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Can a state party that has referred a situation to the ICC "withdraw" the referral?

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MEMORANDUM FOR THE INTERNATIONAL CRIMINAL COURT

ISSUE: CAN A STATE PARTY THAT HAS REFERRED A SITUATION TO THE ICC "WITHDRAW" THE REFERRAL?

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I. Introduction and Summary of Conclusions

a. Issue

The Rome Statue of the International Criminal Court finally entered into force on July 1, 2002, [1] after decades of delay and fully another decade of long and arduous preparation.[2] The International Criminal Court (ICC) has received and accepted a total of four referrals of "situations" to date, three of which have been "self-referrals," where the State Party on or in whose territory the alleged crimes have occurred or are occurring referred the situation to the ICC.[3] The drafters of the Rome Statute for the ICC assumed that no State Party would ever actually self-refer,[4] despite implicitly providing for such action in the Rome Statute,[5] and a current situation has presented the Court with a second unexpected twist. President Yoweri Museveni of Uganda, having made the first-ever State Party referral to the ICC in the name of Uganda in December 2003,[6] suddenly announced in November 2004 that Uganda might "withdraw" its case from the ICC, in order to make peace with the rebel Lord's Resistance

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[1] Rome Statute of the International Criminal Court, July 17, 1998, 37 I.L.M. 999 [hereinafter ICC Statute], *available at* http://www.icc-cpi.int/library/about/officialjournal/Rome_Statute_English.pdf [reproduced in the accompanying notebook at Tab 1]

[2] For a brief introduction and history of the ICC Statute, see Rome Statute of the International Criminal Court: Overview, at http://www.un.org/law/icc/general/overview.htm

[3] See generally International Criminal Court: Situations and Cases, at http://www.icc-cpi.int/cases.html

[4] Mahnoush H. Arsanjani and W. Michael Reisman, *Developments at the International Criminal Court: The Law-in-Action of the International Criminal Court*, 99 AM. J. INT'L L. 385, 386-387 [reproduced in the accompanying notebook at Tab 56]

[5] ICC Statute, *supra* note 1, art. 14(1) [reproduced in the accompanying notebook at Tab 1]

[6] International Criminal Court Press Release, President of Uganda refers situation concerning the Lord's Resistance Army (LRA) to the ICC, 29 January 2004, ICC-200401299-44-En [reproduced in the accompanying notebook at Tab 34]

Army.[7] The Rome Statute, however, does not appear to provide for such a withdrawal. By now, the ICC and its Chief Prosecutor have invested substantial resources over the past three years investigating and preparing the case for trial. Two observers have noted that "a withdrawal in these circumstances would incur a considerable loss of credibility for the Court and would represent a defeat for the policy against impunity, the principle that animates the very idea of the Court."[8]

This memorandum addresses the consequent issue: What if a State, self-referring or otherwise, changes its mind and attempts to "withdraw" an ICC referral? What is the role of the ICC at that point? This issue becomes especially relevant and pressing as events in Uganda unfold and the possibility grows of an attempted "withdrawal" of Uganda's referral. This memo therefore aims to analyze the Rome Statute, the draft history, and the expert commentaries, together with the statutory and case law of the other major human rights courts and bodies, and the Vienna Convention on the Law of Treaties, to consider in-depth whether a State Party can withdraw a referral from the ICC.

b. Summary of Conclusions

i. The Rome Statute of the International Criminal Court does not provide for withdraw of a referral

Strictly speaking, the plain language of the Rome Statute simply does not allow for a State to withdraw a referral made to the ICC. The few mentions of withdrawal in the Rome

[7] *ICC MAY DROP LRA CHARGES*, New Vision (Uganda) (15 November 2004) [reproduced in the accompanying notebook at Tab 62]

[8] Arsanjani and Reisman, *supra* note 4, at 397 [reproduced in the accompanying notebook at Tab 56]

Statute do not relate to withdrawal form the Statute. The one article dealing solely with withdrawal from the treaty instead ensures that States Parties remain bound to their existing obligations. The Statute explicitly forbids withdrawal of a referral when withdrawal is examined instead as a State Party's unilateral attempt to take criminal jurisdiction away from the Court.

ii. The draft history of the Rome Statute similarly contains no discussion of withdrawal and makes no allowance for withdrawal

The draft history of the Rome Statute, like the Statue itself, does not address withdrawal, contains no discussion of withdrawal, and makes no allowance for withdrawal of a referral. The drafters did not address the possibility in part due to the assumption that no State Party would ever self-refer a situation to the Court of crimes occurring on or in its own territory; the confusion over the issue of withdrawal of a referral is itself the product of the unexpected self-referral phenomenon. On the other hand, the draft history demonstrates the drafters intent, reflected in the Rome Statute, to bind States Parties to their obligations under the Statute and refrain for the Court the power to determine jurisdiction over matters referred to it.

iii. One international court has established the limited possibility for withdrawal of a referral

The Inter-American Court of Human Rights recognized a withdrawal of a referral by the Inter-American Commission under within the very narrow temporal window between the when a referral is made to the Court and when the Court actually exercises its jurisdiction over that case or referral. This limited possibility for withdrawal logically translates to the ICC, given the similar procedural regimes of the two courts. The Prosecutor of the ICC has no reason not to

recognize this very limited form of withdrawal, consider the flexibility and versatility that the Prosecutor has shown with the Rome Statute to date. This recognition does not diminish the power or the nature of the Court and may reassure those States that already fear the powers and independence of the Court and its Prosecutor.

iv. Otherwise, every other international human rights body rejects the concept of unilateral withdrawal, termination, or modification

Otherwise, however, the statutory and treaty bases for every other major international human rights body, as well as the case history and legal analysis of every other major international human rights court or adjudicative body, strongly support the implications in the Rome Statute and its draft history in favor of an international court's control over its own jurisdiction and opposed to the unilateral withdrawal by a State of its obligations under a treaty. The Inter-American Court in particular has gone to great lengths to elevate the status and the protections afforded to human rights treaties and establish that withdrawal is a particularly damaging act in the face of such treaties. The findings of these other international courts and bodies and their statutes naturally apply to the ICC, in light of the human rights implications of the ICC's own Statute and the Rome Statute's specific call for the application of law with regard internationally recognized human rights.

v. The Vienna Convention on the Law of Treaties as applied to the Rome Statute also fails to establish the possibility for withdrawal of a referral from the ICC

The Vienna Convention on the Law of Treaties also fails to establish the possibility for withdrawal of a referral when applied to the Rome Statute. The Vienna Convention is the natural tool for addressing this issue, considering its consistent use by other international human rights bodies in the same context. In fact, taken together with the holdings of the international courts, the Vienna Convention overwhelmingly finds against the possibility of withdrawal.

vi. An actual attempted withdrawal would not change the role of the ICC

An actual attempt to withdraw a referral by a State Party would not likely change the role of the ICC. The Rome Statute was drafted with the expectation of conflict and dispute over issues of complementarity and sovereignty and with the knowledge that the Court has no recourse in the fact of a non-compliant State Party. However, as the Prosecutor has successfully and deftly maintained a non-adversarial policy of cooperation with States Parties thus far, an attempted withdrawal does not necessarily infer a fight.

vii. Uganda, the cause of the confusion over the issue of withdrawal, will not likely attempt to withdraw their own referral from the ICC

Finally, Uganda, whose President made the first ever referral as well as the first ever *self-referral* to the ICC, and whose statements raised the very spectre of withdrawal that this memorandum addresses, is unlikely to actually attempt to withdraw its own referral. Ugandan government officials have consistently and repeatedly indicated that they understand the proper procedural requirements for challenging the admissibility and jurisdiction of a case and that they will not actually try to wrest control of their referral back from the Court.

