of that vessel or aircraft.
   (b) The State of which the person accused of the crime is a national.
3. If the acceptance of a State which is not Party to this Statute is required under paragraph 2, that State may, by declaration lodged with the Registrar, accept the exercise of jurisdiction by the Court with respect to the crime in question. The accepting State shall cooperate with the Court without any delay or exception in accordance with Part 9.

[172] Draft Statute for the International Criminal Court, Report of the International Law Commission, Article 21.

Court could act only when both the custodial State and the territorial State accepted the Court's jurisdiction.[173] Moreover, the consent of States Parties was granted under an opt-in system in which a State could specify categories of crimes for which it accepted the Court's jurisdiction. Therefore, the Court was not granted inherent jurisdiction based upon a State ratifying the Statute. Instead, a special declaration in which a State specifically accepted the Court's jurisdiction was required.[174] The same fundamental questions about ICC jurisdiction subsequently arose before the Ad Hoc and Preparatory Committees. Within the PrepComm, widespread support for inherent jurisdiction over genocide prevailed, but views differed as to whether war crimes and crimes against humanity should also be covered under a regime of inherent jurisdiction. Those opposed to such measures, although aware of the gravity of the crimes, focused on the importance of protecting State sovereignty and the need to obtain maximum State support. Some delegations therefore argued that the consent of both the State of nationality of the accused and of the victim should be secured, in addition to the consent of the custodial and territorial States, before the Court could exercise its jurisdiction.

By the time the Committee of the Whole convened at the Rome Conference, a broad range of State proposals reflected new support for inherent jurisdiction. For example, the German proposal was based upon the logic that universal jurisdiction allows individual States to prosecute crimes within the Court's subject matter jurisdiction, and the ICC should have the same capacity as a contracting State.[175] The German delegation vigorously supported universal jurisdiction, noting that under current international law all States may already exercise universal jurisdiction for genocide, crimes against humanity, and war crimes. Thus, just as any State can exercise its own national jurisdiction without consent from either the custodial or territorial State, the ICC should be able to do the same. The Germans observed that with regard to genocide, States have frequently exercised universal jurisdiction by enacting Statutes, and that extraditions and prosecutions have occurred based upon this principle. Although under Article IV of the Genocide Convention the territorial State may be under an obligation to prosecute, the exercise of jurisdiction by other

[173] Draft Statute for the International Criminal Court, Report of the International Law Commission, Article 22.
[174] Draft Statute for the International Criminal Court, Report of the International Law Commission, Article 22.
[175] Proposal of Germany, A/AC.249/1998/DP.2, 1998.

States is not precluded. With regard to crimes against humanity, the Germans recalled that jurisdiction at Nuremberg was based *inter alia* on the fact that each of the Allied Powers could have exercised jurisdiction without an existing territorial or personal link. Many States have enacted Statutes providing for universal jurisdiction over these crimes, and the basic human rights that are violated in the context of crimes against humanity are of *erga omnus* character. Thus, just as third Party States have an interest in and a right to bring offenders to justice, so too does the ICC. Finally, with regard to war crimes, the Germans noted that the Geneva Conventions provide that all contracting parties are obliged to prosecute individuals who have committed grave breaches, regardless of their nationality. Thus, as they asserted,

> [t]here is no reason why the ICC—established on the basis of a Treaty concluded by the largest possible number of States—should not be in the very same position to exercise universal jurisdiction for genocide, crimes against humanity, and war crimes in the same manner as the contracting Parties themselves.... By ratifying the Statute of the ICC, the States Parties accept in an official and formal manner that the ICC can also exercise criminal jurisdiction with regard to these core crimes. This means that, like the Contracting States, the ICC should be competent to prosecute persons which [sic] have committed one of these core crimes, regardless of whether the territorial State, the custodial State, or any other State has accepted the jurisdiction of the Court.[176]

The Germans thus argued that the ICC should hold universal jurisdiction with no need for specific State consent. This proposal received strong support from some delegations and many NGOs, who felt that requiring State consent separately from ratification of the Statute would inevitably detract from the Court's effectiveness. If the German proposal had been accepted, Article 17 would still have mandated that the ICC exercise universal jurisdiction only when a national system proved unable or unwilling to act. Therefore, universality would not have divested national courts of their sovereignty or their primary role in international prosecution. Rather, universal jurisdiction would have granted the ICC jurisdiction over core crimes committed in any State, whether or not it was Party to the Statute. The rights of non-State Parties

[176] Proposal of Germany.

would not have been violated, however, as they would be under no obligation to cooperate with the Court.

Sensing strong opposition to the German proposal from many delegations, the Korean proposal instead called for automatic jurisdiction.[177] The Koreans argued that a State should automatically accept the ICC's jurisdiction by becoming a Party to the Statute. Under this option one or more of the following States must be Party to the Statute in order for the ICC to exercise jurisdiction: the territorial State, the custodial State, the State of nationality of the accused, or the State of nationality of the victim. As the Koreans noted,

> [t]hose who favor the concept of inherent jurisdiction overlook the fact the proposed Court is a treaty body to be created through the consent of the States. It is State consent that justifies the jurisdictional link between States Parties to the Statute and the Court. Forgoing any precondition to the exercise of jurisdiction would run a risk of rendering the acceptance of the Court's jurisdiction meaningless.... The adherents to the State consent regime also fail to recognize that the requirement of State consent at two distinct stages—acceptance and exercise—would render the Court ineffective due to this jurisdictional hazard. For the Court to be as effective as possible, State consent should be called for once, when a State becomes party to the Statute. Otherwise, it would deprive the Court of the predictability of its function by granting States a *de facto* right of veto to determine whether the Court is able to exercise jurisdiction.[178]

Thus, the Koreans favored a consent regime based upon automatic, but not inherent, jurisdiction. Although the Korean proposal garnered wide support, it proved unacceptable to many States who required a second layer of State consent. These States objected that it embodied a type of universal jurisdiction. Even among those preferring inherent jurisdiction, tensions persisted about whether the consent of a non-Party State should also be required, and if so, whether that State would be the territorial, national, or custodial State of the accused.

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[177] Proposal of the Republic of Korea, A/CONF.183/C.1/L.6, 1998.
[178] Proposal of the Republic of Korea.

Alternative proposals indicated persistent concerns about the erosion of State sovereignty. The United Kingdom suggested jurisdiction for the ICC based upon territoriality, when both the custodial State and the territorial State consented by becoming States Parties to the Statute.[179] However, others objected that obtaining consent from both these States would be difficult, and the proposal was eventually amended by removing the custodial State requirement. The United States supported requiring consent from both the territorial State and the State of nationality of the accused in cases where the Security Council did not trigger the Court's jurisdiction. The United States demanded the ICC not hold jurisdiction over nationals of non-States Parties, and argued that to do otherwise would violate the Vienna Convention on the Law of Treaties.[180] However, the American demand for an indispensable requirement of consent from the State of nationality of the accused was not shared by the overwhelming majority of States, who feared it would potentially paralyze the Court.[181] An opt-in proposal was also offered. Before the Court could assume jurisdiction, as many as five different States would have to consent, including the custodial State, the territorial State, the State that requested the extradition of the accused from the custodial State, the State of nationality of the accused, and the State of nationality of the victim. Under this proposal, the ICC would become less competent than States to prosecute offenders. Ratification would mean little as States could remove a case from consideration by the Court when politically expedient. Such a proposal could have rendered the Court ineffective in those cases not referred by the Security Council.

The Bureau Discussion Paper and Proposal both narrowed the range of options regarding preconditions to the exercise of jurisdiction, but each adopted a relatively cautious approach. As presented in the Discussion Paper, Article 7 offers various options related to State acceptance. Because it remained undecided whether there would ultimately be an opt-in system or automatic jurisdiction, all proposals in Article 7 require that the relevant States "be a Party to the Statute, or have accepted the jurisdiction" in accordance with an opt-in regime.[182] The first option, like the Korean

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[179] Proposal of the United Kingdom, A/AC.249/1998/WG.3/DP.1, 1998.
[180] Article 34 of the Vienna Convention on the Law of Treaties reads, "[a] treaty does not create binding obligations or rights for a third State without its consent."
[181] Proposal of the United States, A/CONF.183/C.1/L.70, 1998.
[182] Bureau Discussion Paper, Part 2 (Jurisdiction, Admissibility, and Applicable Law), Committee of the Whole, United Nations Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court, Rome, Italy, 15 June to 17 July, 1998, A/CONF.183/C.1/L.53, July 6,

Proposal, mandates that in order for the Court to exercise jurisdiction, one or more of the following States must accept the Court's jurisdiction: the territorial State, the custodial State, the national State of the victim, or the national State of the accused.[183] A more stringent requirement that the territorial State must accept the Court's jurisdiction is presented by the second option.[184] The third possibility is even more restrictive, requiring that both the territorial State and the custodial State accept the Court's jurisdiction.[185] Finally, the fourth option, reflecting a proposal made by the United States, requires acceptance from the State of nationality of the accused.[186] With regard to the question of automatic jurisdiction or an opt-in regime, the second paragraph of Article 7 favors automatic jurisdiction: "a State which becomes a Party to the Statute thereby accepts the jurisdiction of the Court."[187] However, it remained unresolved whether a State would accept jurisdiction for all core crimes, or simply for genocide. Another option for Article 7 established an opt-in regime "for treaty crimes and possibly for one or more core crimes," in which a State could either express its consent when becoming a State Party, or at a later time though a declaration.[188] The declaration could be of a general or limited nature, or could be limited to a specified time period. The Bureau Discussion Paper thus helped frame ensuing debates, but genuine willingness to compromise on fundamental issues, especially State acceptance of the exercise of jurisdiction, still failed to emerge.