II. Factual Background

a. Current Referrals, Situations, and Declarations before the ICC

In December 2003, Ugandan President Museveni "took the decision to refer the situation concerning the Lord's Resistance Army to the Prosecutor of the International Criminal Court,"[9] marking the first-ever State Party referral to the fledgling ICC of a situation occurring on the State Party's own territory. President Museveni sought a new option for ending the horrors inflicted upon the people of northern Uganda after twenty-plus years of civil war with the rebel LRA and faced with "persistent international indifference coupled with the exhaustion of available alternatives."[10] After the Prosecutor officially opened an investigation into the situation, however, President Museveni unexpectedly announced in November 2004 that Uganda might "withdraw its case" from the ICC, having recently negotiated a partial ceasefire and possible peace negotiations with the LRA leaders.[11]

Museveni's claim drew immediate outcry from human rights groups and the international community. Amnesty International quickly noted that

> there is not a scrap of evidence in the drafting history or in commentaries by leading international law experts on the Rome Statute suggesting that once a state party has referred a situation that it can 'withdraw' the referral. As soon as the situation has been referred, the ICC has jurisdiction and the state cannot 'withdraw' its referral.[12]

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[9] ICC Press Release, Uganda, *supra* note 6 [reproduced in the accompanying notebook at Tab 34]

[10] Payam Akhavan, *The Lord's Resistance Army Case: Uganda's Submission of the First State Referral to the International Criminal Court*, 99 AM. J. INT'L L. 403, 410 [reproduced in the accompanying notebook at Tab 60]

[11] *ICC MAY DROP LRA CHARGES*, *supra* note 6 [reproduced in the accompanying notebook at Tab 62]. M. Cherif Bassiouni has suggested that this statement itself is "tantamount to a withdrawal of the referral." M. Cherif Bassiouni, *The ICC – Quo Vadis?*, ICJ 4 3 (421) [reproduced in the accompanying notebook at Tab 55]

[12] Amnesty International Press Release, Uganda: Government cannot prevent the International Criminal Court from investigating crimes (16 November 2004) [reproduced in the accompanying notebook at Tab 63]

While this claim seems logical given the absence of any clear language in the Rome Statute regarding withdrawal of a referral, Amnesty did not provide any detailed analysis to support their conclusion. Since these events, no other clear analysis of the issue of withdrawal has emerged, and the Prosecutor has since issued warrants for the tope five LRA leaders.[13] However, these leaders have seized upon Museveni's statement and repeatedly insisted that they will not consent to peace or any other settlement until the referral is withdrawn and the ICC warrants are dropped.[14] President Museveni therefore can claim the dubious honor of having created the current confusion over withdrawal of a referral and imperiled the entire ICC referral procedure.

Three other referrals have been made to the ICC subsequent to the initial Ugandan referral. The Democratic Republic of the Congo and the Central African Republic have each also referred situations occurring within their own territory, in April 2004[15] and January 2005,[16]

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[13] *Museveni Wants LRA Warrants - For Now*, Institute for War & Peace Reporting/AllAfrica.com (27 July 2007) [reproduced in the accompanying notebook at Tab 68]

[14] *Rugunda Explains Government Line on ICC*, New Vision/AllAfrica.com (11 October 2006) [reproduced in the accompanying notebook at Tab 64]; *LRA's Otti Vows to Kill ICC Captors*, The Monitor/AllAfrica.com (13 October 2006) [reproduced in the accompanying notebook at 64]; *Rebel Leader Vows War over Indictments*, New Vision/AllAfrica.com (25 May 2007) [reproduced in the accompanying notebook at Tab 67]; *Museveni Wants LRA Warrants - For Now*, *supra* note 13, [reproduced in the accompanying notebook at Tab 68]; *Gov't Rules Out Blanket Amnesty for LRA*, Institute for War & Peace Reporting/AllAfrica.com (8 October 2007) [reproduced in the accompanying notebook at Tab 69]

[15] International Criminal Court Press Release, Prosecutor receives referral of the situation in the Democratic Republic of Congo, 19 April 2004, ICC-OTP-20040419-50-En [reproduced in the accompanying notebook at Tab 35]

[16] International Criminal Court Press Release, Prosecutor receives referral concerning Central African Republic, 7 January 2005, ICC-OTP-20050107-86-En [reproduced in the accompanying notebook at Tab 36]

respectively. Additionally, the United Nations Security Council referred the situation in Darfur, Sudan, in March 2005.[17]

Finally, the Ivory Coast made the first-ever non-State Party provisional declaration to the ICC in February 2005.[18] Ivory Coast signed the Rome Statute soon after it was opened for signature in 1998 but has never subsequently ratified, accepted, approved, or acceded to the Statute.[19]

b. The Basic Referral Procedure

The Rome Statute outlines a basic procedure for a State to refer a situation to the Prosecutor of the ICC. The Statute makes clear that only a State Party may refer a situation.[20] A State Party is one that signed the Rome Statute prior to 31 December 2000 and has subsequently ratified, accepted, or approved the Statute, or one that has otherwise acceded to the Statute since 31 December 2000.[21] By definition, a State Party "accepts the jurisdiction of the Court with respect to the crimes referred to in article 5,"[22] namely genocide, war crimes, crimes against humanity, or aggression.[23] A State Party may thus "refer to the Prosecutor a situation in which

[17] United Nations Security Council Press Release, Security Council Refers Situation in Darfur, Sudan, to Prosecutor of International Criminal Court, 31 March 2005, SC/8351 [reproduced in the accompanying notebook at Tab 38]

[18] International Criminal Court Press Release, Registrar confirms that the Republic of Côte d'Ivoire has accepted the jurisdiction of the Court, 15 February 2005, ICC-20050215-91-En [reproduced in the accompanying notebook at Tab 37]

[19] *Id.*

[20] ICC Statute, *supra* note 1, arts. 13(a) and 14 [reproduced in the accompanying notebook at Tab 1]

[21] *Id.*, art. 125

[22] *Id.*, art 12(1)

[23] *Id.*, art. 5(1)

one or more crimes within the jurisdiction of the Court appear to have been committed,"[24] in writing,[25] so that the Prosecutor may subsequently investigate the situation and charge specific individuals with those crimes. The Court may then exercise its jurisdiction specifically over that situation.[26] The referral procedure therefore has three steps: 1) a State becomes a Party to the Rome Statute and accepts the Court's general jurisdiction over the enumerated crimes; 2) a State refers a specific situation to the Court and "triggers" the Court's jurisdiction; and 3) the Court exercises its jurisdiction.