The Bureau issued a second proposal with alternative options in an effort to reach a workable compromise on preconditions to the exercise of jurisdiction.[189] In Article 7, this new proposal separates the preconditions on genocide from those on war crimes and crimes against humanity. Concerning genocide, the Court could exercise its jurisdiction according to the terms of the Korean proposal.[190] For crimes against humanity and war crimes, three options still remained. The first is identical to the preconditions for genocide. The second is more restrictive, requiring the consent

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1998, Article 7 [hereinafter Bureau Discussion Paper].
[183] Bureau Discussion Paper, Article 7, Option 1.
[184] Bureau Discussion Paper, Article 7, Option 2.
[185] Bureau Discussion Paper, Article 7, Option 3.
[186] Bureau Discussion Paper, Article 7, Option 4.
[187] Bureau Discussion Paper, Article 7(2).
[188] Bureau Discussion Paper, Article 7(bis).
[189] Bureau Proposal, Part 2 (Jurisdiction, Admissibility, and Applicable Law), Committee of the Whole, United Nations Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court, Rome, Italy, 15 June to 17 July, 1998, A/CONF.183/C.1/L.59, July 9, 1998 [hereinafter Bureau Proposal].
[190] Bureau Proposal, Article 7(1).

of both the territorial and the custodial State, while the third option, again reflecting a United State proposal, simply requires the consent of the State of nationality of the accused.[191] The debate about automatic jurisdiction versus an opt-in regime was still not resolved in the Bureau Proposal, although some progress had been made. As reflected in both alternatives for Article 7 on acceptance of jurisdiction, "a State which becomes a Party to the Statute thereby accepts the jurisdiction of the Court with respect to the crime of genocide."[192] However, in the first option, a State that becomes Party to the Statute thereby accepts ICC jurisdiction over all core crimes, thus conferring automatic jurisdiction.[193] In contrast, the second option allows for States to opt-in through a declaration either at the time of becoming a State Party or at a later time, and such a declaration could be of general or limited application, and could be made for a specified time period.[194]

The compromise position that finally emerged is reflected in Article 12 of the Rome Statute, which combines State acceptance of jurisdiction with preconditions for the exercise of jurisdiction. As adopted, Article 12 is not as restrictive as it might have been. The first paragraph of the article outlines that "[a] State which becomes a Party to this Statute thereby accepts the jurisdiction of the Court" with respect to genocide, crimes against humanity, war crimes, and the crime of aggression once defined and adopted.[195] It therefore confers automatic jurisdiction over core crimes. The second paragraph outlines that in cases where a State Party refers a situation to the Prosecutor, or when the Prosecutor has initiated an investigation *proprio motu*, State acceptance of the Court's jurisdiction by either the territorial State or the State of nationality of the accused is necessary. This provision represents a compromise between those who preferred universal jurisdiction or a list of States from which at least one must accept the jurisdiction of the Court by ratifying the Statute, versus those who preferred acceptance from both the territorial State and the State of nationality of the accused.

Article 12 reduced the preconditions to the exercise of jurisdiction, with a jurisdictional nexus based upon either the territorial State or the State of nationality of the accused becoming States Parties to the Statute. The first subparagraph details that

[191] Bureau Proposal, Article 7(2), Options 2-3.
[192] Bureau Proposal, Article 7(bis), Options 1-2.
[193] Bureau Proposal, Article 7(bis), Option 1.
[194] Bureau Proposal, Article 7(bis), Option 2.
[195] Rome Statute, Article 14(1).

the Court may exercise its jurisdiction based upon consent of the territorial State. Territorial jurisdiction is a manifestation of State sovereignty, as a State is granted jurisdiction over the persons, property, and conduct inside its territory. This is a universally accepted rule in international criminal law, and was thus accepted as one method to allow the ICC to assume jurisdiction. In exercising its jurisdiction under this subparagraph, the Court is not assuming jurisdiction over non-States Parties in violation of the Vienna Convention, as the United States has argued. Rather, an individual is potentially held accountable to the jurisdiction of the Court when crimes are committed in the territory of a State Party. Nothing prohibits a State from voluntarily delegating to the ICC its sovereign ability to prosecute based upon territorial jurisdiction. The second subparagraph allows the Court to exercise its jurisdiction with the consent of the State of nationality of the accused. The third paragraph of Article 12 addresses acceptance of jurisdiction by non-States Parties. It provides that if such a State's consent is required for the Court to exercise jurisdiction, that State may declare *ad hoc* its acceptance for the specific crime.

Therefore, Article 12 is a product of compromise that allows the Court to exercise its jurisdiction subject to specific preconditions without unduly impinging upon State sovereignty. One potential deficiency in this article may be that acceptance of the Statute by the custodial State is not a precondition to the exercise of jurisdiction by the ICC. Such a provision could have ensured that crimes will not go unpunished if the territorial State or State of nationality of the accused are not Parties to the Statute or do not consent *ad hoc*, or if there is no Security Council referral. Although Article 12 could have been even more restrictive, as adopted it provides the Court with less power than either the German or Korean proposal, demonstrating the residual desire to place primary authority for criminal prosecution at the national level.