The Rome Statute provides a number of options for delay, deferral, and termination of an investigation or prosecution once a referral has been made. The United Nations Security Council can delay or suspend an investigation or prosecution indefinitely under Article 16.[27] Articles 17 through 19 establish a broad platform for determining admissibility and jurisdiction for a given case. Not only may an interested State[28] or an accused[29] challenge admissibility or jurisdiction based on various criteria, but the Court itself may also voluntarily question the admissibility of a case[30] and *must* "satisfy itself that it has jurisdiction in any case brought before it."[31] The

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[24] *Id.*, art. 14

[25] Rules of Procedure and Evidence of the International Criminal Court, Rule 45, ICC-ASP/1/3 [hereinafter ICC Rules], *available at* http://www.icc-cpi.int/library/about/officialjournal/Rules_of_procedure_and_Evidence_English.pdf [reproduced in the accompanying notebook at Tab 2]

[26] ICC Statute, *supra* note 1, art. 13[reproduced in the accompanying notebook at Tab 1]

[27] *Id.*, art. 16

[28] *Id.*, arts. 18 and 19, generally

[29] *Id.*, art. 19, generally

[30] *Id.*, art 19(1)

[31] ICC Statute, *supra* note 1, art. 19(1) [reproduced in the accompanying notebook at Tab 1].

Prosecutor may defer an investigation in light of admissibility issues under these articles. Article 53 provides that the Prosecutor may decline to prosecute following an investigation and that he may reconsider a decision to investigate or prosecute a case.[32] He also may amend or withdraw charges against an individual pursuant to Article 61.[33] The Statute generally shows flexibility in favor of States in light of "exceptional circumstances,"[34] "change of circumstances,"[35] and "new facts or information."[36] Each of these options represents a procedural check on the power of the Court that could conceivably be leveraged by any interested and determined party.[37]

States not party to the ICC may not make referrals.[38] Rather, those states may make *ad hoc* declarations accepting the ICC's jurisdiction over the Rome Statute's crimes without actually becoming a State Party,[39] thereby allowing the Prosecutor to initiate investigations at his

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[32] *Id.*, art. 53

[33] *Id*., art. 61

[34] *Id.*, art. 19(4)

[35] *Id.*, art. 18(7) ("Change of circumstances" can also work against a State; see art. 18(3))

[36] *Id.*, art. 53(4)

[37] On the other hand, one ICC analyst has noted that the Pre-Trial Chamber has no power to restrain the Prosecutor "once the jurisdictional and admissibility requirements have been satisfied" – the Prosecutor's discretion is his only control at that point. "Although there are institutional checks on the power of the Prosecutor…bureaucratic realities provide no procedural boundaries to check – or assist – his decision to prosecute when the 'interestes of justice' are in question." J. Alex Little, *Balancing Accountability and Victim Autonomy at the International Criminal Court*, 38 GEO. J. INT'L L. 363, 379 [reproduced in the accompanying notebook at Tab 53]

[38] Sharon Williams, 'Article 13: Exercise of jurisdiction,' ¶ 15, in Otto Triffterer, ed., Commentary on the Rome Statute of the International Criminal Court: Observers' Notes, Article by Article, Baden-Baden: Nomos Verlagsgesellschaft, 1999 [reproduced in the accompanying notebook at Tab 44]

[39] ICC Statute, *supra* note 1, art. 12(3) [reproduced in the accompanying notebook at Tab 1]

discretion using his Article 15 *proprio motu* privileges.[40] Although the drafters of the Statute may have intended the Court to interpret these declarations "in the sense of 'situation in question,'"[41] they arguably did not mean for the Court to treat an *acceptance* of such declarations as analogous to a State Party referral.[42] "To treat a declaration under Article 12(3) in the same way as a referral would grant third states a privilege that was reserved to states parties to the Statute. Article 14 limits the possibility of referrals expressly to states parties, and the article's drafting history confirms that this limitation was intended."[43] Otherwise, non-States Parties could take advantage of the powers and resources of the ICC "without sharing the burdens and obligations assumed by states parties, such as budgetary contributions and duties of cooperation."[44] Consequently, this memo does not directly address the issues involved in a non-State Party declaration.

This memo also does not specifically address issues concerning Security Council referrals to the ICC. Article 16 of the Rome Statute provides the Security Council with the power to indefinitely defer the investigation or prosecution of any case;[45] therefore, the question

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[40] *Id.*, arts. 12(2) and 15; Carsten Stahn, Mohamed M. El Zeidy, and Hecto Olasolo, *Developments at the International Criminal Court: The International Criminal Court's ad hoc Jurisdiction Revisited*, 99 AM. J. INT'L L. 421, 426 [reproduced in the accompanying notebook at Tab 49]

[41] Hans-Peter Kaul, 'Preconditions to the Exercise of Jurisdiction', p. 611, in Antonio Cassese, Paola Gaeta, John R.W.D. Jones, eds., The Rome Statute of the International Criminal Court: A Commentary; Volume 1, New York: Oxford University Press Inc., 2002 [reproduced in the accompanying notebook at Tab 39]

[42] Stahn, El Zeidy, and Olasolo, *supra* note 40, at 424 [reproduced in the accompanying notebook at Tab 49]

[43] *Id*.

[44] *Id.*, 425; see also Williams, 'Article 13: Exercise of jurisdiction,' *supra* note 38, ¶ 3 [reproduced in the accompanying notebook at Tab 44] (noting that the ILC similarly believed that restriction of referrals to States Parties would enhance cooperation and encourage ratification)

[45] ICC Statute, *supra* note 1, art. 16 [reproduced in the accompanying notebook at Tab 1]

of whether the Security Council may withdraw a referral is less compelling. Where relevant, however, conclusions that relate to Security Council referrals as well as State referrals are noted.

c. The Self-Referral Phenomenon

The factual background to the withdrawal issue necessarily includes the fact that "self-referrals" are themselves something of an unexpected phenomenon. As Mahnoush Arsanjani and W. Michael Reisman, two expert commentators on the ICC, have observed,

> Before and during the Rome negotiations, no one -- neither states that were initially skeptical about the viability of an international criminal court nor states that supported it -- assumed that governments would want to *invite* the future court to investigate and prosecute crimes that had occurred in their territory. To the contrary, it was assumed that the Court would become involved only in those states that were *unwilling* or refused to prosecute, staged a sham prosecution of their governmental cronies, or were simply *unable* to prosecute. There is no indication that the drafters ever contemplated that the Statute would include *voluntary* state referrals to the Court of difficult cases arising in their own territory. By voluntary referral we refer to situations in which the sole basis for satisfying the Court's admissibility test is the referral -- whether effected formally or implicitly -- by the state in which a crime or the situation subject to investigation has taken place.[46]

In other words, the expectation was that States Parties would only refer situations *in other States*.

The current Prosecutor altered this expectation upon accepting his position at the Court. The Prosecutor issued a policy paper in September 2003 in which he outlined some principles and goals of the Office of the Prosecutor (OTP), as well as some basic organizational issues – sort of a "State of the OTP" address.[47] He made two particularly noteworthy remarks in this

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[46] Arsanjani and Reisman, *supra* note 4, at 386-387 [reproduced in the accompanying notebook at Tab 56]

[47] Paper on some policy issues before the Office of the Prosecutor, September 2003, *available at* http://www.icc-cpi.int/library/organs/otp/030905_Policy_Paper.pdf [hereinafter "OTP Policy Paper"] [reproduced in the accompanying notebook at Tab 30]

paper, for the purposes of this discussion. First, he declared his intention for the OTP to "function with a two-tiered approach to combat impunity," in which his office would pursue those "who bear most responsibility for the crimes" while encouraging "national prosecutions, where possible, for the lower-ranking perpetrators."[48] Second, in keeping with a "two-tiered approach," he stated that, rather than working only on potentially adversarial situations where a State is unwilling or unable genuinely to investigate or prosecute,

> there is no impediment to the admissibility of a case before the Court where no State has initiated any investigation. There may be cases where inaction by States is the appropriate course of action. For example, the Court and a territorial State incapacitated by mass crimes may agree that a consensual division of labour is the most logical and effective approach.[49]

The Prosecutor integrated the ideals of complementarity, effective prosecution, and "duty of every State to exercise its criminal jurisdiction over those responsible for international crimes" embodied in the Rome Statute.[50] He essentially declared his intention to work with States Parties, and not against them.