Complementarity in Article 13: Trigger Mechanisms

The trigger mechanisms for initiating the Court's exercise of jurisdiction were also among the most complex and sensitive issues debated at Rome.[196] The primary

[196] Article 13 reads: The Court may exercise its jurisdiction with respect to a crime referred to in Article 5 in accordance with the provisions of this Statute if: (a) A situation in which one or more of such crimes appears to have been committed is referred to the Prosecutor by a State Party in accordance with Article 14; (b) A situation in which one or more of such crimes appears to have been

questions to be resolved were the role of the Security Council, the power of States Parties to refer a case to the Prosecutor, and the independent authority of the Prosecutor to initiate an investigation. Article 13 is intimately related to Article 12, as well as to Article 14 on referral by a State Party, Article 15 on the role of the Prosecutor, and Article 16 on the deferral of investigation or prosecution.

As demonstrated in the draft Statutes for the ICC, mechanisms for triggering the Court's jurisdiction were highly contested and frequently revised. The 1994 ILC draft affords the Prosecutor no independent powers to begin an investigation, as the Statute is geared towards State consent and Security Council control. The trigger mechanism provides inherent jurisdiction only for the crime of genocide. Moreover, only a State Party to the Statute that is also a Contracting Party to the Genocide Convention can lodge a complaint regarding genocide. For all other crimes, a State Party must specifically accept the jurisdiction of the Court through an opt-in scheme intended to protect State sovereignty and thereby encourage ratification of the Statute. A year later, the Ad Hoc Committee raised a number of concerns regarding the trigger mechanisms established in the ILC draft Statute. Some States suggested that complaints concerning genocide should not be limited, while others asserted that only States with a direct interest in any given case, specifically the custodial State, territorial State, or State of nationality of the victim, should be able to initiate an investigation or prosecution. Moreover, it was in the Ad Hoc Committee that some delegations proposed the role of the Prosecutor be expanded to include the right to initiate an investigation *proprio motu*, without State or Security Council referral. These same issues over triggering jurisdiction also emerged in the Preparatory Committee. Although support for empowering the Prosecutor with greater independence to initiate proceedings had grown, the parameters of such a role were undecided. Additionally, while delegations strongly favored State Party referral of cases, they remained divided as to inherent jurisdiction versus opt-in proposals, as well as to the role of the Security Council.

By 1998, the great majority of delegations at the Rome Conference willingly accepted a trigger mechanism allowing States Parties to refer situations. The outstanding issues were the roles of the Prosecutor and the Security Council. Division

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committed is referred to the Prosecutor by the Security Council acting under Chapter VII of the Charter of the United Nations; (c) The Prosecutor has initiated an investigation in respect of such a crime in accordance with Article 15.

persisted on the question of granting independent powers to the Prosecutor, although the majority favored a *proprio motu* role subject to certain limitations to prevent abuses of power. Non-governmental organizations represented at the Conference also believed an independent Prosecutor necessary for an effective Court. These arguments were based upon a suspicion that State complaints and Security Council referral might prove insufficient to allow the ICC to operate on behalf of the entire international community. It was feared that without a *proprio motu* role for the Prosecutor, few cases would come before the Court due to the reluctance of States Parties to make complaints and the potential for a Security Council veto. Although some States worried about abuses of power from an overzealous or politically motivated Prosecutor, these concerns were addressed by limits placed upon the Prosecutor in Article 15.

Agreement in Rome on the role of the Prosecutor grew from the Bureau Discussion Paper and Proposals. In the Discussion Paper, Article 6 includes an option for the Court to exercise its jurisdiction when "the Prosecutor has initiated an investigation in respect of such a crime in accordance with Article 12."[197] Article 12 permits the Prosecutor to initiate investigations *proprio motu*, although a prosecution can only proceed with the authorization of a pre-trial chamber.[197] [198] However, at this stage the issue remained unresolved, as another option was the removal of Article 12 altogether. Yet the inclusion of these paragraphs, which at least considered a *proprio motu* role for the Prosecutor, indicate a first step towards allowing the Court to exercise its jurisdiction more freely. The subsequent Bureau Proposal expressly provides for a *proprio motu* power for the Prosecutor in Article 6, which is no longer simply an option to be considered but instead a newly incorporated feature.[199] However, Article 12 additionally qualifies that "a provision for additional safeguards before the Prosecutor can act" might be necessary in order to ease the anxieties of those States still concerned about granting the Prosecutor such independent authority.[200] Security Council triggering of ICC jurisdiction also remained a contentious issue, as a small but vocal minority of States continued to object to any role for the Security Council, arguing it would politicize the Court and undermine its

[197] Bureau Discussion Paper, Article 6(c), Option 1.
[198] Bureau Discussion Paper, Article 12, Option 1.
[199] Bureau Proposal, Article 6(c).
[200] Bureau Proposal, Article 12, Option 2.

credibility. These States feared permanent Security Council Members would block referrals involving their own nationals or national interests. Some delegations further argued that the Security Council lacked power of referral under the UN Charter. However, the majority of States acknowledged the enforcement powers of the Security Council under the UN Charter, which under the terms of Article 13 is permitted to refer situations to the Prosecutor.