The Prosecutor's policy declaration had three tangible effects. First, the policy paper itself highlighted the Prosecutor's dynamic and innovative approach to applying and interpreting the Rome Statute, especially in light of the ambiguities built into the Statute[51] and the lack of

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[48] *Id.*, p. 3

[49] *Id.*, p. 5

[50] ICC Statute, *supra* note 1, preamble [reproduced in the accompanying notebook at Tab 1]

[51] A surprising number of Rome Statute article and draft history discussions conclude with some version of the statement that the drafters "failed to solve the problem and decided to leave it for the Court to resolve." Stahn, El Zeidy, and Olasolo, *supra* note 40, at 424 (discussing the Court's temporal jurisdiction) [reproduced in the accompanying notebook at Tab 49] See also *infra* note 52 (discussing waiver of complementarity and self-referrals, "…it seems that this issue was left to the Court's interpretation."); Little, *supra* note 37, at 365 [reproduced in the accompanying notebook at Tab 53] ("…the Rome Statute had left open the question of whether and when the Court should defer to domestic amnesties for such perpetrators.") There are numerous other examples, especially in the draft history materials. Little's explanation for this is that "the lack of guidance was intended, at least in part, to

adjudicative history at the ICC to date. The drafters of the Rome Statute apparently left the possibility of self-referral or waiver of complementarity to the Court's interpretation,[52] and the Prosecutor gave the question some definition. Arsanjani and Reisman characterize this as "the law-in-action of the International Criminal Court."[53]

Second, the Prosecutor has in fact worked closely with States Parties, and he succeeded in obtaining the first three referrals to the ICC as self-referrals. He has noted that he worked especially with both Uganda and Congo to encourage those States to self-refer their situations.[54] This seemingly cooperative achievement has a potential dark side, however. This cooperation amounts to something of a hybrid between the power of self-referral and the Prosecutor's *proprio motu* powers under Article 15 of the Rome Statute.[55] As such, it could be seen as a dodge by the Prosecutor of the authorization he is required to obtain from the pre-Trial Chamber to start an investigation *proprio motu* under Article 15[56] and an abuse of the automatic investigation mandated by a State Party referral under Article 53.[57] The Prosecutor must

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provide the Prosecutor with a wide range of options when faced with admittedly new circumstances." Little, *supra* note 37, at 379 [reproduced in the accompanying notebook at Tab 53]

[52] Mohamed M. El Zeidy, *The Ugandan Government Triggers the First Test of the Complementarity Principle: An Assessment of the First State's Party Referral to the ICC*, INTERNATIONAL CRIMINAL LAW REVIEW 5: 83-119, 2005, at 100 [reproduced in the accompanying notebook at Tab 58]

[53] Arsanjani and Reisman, *supra* note 4, generally [reproduced in the accompanying notebook at Tab 56]

[54] Public remarks by ICC Chief Prosecutor Luis Moreno-Ocampo at Case Western Reserve University School of Law, 16 October 2007

[55] ICC Statute, *supra* note 1, art. 15 [reproduced in the accompanying notebook at Tab 1]

[56] *Id.*, art. 15(3)

[57] *Id.*, art. 53(1); Paola Gaeta, *Is the Practice of 'Self-Referrals' a Sound Start for the ICC?*, ICJ 2.4 (949) (discussing in greater depth this and other "possible pitfalls" of self-referrals and the Prosecutor's policy) [reproduced in the accompanying notebook at Tab 59]

therefore take care that this process of encouraged self-referral occurs transparently and by-the-book.

Third, however, the self-referral phenomenon has itself generated the current confusion over whether a State Party can withdraw a referral. Theoretically, as the drafters expected, a State Party referring a situation in another State would have little desire to withdraw a referral; any situation grave enough to warrant a referral would be unlikely to dissipate enough to cause the referring State to change its mind.[58] Alternatively, the drafters feared that the ICC would receive only throwaway referrals, because "states might abuse such an option by trying to send frivolous or politically motivated referrals with regard to situations in the territory of a political adversary."[59] To address such concerns, the drafters built a screening process into the Rome Statute for the Prosecutor and a notification process for the referred State.[60] This notification process may actually provide the lone avenue for withdrawal for a self-referring State (discussed below at Section II(d)(ii)(1)).

Instead, with the apparent proliferation of self-referrals, the ICC must deal with the variety of reasons that a State may seek to withdraw its referral. "Considering the pressure for resolving disputes through negotiation and the recognition that some of these disputes are not susceptible to military solutions, is it not likely that some states that have made voluntary referrals may later agree, as part of the negotiating process with their adversaries, to withdraw their referral to the ICC? Grounds for withdrawal… could be that the state has decided to use its

[58] Philippe Kirsch, QC and Darryl Robinson, "Referral by State Parties", pp. 624-625, in Cassese, Gaeta, and Jones, eds., *supra* note 41 [reproduced in the accompanying notebook at Tab 40]

[59] Arsanjani and Reisman, *supra* note 4, n. 9 [reproduced in the accompanying notebook at Tab 56], citing Kirsch and Robinson, "Referral by State Parties", *supra* note 58, [reproduced in the accompanying notebook at Tab 40]

[60] *Id*.; ICC Statute, *supra* note 1, arts. 53 and 18(1) [reproduced in the accompanying notebook at Tab 1]

national judicial system to deal with crimes…"[61] More drastically, a newly elected government, a government that overthrows the previous one, or a brand new government taking power in the wake of a State's fracturing or State succession would be especially likely to try to withdraw a referral from the ICC.

Whatever the cause, the issue of withdrawal is now unavoidable, and the evolution of the ICC process must be considered as part of the backdrop to the discussion.

III. Legal Discussion

a. The Rome Statute does not provide for withdrawal of a State Party referral

The Rome Statute does not provide for withdrawal of a State Party referral anywhere, either on its face or under more nuanced scrutiny. The glaring absence of such a provision taken together with the abundance of other procedural safeguards available to both the State and the Prosecutor strengthens the conclusion that the Statute simply does not allow a referral to be withdrawn. Rather, the Statute as a whole conveys the impression that once a referral has been made and the Court has exercised its jurisdiction, control and power over the referral lies entirely in the hands of the Court.

The Statute itself makes reference to "withdrawal" in only four of its one hundred and twenty-eight articles, and only three of these references directly concern States Parties. Article 127 deals exclusively with withdrawal from the Rome Statute as a whole and provides the best context for the Statute's treatment of the concept of "withdrawal". Article 127 states in full:

> 1. A State Party may, by written notification addressed to the Secretary-General of the United Nations, withdraw from this Statute. The withdrawal shall take effect one year after the date of receipt of the notification, unless the notification specifies a later date.