Article 13 is a vital component of the system of jurisdiction and complementarity of the Rome Statute. Under this article, the ICC may exercise jurisdiction over genocide, war crimes, crimes against humanity, and aggression. According to the first paragraph, only States that are Parties to the treaty can refer a situation to the Prosecutor and thereby trigger the Court's jurisdiction. Non-States Parties cannot make *ad hoc* referrals. The second paragraph outlines the terms for Security Council referral when it discovers, pursuant to Chapter VII of the UN Charter, the existence of a threat to peace, breach of the peace, or act of aggression. The Court will then have jurisdiction over crimes contained within its subject matter jurisdiction alleged to have been committed in that situation. As outlined in Article 12, the ICC can exercise its jurisdiction without the consent of either the territorial State or state of nationality of the accused when a situation is referred by the Security Council. Security Council referral will also play an important role when crimes have allegedly occurred but neither States Parties nor the Prosecutor can initiate proceedings under the terms of Article 12(2). Thus, referral by the Security Council will be essential in allowing the Court to exercise its jurisdiction and prevent impunity. Finally, the third paragraph of Article 13 grants the Prosecutor power to initiate an investigation *proprio motu*. This provision will also be central to effective functioning of the ICC by allowing investigations and prosecutions of situations even if States fail to refer a case for political reasons. Article 13 successfully balances State sovereignty against the need to create trigger mechanisms that allow the Court to prosecute the perpetrators of gross offenses.

Complementarity in Article 17: Issues of Admissibility

Issues of admissibility, addressed in Article 17, are the anchor of the Rome Statute's jurisdictional regime. As reflected in this article, the goal of the Statute is clearly not to negate State sovereignty. State concern for sovereign interests was at the center of the negotiations surrounding issues of admissibility. Ultimately, Article 17

provides for safeguards that preserve national primacy over jurisdiction, and was thus essential for adoption of the Statute.

The principle of complementarity is contained in the first two paragraphs of Article 17:

> Having regard to paragraph 10 of the Preamble and Article 1, the Court shall determine that a case is inadmissible where:
>
> (a) The case is being investigated or prosecuted by a State which has jurisdiction
>
> over it, unless that State is unwilling or unable genuinely to carry out the investigation or prosecution;
>
> (b) The case has been investigated by a State which has jurisdiction over it and the State has decided not to prosecute the person concerned, unless the decision resulted from the unwillingness or inability of the State to genuinely prosecute.[201]

This article ensures the Court cannot exercise jurisdiction over a case when a State is investigating or prosecuting in good faith, and thereby protects State primacy over criminal jurisdiction by assuring that the ICC will only complement such efforts. Clearly, Article 17 is intimately connected to paragraph 10 of the preamble, as well as Article 1, Article 12 on preconditions to the exercise of jurisdiction, Article 13 on trigger mechanisms, Article 15 on the initiation of an investigation by the Prosecutor, Article 18 on preliminary rulings on admissibility, and Article 19 on challenges to the jurisdiction of the Court. Because these jurisdictional principles are so closely interrelated, many delegations found it difficult to compromise on any single issue without having a clear notion of the final language of the other articles. Initially, however, many States argued that the primary obligation to prosecute belongs to States and that the ICC should only act when a national system is unable to investigate or prosecute. Other States and NGOs wanted a more active role for the Court and felt the ICC should be able to intervene when a national system is unavailable or national proceedings are ineffective.

Establishing criteria for admissibility was essential to defining the complementary role of the ICC relative to national courts. The 1994 ILC draft Statute

[201] Rome Statute, Articles 17(1)(a) and (b).

makes clear that the Court is intended to operate where there is no prospect of a trial in national courts, which are either unavailable or ineffective. As such, Article 35 sets three grounds for inadmissibility: when the case had been duly investigated by a State with jurisdiction and the decision of the State not to proceed to prosecution is well-founded, when the crime was under investigation by a State with jurisdiction and there is no reason for the Court to take any action with respect to the crime, or when the crime is not of such gravity to justify action by the ICC. These measures were intended to assure that the Court would only address cases as outlined in the preamble. In the subsequent Ad Hoc Committee, many delegations noted that although the ILC intended for the Court to compliment national jurisdictions, further elaboration of the principle of complementarity was needed so that its implications for the substantive provisions of the Statute could be fully understood. The Preparatory Committee also recognized that it was crucial to find a proper balance between the ICC and national authorities in order for the Statute to be accepted by a large number of States. As a result, Article 15 expands the grounds where the Court can assume jurisdiction and introduces the principle of States acting in good faith. Consensus emerged that the Court should determine when a case is inadmissible, and not exercise jurisdiction unless States are unable or unwilling to carry out investigations and prosecutions.