[61] Arsanjani and Reisman, *supra* note 4, at 397 [reproduced in the accompanying notebook at Tab 56]

> 2. A State shall not be discharged, by reason of its withdrawal, from the obligations arising from this Statute while it was a Party to the Statute, including any financial obligations which may have accrued. Its withdrawal shall not affect any cooperation with the Court in connection with criminal investigations and proceedings in relation to which the withdrawing State had a duty to cooperate and which were commenced prior to the date on which the withdrawal became effective, nor shall it prejudice in any way the continued consideration of any matter which was already under consideration by the Court prior to the date on which the withdrawal became effective.

Taken as a whole, Article 127 upholds the sovereign right of a State to withdraw from a treaty, while binding the withdrawing State to its existing obligations under the ICC. The one-year notice allows the Court ample time to take under consideration any relevant matter and to thwart a State Party seeking to evade responsibility for crimes not yet connected "with criminal investigations and proceedings" by withdrawing.

The mere existence of the general withdrawal clause in Article 127 is itself evidence that the Statute does not explicitly or implicitly permit withdrawal of a specific referral. As noted in Section II(b), the referral process comprises three steps. The provision for withdrawal from the first step (becoming a State Party) but not the others (specifically, making a referral) suggests, if not the negative implication of deliberate omission,[62] then at least the lack of consideration of the capability to withdraw a referral under the Statute. Taken together with the many other options for delay, deferral, and termination of a case, this omission or lack of consideration is conspicuous.

[62] *Expressio unius est exclusio alterius*, "to express or include one thing implies the exclusion of the other, or of the alternative." Black's Law Dictionary (8th ed. 2004). This canon of construction is "at best a description, after the fact, of what the court has discovered from context." *Id*., quoting Reed Dickerson, *The Interpretation and Application of Statutes* 234- 35 (1975). The Rome Statute provides plenty of context with which to examine this idea.

Article 121 briefly addresses withdrawal from the treaty "with immediate effect" as a legitimate response by a State Party to an amendment to the Rome Statute, but conditions the withdrawal on compliance with Article 127(2).[63] This article therefore similarly affirms a State's sovereign right not to be bound involuntarily to new treaty obligations while holding that State accountable for those obligations already in place. Of course, Article 121 does not have any effect until 2009 at the earliest.[64]

Article 124 allows a State Party to withdraw a declaration limiting its recognition of the jurisdiction of the ICC "at any time;"[65] in other words, the Statute does not restrict a State Party from entering further into the auspices of the Court, as opposed to withdrawing from it. Finally, Article 61 establishes the Prosecutor's power to withdraw charges in certain circumstances and does not relate to States Parties actions.

In order to more fully consider the concept of withdrawal of a referral with respect to the Statute, it is helpful to more clearly define the concept. A referral is the submission by a State Party of a situation to the Prosecutor,[66] for the Court to then exercise its jurisdiction over specific crimes in that situation.[67] Several ICC experts have described a *self*-referral more specifically as a State Party's voluntary decision to relinquish its jurisdiction over a situation.[68] Logically, then,

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[63] ICC Statute, *supra* note 1, art. 121(6) [reproduced in the accompanying notebook at Tab 1]

[64] *Id.*, art. 121(1) (amendments cannot even be proposed until July 1, 2009)

[65] *Id.*, art. 124

[66] *Id.*, art. 14(1)

[67] *Id.*, art. 13(a)

[68] Arsanjani and Reisman, *supra* note 4, at 388 [reproduced in the accompanying notebook at Tab 56]; El Zeidy, *supra* note 52, at 100, 102, and 104 [reproduced in the accompanying notebook at Tab 58]; Akhavan, *supra* note 10, 404, 413-416, 418 [reproduced in the accompanying notebook at Tab 60]. All four experts cite the 1995 Report of the Ad Hoc Committee on the Establishment of an International

a withdrawal of a referral is the unilateral removal or retraction of a situation from the Court's jurisdiction, assuming the Court has taken the steps to exercise its jurisdiction.[69]

In this light, the Rome Statute is crystal clear. Article 19(1) states that "the Court shall satisfy itself that it has jurisdiction in any case brought before it." The notion of *competence de la competence*, a court's power to determine its own jurisdiction, is so well settled in international law that "the requirement in this paragraph that the Court satisfy itself in any case before it that it has jurisdiction was not strictly necessary."[70] A State may challenge the jurisdiction or the admissibility of a case under Rule 19 once the Court has taken jurisdiction,[71] but a State Party can not unilaterally supersede the authority of the Court to deny jurisdiction.

b. The draft history of the Rome Statute contains no discussion of withdrawal of a State Party referral

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Criminal Court as the origin of the "relinquish" language (discussed further *infra* at Section III(b)), in the context of discussing the legitimacy of self-referrals. Report of the Ad Hoc Committee on the Establishment of an International Criminal Court, UN GAOR, 50th Sess., Supp. No. 22, ¶ 47, UN Doc. A/50/22 (1995) [reproduced in the accompanying notebook at Tab 32]. Arsanjani and Reisman contend that a case deriving from a self-referral is inadmissible before the ICC, while El Zeidy and Akhavan (writing at about the same time and using very similar language) seem to agree that self-referrals are legitimate and admissible. Arsanjani and Reisman, *supra* note 4, at 386-391; El Zeidy, *supra* note 52, at 104 ("There is no logic in rejecting a State's attempt to relinquish its jurisdiction in favor of the Court from the outset"); Akhavan, *supra* note 10, at 415 ("There is no basis, in law or policy, for the assertion that states cannot voluntarily relinquish jurisdiction in favor of the ICC"). The current Chief Prosecutor obviously takes the latter view.

[69] See section II(d)(ii)(1) for discussion of whether and when the Court's jurisdiction has been exercised.

[70] Christopher K. Hall, 'Article 19: Challenges to the jurisdiction of the Court or the admissibility of a case,' ¶ 2, in Triffterer, ed., *supra* note 38 (citing the case of *Prosecutor v. Tadić* from the International Criminal Tribunal for the Former Yugoslavia) [reproduced in the accompanying notebook at Tab 46]

[71] ICC Statute, *supra* note 1, arts. 19(2), (4), (5), and (7) [reproduced in the accompanying notebook at Tab 1]

The draft history of the Rome Statute, like the Statute itself, contains virtually no discussion of the possibility of withdrawal of a State Party referral. This fact is unsurprising, given that this issue arose out of the self-referral phenomenon, which was itself barely considered by the drafters. However, the absence of discussion of withdrawal, the minimal consideration of self-referral, the drafters' heavy focus on issues of complementarity and jurisdiction, and the language of the draft statute itself, taken as a whole, convey the strong impression that the drafters did not intend to provide a State with the power to unilaterally withdraw a referral from the Court and did intend to bind States to their obligations under the Statute.