Attaining closure on issues of admissibility was pivotal to adoption of the Rome Statute. Any attempt by a government to weaken complementarity might have endangered agreement on the remainder of the Statute and caused the entire diplomatic conference to fail. If Article 17 had been opened for renegotiation and substantial changes, the delicate balance based on compromise might well have degenerated. Thus, delegations were encouraged not to revisit the substance of these provisions. Although not all States were completely satisfied by the article, most recognized its importance and were willing to accept its terms. However, delegations including China, Egypt, Mexico, Indonesia, India, and Uruguay wanted to reopen negotiations. Thus, the coordinator attempted to resist holding informal consultations, fearing they might invite delegations to offer new proposals that could completely unravel the principle of complementarity. Additionally, he believed bilateral contacts with delegations would afford a better opportunity to gauge the concerns of those

States still opposed to the text.[202] Three main complaints with the article surfaced. First, some States believed the second paragraph granted the Court too much discretion to determine unwillingness, and feared that no objective criteria were included to guide the Court. Secondly, the phrase "undue delay" in the second paragraph was determined to be too low a threshold for unwillingness. Finally, with regard to inability, some delegations were concerned that the "partial collapse" of a national judicial system was an insufficient basis to allow the Court to exercise its jurisdiction. These delegations argued that it was possible for a national judicial system to partially collapse, for example in one region of the country, yet the State could still retain the ability to undertake a genuine prosecution.

These issues were resolved in the negotiations that followed. In both the Bureau Discussion Paper and the Bureau Proposal, the first concern was met by including in the determination of unwillingness the requirement that the proceedings violate independence or impartiality as defined "in accordance with the norms of due process recognized by international law." The language was later refined to read "having regard to the principles of due process recognized by international law," and inserted into the chapeau to the second paragraph.[203] The concern about "undue delay" was allayed by replacing "undue" with "unjustified," thus addressing the fears of those delegations not wanting the ICC to act as a Court of review over national jurisdictions. "Unjustified" was viewed as providing for a higher standard than "undue," as "unjustified" implies that a State will have the opportunity to explain any delay before the ICC can determine that a case will be admissible. The issue of "partial collapse" proved more difficult. Although the adjective "partial" did remain in the Bureau's Discussion Paper and Proposal, in the final package presented to the Committee of the Whole the wording had been changed to "substantial collapse."

Therefore, complementarity as embodied in Article 17 is the cornerstone of the Rome Statute, and balances State sovereignty against the need for an effective and viable Court. Article 17 emphasizes that the ICC is complementary to national judicial systems. Without this article, agreement and compromise would mostly likely have been impossible. The chapeau to Article 17 refers to paragraph ten of the preamble as well as to Article 1 of the Statute, although complementarity is most

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[202] Roy S.K.Lee, ed. *The International Criminal Court: The Making of the Rome Statute: Issues, Negotiations, Results* (London, UK: Kluwer Law International, 1999) pp. 52-53.
[203] Bureau Discussion Paper pp. 17-19, and Bureau Proposal pp.15-16.

clearly manifested in the body of Article 17 itself. The first paragraph of the article clearly upholds the primacy of national jurisdictions in outlining the four grounds by which the Court is to determine the admissibility of a case. The first standard is for the Court to determine that a crime "is being investigated or prosecuted by a State which has jurisdiction over it, unless the State is unable or unwilling genuinely to carry out the investigation or prosecution."[204] The second criteria of inadmissibility is when an offense "has been investigated by a State which has jurisdiction over the it and the State has decided not to prosecute the person concerned, unless that decision resulted from the unwillingness or inability of the State genuinely to prosecute."[205] The third ground, which is included in the domestic practice of most States, is that a case will be inadmissible "if the person concerned has already been tried for conduct which is the subject of the complaint."[206] Finally, a case is inadmissible when it is not of "sufficient gravity" to justify action by the ICC.

The second paragraph of Article 17 addresses the limitations on inadmissibility. In order for the Court to determine unwillingness on the part of a State, one of the conditions listed in the subparagraphs must exist. First, a State will be considered unwilling if proceedings are undertaken for the purpose of "shielding the person concerned from criminal responsibility."[207] This subparagraph is intended to allay the concern that a State might conduct a sham investigation or trial and therefore not render genuine justice. However, it may be extremely difficult for a Prosecutor to prove the devious intent of a State under these terms. Secondly, a State will be considered unwilling if there is "an unjustified delay in the proceedings which in the circumstances is inconsistent with an intent to bring the person concerned to justice."[208] This offsets the burden of proof placed on the Prosecutor in the first subparagraph, but is similarly an attempt to determine the good faith of a State. Finally, should the Court determine that "the proceedings were or are not being conducted independently or impartially, and they were or are being conducted in a manner which, in the circumstances, is inconsistent with an intent to bring the person concerned to justice," the case will be admissible.[209] Originally, this clause was

[204] Rome Statute, Article 17(1)(a).
[205] Rome Statute, Article 17(1)(b).
[206] Rome Statute, Article 17(1)(c).
[207] Rome Statute, Article 17(2)(a).
[208] Rome Statute, Article 17(2)(b).
[209] Rome Statute, Article 17(2)(c).

thought to relate to inability rather than unwillingness, in the sense that a State could not provide for impartial proceedings. However, during consultations it appeared that even where proceedings were not a sham, they could be still be defective in a manner indicating unwillingness, such as attempts to cause a mistrial or taint evidence. As such, this paragraph was placed under the definition of unwillingness.

Finally, in the third paragraph of Article 17, the terms for determining inability are defined. The Court must consider whether, "due to a total or substantial collapse or unavailability of its national judicial system, the State is unable to obtain the accused or the necessary evidence and testimony or otherwise unable to carry out its proceedings."[210] This paragraph was designed to address situations in which the collapse of a central government or general chaos due to civil war or natural disaster leads to massive public disorder and the inability of a national judicial system to function. Although many components of Article 17 are not as demanding as they might have been, it should be noted that the contents of this article were necessary for the Statute to be adopted by the great majority of States in Rome. Article 17 reflects a pragmatic compromise negotiated to protect State sovereignty while also creating a functional Court.

Conclusion

As this analysis of the Rome Statute details, the articles related to jurisdiction create a complex and interconnected system in which the principle of complementarity is fundamental. Resolving concerns about the subject matter jurisdiction of the Court, preconditions to the exercise of jurisdiction, and State acceptance of jurisdiction was necessary in order to adopt a Statute with both meaningful and functional provisions as well as widespread international support. The preamble and Articles 12, 13, and 17, on the preconditions to the exercise of jurisdiction, State consent, the trigger mechanisms, and issues of admissibility, represent a finely constructed compromise on controversial principles, as can been seen in their evolution through past draft Statutes. Many aspects of these articles have been heavily criticized, both for unduly restricting the independence of the Court, and conversely for failing to protect traditional notions of State sovereignty. However, by constructing a workable regime of complementarity, these articles succeeded in laying

[210] Rome Statute, Article 17(3).

the foundation for a Court which has the potential to become an effective tool for international justice, while sufficiently protecting State sovereignty in order to foster broad support from the international community.

CONCLUSION

This thesis explores the principle of complementarity in the Statute of the International Criminal Court as an indicator of a fundamental shift currently occurring in international law. The creation of the Court based upon complementarity reveals the potential subordination of an international system prefaced upon State sovereignty to a new international system based upon collective interests. The adoption of the Rome Statute in 1998 resulted from both a gradual progression towards enforcement of evolving international norms, and a unique confluence of political circumstances and historical events. The establishment of the Court represents

> the natural culmination of two trends in world politics, one of which began late in the nineteenth century and the other after World War II. The first was an increasing recognition of individual human rights as a legitimate subject of international law.... The second trend was the creation of a variety of international institutions to bring within a more universal and law-like framework matters that previously had been left to unilateral state action.[211]

The complementarity of the ICC signals the beginning of a new era in international law, in which shared interests favoring justice for crimes of international concern may prevail over traditional notions of State sovereignty.

The evolution of the complementary jurisdictional regime of the nascent International Criminal Court therefore provides evidence of an emerging post-modern international constitutional approach to genocide, war crimes, and crimes against humanity. To understand the principle of complementarity and how it embodies this shift in the international system, this thesis undertook a detailed analysis of the provisions of various draft Statutes and the final Rome Statute. The Court's subject matter jurisdiction, preconditions to the exercise of jurisdiction, and State acceptance of jurisdiction were each examined as direct manifestations of complementarity. As is

[211] Sewall, Kaysen, and Scharf p. 1.