As discussed above in Section II(c), the drafters of the Rome Statute apparently never "contemplated that the Statute would include *voluntary* state referrals to the Court of difficult cases arising in their own territory."[72] On the contrary, the drafters envisioned a "typically interstate trigger mechanism"[73] like those in place at other human rights bodies, and the debate over State referrals therefore centered primarily on which States could refer, and whether States should refer situations or individual cases.[74] Secondary to these concerns was the drafters' fear of abuse of the process by States for "frivolous or vexatious purposes."[75]

The drafters also believed that States would submit referrals only rarely anyway. As one observer has pointed out, the interstate complaint mechanism "is not particularly suitable for the

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[72] Arsanjani and Reisman, *supra* note 4, at 386-387 [reproduced in the accompanying notebook at Tab 56]

[73] Antonio Marchesi, 'Article 14: Referral of a situation by a State Party', ¶ 6, in Triffterer, ed., *supra* note 38 [reproduced in the accompanying notebook at Tab 45]

[74] Kirsch and Robinson, "Referral by State Parties", *supra* note 58, generally [reproduced in the accompanying notebook at Tab 40]; Williams, 'Article 13: Exercise of jurisdiction,' *supra* note 38, ¶ 10 [reproduced in the accompanying notebook at Tab 44]

[75] *Id.*, p. 622; see also Arsanjani and Reisman, *supra* note 4, n. 9, as cited earlier [reproduced in the accompanying notebook at Tab 56]

purpose of individual criminal justice," because "state complaints are, typically, aimed at initiating proceedings before the International Court of Justice or an arbitral tribunal entrusted with the task of settling a dispute between States and possibly ascertaining an internationally wrongful act."[76] Additionally, a number of drafters and ICC experts have cited the general failure of States to use the interstate complaint procedures available at various other human rights bodies as evidence that States would be reluctant to initiate "independent international inquiries into human rights violations" by other States at the fledgling ICC.[77] Consequently, it was expected that the Court would have to rely primarily on Security Council referrals (at least at first)[78] and the Prosecutor's independent powers[79] in order to actually exercise the Court's jurisdiction and prosecute individual cases.

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[76] Marchesi, *supra* note 73, ¶ 6 [reproduced in the accompanying notebook at Tab 45]

[77] *Id.* ("Certain precedents, including the failure of the interstate complaint procedure provided for by the ICCPR, indicate that Governments are not inclined to set off independent international inquiries into human rights violations by other Governments…"); Gaeta, *supra* note 57, [reproduced in the accompanying notebook at Tab 59] ("In practice, however, states are likely to take advantage of this opportunity rarely, as the small number of interstate complaints within the framework of human rights treaties clearly shows."); Philippe Kirsch, QC and Darryl Robinson, 'Initiation of Proceedings by the Prosecutor,' p. 662-663 and n. 28, in Cassese, Gaeta, and Jones, eds., *supra* note 41 [reproduced in the accompanying notebook at Tab 41] ("…the experience under various human rights conventions was a persuasive indication that reliance on States to refer situations would not be ideal." They further note that no inter-state human rights complaints had, to date, been brought either under the ICCPR or to the Inter-American Court of Human Rights under the American Convention on Human Rights, and that only seven such cases had been brought before the European Commission on Human Rights, of which only one came before the European Court.) Also, as the website for the Office of the United Nations High Commissioner for Human Rights helpfully states, "Several of the Human Rights Treaties contain provisions to allow for State parties to complain to the relevant treaty body about alleged violations of the treaty by another State party. **Note:** these procedures have never been used." See 'Human Rights Bodies – Complaints Procedures: Inter-State Complaints,' *available at* http://www.ohchr.org/english/bodies/petitions/index.htm.

[78] Sharon Williams, 'Article 12: Preconditions to the exercise of jurisdiction,' ¶ 3, in Triffterer, ed., *supra* note 38 [reproduced in the accompanying notebook at Tab 43]; Marchesi, *supra* note 73, ¶ 5 [reproduced in the accompanying notebook at Tab 45]

However, a lone example of the consideration of self-referral exists in the draft history, disguised as a question of "waiver of complementarity." Mohamed M. El Zeidy succinctly describes this example in his discussion of the Ugandan self-referral:

> The question of waiver first arose during the discussions of the 1995 *Adhoc Committee* and seemed to be controversial. While it has been proposed that the Statute should permit a situation where a State might 'voluntarily decide to relinquish its jurisdiction in favour' of the ICC, the proposal did not gain support from some delegations. Some of them believed that such a proposal would be inconsistent with the principle of complementarity as the ICC 'should in no way undermine the effectiveness of national justice systems and should only be resorted to in exceptional cases.' A footnote was inserted to that effect in subsequent drafts and remained until the Rome Conference. It was not discussed however, during the Conference as many delegations thought that the issue would be better dealt with in the Rules of Procedure and Evidence. The Rules, however, were silent regarding this question and it seems that this issue was left to the Court's interpretation.[80]

At this point, of course, the Prosecutor has encouraged, and the Court has apparently accepted, self-referrals as a means of triggering the Court's jurisdiction. Given the low profile of this note over the years, the drafters never actually considered the additional implications of such a concept – such as withdrawal.

The drafters were also preoccupied with the definition of jurisdiction in two important respects, for the purposes of this discussion. First, Sharon A. Williams' analyses of the draft history of Articles 12 and 13 demonstrates that the drafters very carefully constructed the

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[79] Kirsch and Robinson, 'Initiation of Proceedings by the Prosecutor,' *supra* note 77, p. 663 [reproduced in the accompanying notebook at Tab 41]; Marchesi, *supra* note 73, ¶ 5 [reproduced in the accompanying notebook at Tab 45]

[80] El Zeidy, *supra* note 52, p. 100 [reproduced in the accompanying notebook at Tab 58] He cites, in part, the Report of the Ad Hoc Committee on the Establishment of an International Criminal Court, *supra* note 68, ¶ 47 [reproduced in the accompanying notebook at Tab 32]; the Draft Statute for the International Criminal Court and Draft Final Act of the United Nations Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court, art. 15, p. 48 n. 38, 14 April 1998, A/CONF.183/2/Add.1 [reproduced in the accompanying notebook at Tab 33] [hereinafter 1998 Draft Statute]; and John T. Holmes, 'The Principle of Complementarity', p. 78, in Roy S. Lee, ed., The International Criminal Court: The Making of the Rome Statute; Issues, Negotiations, Results, Boston: Kluwer Law International, 1999 [reproduced in the accompanying notebook at Tab 42]

jurisdictional regime for these two articles. The resulting articles were a compromise, especially with regard to Article 12, that backed away from giving the Court universal or inherent jurisdiction and instead relied very heavily on State Party consent and referral for the Court to function.[81] The sudden and unilateral withdrawal of jurisdiction from the Court would therefore interfere with the functioning of the Court, at best, and destroy the Court's functioning altogether, at worst. Such withdrawal cannot be compatible with the jurisdictional structure created in these articles.

Second, the draft history shows that the drafters strongly supported the inclusion of the concept of *competence de la competence* in Article 19. This concept is so well established as to be almost taken for granted by the Court, as discussed in Section III(a). John T. Holmes has noted that "the principle that the Court must always satisfy itself as to its jurisdiction was widely supported. The language eventually agreed upon made clear that this duty existed throughout all stages of the proceedings."[82] The drafters therefore always intended for the Court to control decisions regarding a case over which it had exercised jurisdiction. The idea that a State could unilaterally withdraw jurisdiction from the Court directly contradicts the drafters' intentions and the eventual Rome Statute's language.