evident in the preceding chapters, these three entwined strands of complementarity evolved together to create the current regime. Initially, the question of subject matter jurisdiction was highly contested. States disagreed about what constituted crimes of international concern, or even what offenses were widely recognized international crimes, and asserted that customary international law was not sufficiently developed to guide to the Court. Over time, shared norms emerged which defined genocide, war crimes, and crimes against humanity as gross offenses of concern to the international community as a whole, and therefore as worthy of prosecution. Closely tied to the evolution of the provisions on subject matter jurisdiction was the issue of State acceptance of jurisdiction. Initially, the majority of States preferred an opt-in regime for all crimes, in which a State, even after becoming Party to the Statute, must still grant its specific consent before the Court could assume jurisdiction. The question of which States would need to consent to the Court's jurisdiction was also fundamental, with proposals requiring acceptance by the State of nationality of the accused, State of nationality of the victim, territorial State, custodial State, or some combination thereof considered at various stages. However, as the Court's subject matter jurisdiction was narrowed and the importance of international justice for the most serious crimes acknowledged, States showed a new willingness to accept automatic jurisdiction, initially over genocide only, and later over all core crimes, in order to empower the Court to operate where national courts fell short. Inherent jurisdiction was considered essential to safeguard the interests of the international community and to create a viable Court with the support of States Parties. Similarly, the development of the preconditions to the exercise of jurisdiction indicates that States gradually grew more comfortable granting the Court greater independent authority. In early draft Statutes, only States were empowered to bring a case before the Court. However, as it became clear that the ICC could be significantly handicapped by such a restriction and as consensus supporting genuine justice surfaced, States proved willing to allow both the UN Security Council and an independent Prosecutor to trigger the Court's jurisdiction, subject to restrictions already contained within the Statute regarding subject matter jurisdiction and State consent. Expanding the trigger mechanism was deemed necessary to ensure that cases of pressing concern could be brought before the Court, even if States proved unwilling to refer such situations for political reasons. Complementarity, as expressed in subject matter jurisdiction, State consent, and the preconditions to the exercise of jurisdiction, therefore created a delicate but functional

balance between national jurisdiction and international justice. States still retain primacy over the International Criminal Court. However, as the evolution of complementarity suggests, in an international environment increasingly supportive of a constitutional and collective approach to serious offenses, many States sacrificed a degree of sovereignty in order to create an organ capable of rendering justice at the international level.

Therefore, complementarity as established in the Rome Statute demonstrates that the international system is moving beyond preoccupation with State values toward protection of human values, that international law is penetrating the shield of State sovereignty, and that the international system is developing institutions to enforce evolving norms. Clearly, this process is not complete. State sovereignty continues to be staunchly defended even as it falls under increasing criticism. The refusal of many States to ratify the Rome Statute in order to protect national jurisdictions indicates that sovereignty remains a powerful force. However, this struggle over complementarity reveals a major shift in international law, in which an international constitutional approach is gaining favor over classical notions of State sovereignty. A foundation of this new perspective rests with the *ad hoc* tribunals, as highlighted by the case of Dusan Tadic before the Appeal Chamber of the ICTY[212]. Despite claims that the primacy of the international tribunal over national courts is unjustified and violates State sovereignty and domestic jurisdiction, the ruling of the Appeal Chamber specifically confirms that authority increasingly resides at the international level. Emphasizing that the crimes within the ICTY's subject matter jurisdiction "do not affect the interests of one State alone but shock the conscience of mankind," the Chamber asserted that:

> It would be a travesty of law and a betrayal of the universal need for justice, should the concept of State sovereignty be allowed to be raised successfully against human rights. Borders should not be considered as a shield against the reach of the law and as a protection for those who trample underfoot the most elementary rights of humanity.[213]

[212] On May 7, 1996, Tadic became the first accused war criminal to stand trial in The Hague for charges of mutilating, beating, raping, and murdering Bosnian-Muslim detainees in 1992 at Omarska and Keraterm.
[213] Dugard p. 338.

Thus, the Appeal Chamber insisted that the authority to investigate and prosecute international crimes rests collectively with the international community, not simply with States. "Any international criminal jurisdiction capable of vindicating the interests of the international community necessarily will involve some compromise of State sovereignty."[214] Beyond the powerful precedents set by the *ad hoc* tribunals, the establishment of the permanent International Criminal Court further indicates that States are no longer the primary layer where public power resides. Rather, a cosmopolitan approach to international justice is clearly evident, as the functions and duties of the international community will often be exercised collectively, at the international level.

The principle of complementarity exposes a current challenge confronting international law. States remain a central feature of the international system, and a desire to value State sovereignty and national criminal jurisdiction persists. However, the concurrent need to enforce existing norms and establish meaningful collective jurisdiction over the most serious crimes of international concern is clearly evident. Complementarity offers an initial response to the question of where authority will reside in the evolving international system, and at what level the functions and duties of the international community will be exercised. The successful adoption of the Rome Statute for a permanent International Criminal Court based upon complementarity indicates a notable shift in the international system. Authority increasingly rests collectively at the international level, rather than nationally with States. An international constitutional approach to the most horrendous crimes in international law is emerging, as States recognize their shared interests and sacrifice a degree of sovereignty in order to render genuine justice. By consistently holding individuals personally accountable for their actions at an international level, the International Criminal Court can begin to heal the wounds of victims by offering a measure of justice, and can become an extremely powerful deterrent to the future commission of genocide, war crimes, and crimes against humanity. Collective action by a unified community of States can greatly increase the prospects for justice, reconciliation, stability, and peace within the international system.

[214] Brown p. 431.

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