Finally, the 1998 Draft Act, the penultimate version of the Rome Statute, provides additional insight into the drafters' thinking. Like the final Statute, the 1998 Draft Statute contains no mention of withdrawal of a referral, only withdrawal in unrelated contexts or

[81] See Williams, 'Article 12: Preconditions to the exercise of jurisdiction,' *supra* note 78, generally [reproduced in the accompanying notebook at Tab 43] and Williams, 'Article 13: Exercise of jurisdiction,' *supra* note 38, generally [reproduced in the accompanying notebook at Tab 44]

[82] Holmes, *supra* note 80, p. 61 [reproduced in the accompanying notebook at Tab 42]

regarding the statute as a whole.[83] There is one semi-exception, however. Article 9 of the Draft Statute (which would eventually become Article 12(3) of the Rome Statute) contains several options for "Acceptance of the jurisdiction of the Court."[84] Option 2 of this draft article would allow a State to accept the jurisdiction of the Court *after* the State becomes a Party "at a later time, by declaration lodged with the Registrar,"[85] rather than automatically as a condition to becoming a State Party (like the eventual Rome Statute Article 12(3)). Option 2 further provides that

> A declaration may be made for a specified period, in which case it may not be withdrawn before the end of that period, or for an unspecified period, in which case it may be withdrawn only upon giving a six month's notice of withdrawal to the Registrar. Withdrawal does not affect proceedings already commenced under this Statute.[86]

Although the drafters ultimately rejected this option in favor of automatic consent to the Court's general jurisdiction,[87] its inclusion reveals the drafters' specific intention to bind States Parties to the obligations incurred by a State's consent to jurisdiction, even when allowing a State flexibility in its consent. This translates directly to the notion that a State cannot rescind a decision to relinquish jurisdiction over a situation to the Court, as would happen in the case of withdrawal of a referral.

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[83] See for example the 1998 Draft Statute, *supra* note 80, arts. 58, 59, 61, 87, 90, 109, 110, and 115 [reproduced in the accompanying notebook at Tab 33]

[84] *Id.*, art. 9, p. 32-33

[85] *Id.*, art. 9, Option 2 ¶ 1(b), p. 33

[86] *Id.*, ¶ 3

[87] ICC Statute, *supra* note 1, art. 12(3) [reproduced in the accompanying notebook at Tab 1]

c. Beyond the Rome Statute – comparison with other international human rights bodies

The ICC has yet to produce any real case law with which to analyze this issue concerning the Rome Statute. It seems appropriate, therefore, to look to the other international human rights supervisory and adjudicative bodies for comparison and analysis. It is worth noting that the ICC is not itself a comprehensive human rights court or treaty; rather, the Court is a criminal court with jurisdiction over those abuses of human rights that constitute "the most serious crimes of concern to the international community as a whole."[88] The Court is therefore technically a limited human rights body. Article 21 of the Rome Statute specifically requires the Court to apply, in addition to the Statute and rules of the Court itself,[89] "applicable treaties and the principles and rules of international law,"[90] and that "the application and interpretation of law pursuant to this article must be consistent with internationally recognized human rights."[91] The Court will no doubt look to the other international criminal tribunals as it prosecutes specific crimes and addresses issues of criminal procedure. On the other hand, the international human rights bodies are especially relevant with regard to broader issues of human rights principle and procedure.

i. The statutes of the major human rights bodies collectively confirm the principle of *competence de la competence* and reject unilateral withdrawal of jurisdiction

[88] *Id.*, art. 5(1)

[89] *Id*., art. 21(1)(a)

[90] *Id.*, art. 21(1)(b)

[91] *Id.*, art. 21(3)

A simple comparison between the Rome Statute and the statutory basis of every other human rights body shows that these statutes uniformly uphold the principle of *competence de la competence* and reject unilateral withdrawal from the jurisdiction of that body, where and when they speak to these issues. Two types of relevant international human rights supervisory bodies currently exist. First, there are the four international human rights courts: the International Court of Justice (ICJ),[92] the Inter-American Court of Human Rights (IACHR), the European Court of Human Rights (ECHR), and the African Court on Human and Peoples' Rights (ACHPR).[93] Second, five of the core international human rights treaties of the United Nations have established supervisory, quasi-adjudicative bodies that hear cases or complaints. The International Covenant on Civil and Political Rights (ICCPR) has established the Human Rights Committee to monitor implementation of the Covenant;[94] additionally, a supervisory Committee has been established for each of the International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families (CMW); the International Convention on the Elimination of All Forms of Racial Discrimination (CERD); the Convention on the

[92] The ICJ is not a human rights court *per se*; rather, the ICJ is a human rights court incidentally as the "principal judicial organ of the United Nations", whose purposes include "promoting and encouraging human rights." U.N Charter, Arts. 92 and 1(3)

[93] The African court is "not yet functioning", due to its relatively recent establishment; however, its statute is in place. See generally the homepage for the African Court on Human and People's Rights at http://www.aict-ctia.org/courts_conti/achpr/achpr_home.html (last accessed on 2 November 2007); the African (Banjul) Charter on Human and Peoples' Rights, Adopted 27 June 1981, OAU Doc. CAB/LEG/67/3 rev. 5, 21 I.L.M 58 (1982), entered into force 21 October 1986 [reproduced in the accompanying notebook at Tab 3]; and the Protocol to the African Charter on Human and Peoples' Rights on the Establishment of an African Court on Human and Peoples' Rights adopted in Ouagadougou, Burkina Faso, June 10, 1998, entered into force January 25, 2004, *available at* http://www.africa-union.org/Official_documents/Treaties_%20Conventions_%20Protocols/africancourt-humanrights.pdf [hereinafter Protocol to the African Charter] [reproduced in the accompanying notebook at Tab 12]

[94] See the International Covenant on Civil and Political Rights, Part IV, adopted 16 December 1966, entered into force 23 March 1976, 999 UNTS 171, [hereinafter ICCPR] [reproduced in the accompanying notebook at Tab 9] and the Optional Protocol to the International Covenant on Civil and Political Rights, generally, adopted 16 December 1966, entered into force 23 March 1976, 999 UNTS 302, [hereinafter ICCPR Optional Protocol] [reproduced in the accompanying notebook at Tab 11]

Elimination of Discrimination against Women (CEDAW); and the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT).[95]

Every one of the statutes or treaties that serves as the foundation of these nine human rights bodies and allows denunciation or withdrawal from the treaty, or withdrawal from a conditional acceptance of the court's or committee's jurisdiction to hear cases or complaints, contains a stipulation that such withdrawal or denunciation shall not release the State from obligations arising, acts occurring, and/or cases or complaints commencing while that State was still party to the treaty or statute.[96] Every treaty or statute providing for denunciation requires at

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[95] See, respectively: the International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families, generally, G.A. Res. 45/158, 45 U.N. GAOR Supp. No. 49A at 262, U.N. Doc. A/45/49 (1990) (entered into force July 1, 2003), [hereinafter ICPMW] [reproduced in the accompanying notebook at Tab 8]; the International Convention on the Elimination of All Forms of Racial Discrimination, generally, adopted 21 December 1965, entered into force, 4 January 1969. 660 U.N.T.S. 195, 5 ILM (1966) 352, [hereinafter ICERD] [reproduced in the accompanying notebook at Tab 7]; the Optional Protocol to the Convention on the Elimination of Discrimination against Women, generally, March 12, 1999, 38 ILM 763 (1999), [hereinafter CEDAW Optional Protocol] [reproduced in the accompanying notebook at Tab 10]; and the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, generally, adopted and opened for signature, ratification and accession on 10 December 1984 by GA Res. 39/46, 39 UN GAOR, Supp. No. 51, UN Doc. A/39/51, at 197 (1984), entered into force 26 June 1987. 1465 U.N.T.S. 85; 23 ILM (1985) 535, [hereinafter CAT] [reproduced in the accompanying notebook at Tab 5]. The remaining two "core international human rights treaties," the International Covenant on Economic, Social and Cultural Rights and the Convention on the Rights of the Child, also have supervisory Committees, but these treaty bodies do not hear cases or complaints. See generally 'Human Rights Treaty Bodies: Monitoring the core international human rights treaties,' at the website of the Office of the United Nations High Commissioner for Human Rights, *available at* http://www.ohchr.org/english/bodies/treaty/index.htm.

[96] See ICPMW, *supra* note 95, art. 89(3)(denunciation) and art. 77(8)(conditional acceptance); ICERD, *supra* note 95, art. 14(3)(conditional acceptance only, oddly); CEDAW Optional protocol, *supra* note 95, art. 19(2)(denunciation only); CAT, *supra* note 95, art. 31(2)(denunciation) and art. 21(2)(conditional withdrawal); ICCPR, *supra* note 94, art. 41(2)(conditional acceptance only; the ICCPR does not allow denunciation or withdrawal from the Covenant, see Section III(d)(ii)(2)(d) below); American Convention on Human Rights, art. 78(2)(denunciation), O.A.S. Treaty Series No. 36, 1144 U.N.T.S. 123, entered into force 18 July 1978, reprinted in Basic Documents Pertaining to Human Rights in the Inter-American System, OEA/Ser.L.V./II82 doc.6 rev.1 at 25 (1992) [reproduced in the accompanying notebook at Tab 4]; European Convention for the Protection of Human Rights and Fundamental Freedoms as amended by Protocol No. 11 (with Protocol Nos. 1,4,6,7,12 and 13), art. 58(2)(denunciation), signed 4 Nov. 1950, entered into force 3 Sep. 1953, 213 U.N.T.S. 221 [hereinafter European Convention], [reproduced in the accompanying notebook at Tab 6]. The International Court of Justice and the African Court do not

least six months' notice,[97] and four of them require a full year.[98] Finally, all four of the human rights courts stipulate their *competence de la competence*, such that the court alone decides disputes or issues of jurisdiction.[99]

It could be contended, based on this unified overview of the other major human rights bodies, that the narrow realm of international human rights treaties and courts has developed a customary international law of procedure, in that such courts must alone decide matters of jurisdiction, that States remain bound to obligations incurred under such treaties in the event of withdrawal or denunciation, and such withdrawal or denunciation requires at least six months notice, where it is permitted at all. The case law of these bodies will bolster this view.

ii. The case law of the major international human rights judicial bodies

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provide for either denunciation or any sort of limited withdrawal, creating the "rebuttable presumption" under Article 56 of the Vienna Convention on the Law of Treaties that they are not subject to denunciation or withdrawal. See the Statute of the International Court of Justice, generally, June 26, 1945 59 Stat. 1055, 1060, 3 Bevans 1153, 1187 [hereinafter ICJ Statute] [reproduced in the accompanying notebook at Tab 15] the Protocol to the African Charter, *supra* note 93, generally [reproduced in the accompanying notebook at Tab 12], and the Vienna Convention on the Law of Treaties, art. 56, concluded at Vienna 23 May 1969, entered into force 27 January 1980; 58 U.K.T.S (1980), Cmnd 7964; 1154 U.N.T.S. 331 [hereinafter VCLT] [reproduced in the accompanying notebook at Tab 16] (please see *supra* note 95 for any additional Tab listings not listed here)

[97] See CEDAW Optional Protocol, *supra* note 95, art. 19(1), [reproduced in the accompanying notebook at Tab 10]; European Convention, *supra* note 96, art. 58(2), [reproduced in the accompanying notebook at Tab 6]

[98] See ICPMW, *supra* note 95, art. 89(2), [reproduced in the accompanying notebook at Tab 8]; ICERD, *supra* note 95, art. 21 [reproduced in the accompanying notebook at Tab 7]; CAT, *supra* note 95, art. 31(1) [reproduced in the accompanying notebook at Tab 5]; and American Convention, *supra* note 96, art. 78(2) [reproduced in the accompanying notebook at Tab 4]

[99] See ICJ Statute, *supra* note 96, art. 36(6) [reproduced in the accompanying notebook at Tab 15]; American Convention, *supra* note 96, art. 62(1) [reproduced in the accompanying notebook at Tab 4]; European Convention, *supra* note 96, art. 32(2) [reproduced in the accompanying notebook at Tab 6]; and Protocol to the African Charter, *supra* note 93, art. 3(2) [reproduced in the accompanying notebook at Tab 12]

The other major international human rights judicial bodies have produced a considerable amount of directly relevant case law and legal analysis with which to further examine the issue of withdrawal of a referral. The Inter-American Court of Human Rights in particular has come out with several outstanding and comprehensive legal rulings that provide excellent context for consideration of issues of jurisdiction, withdrawal, treaty interpretation, and human rights law. The Inter-American Court also delivers the sole convincing case *in favor* of withdrawal of a referral, at least in very narrow circumstances. These other human rights bodies have generally given the seemingly narrow issue of withdrawal important depth and definition.

1. The Inter-American Court of Human Rights has established the limited possibility for withdrawal of a referral

In one of its earlier cases, the Inter-American Court held that a party may, in fact, legally and unilaterally withdraw a case from the Court in certain, limited circumstances. In the *Cayara Case (Cayara v. Peru)*, the Inter-American Commission submitted four joint cases against Peru to the Court after completing the standard Commission investigative procedure.[100] However, the Commission withdrew the case from the Court shortly thereafter in response to strenuous protestations from the Peruvian government over alleged procedural errors.[101] Significantly, the Commission did not *request permission* to withdraw the case; rather, the Commission Chairman simply declared his decision in a note to the Court Secretariat "for the time being to withdraw the case from the Court, in order to reconsider it and possibly present it again at some future date,"

[100] *Cayara Case*, (Preliminary Objections), Judgment of February 3, 1993, ¶ 26, Inter-Am. Ct. H.R. (Ser. C) No. 14 (1993) [reproduced in the accompanying notebook at Tab 19]

[101] *Id.*

and withdrew it.[102] The Secretariat acknowledged the Chairman's note and, apparently, accepted the withdrawal.[103] The Commission then amended the referral to correct the irregularities and resubmitted the case to the Court several months later.[104]

Peru specifically objected to the withdrawal of the case in its preliminary objections, claiming that the Commission's action was illegal and the case was "annulled", due to the fact that neither the American Convention nor the Court rules "contemplate the possibility of withdrawing…a case submitted to the jurisdiction of the Court."[105] The Court, however, found the withdrawal to be perfectly legitimate in light of the objection's basis in Article 51 of the American Convention on Human Rights.[106] Article 51 addresses, in part, whether a matter has been "submitted by the Commission or by the state concerned to the Court *and its jurisdiction accepted*."[107] After conceding the absence of any statutory or procedural reference to withdrawal of an application,[108] the Court stated that

> This does not mean that it is inadmissible. General principles of procedural law allow the applicant party to request a court not to process its application, *provided the court has not begun to take up the case. As a rule, that stage begins with the notification of the other party*. Furthermore, the foundation of the Court's jurisdiction, as set forth in Article 61(1) of the Convention, lies in the will of the Commission or of the States Parties.

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[102] *Id.*

[103] *Id.*, ¶ 27

[104] *Id.*, ¶ 30

[105] *Id.*, ¶ 46. Comically, Peru's objection to the withdrawal was also based in part on apparent indignation at the claim that Peru had requested the withdrawal; Peru had actually requested that the case not be submitted at all. This is not the last example of Peru's sensitive disposition towards the Court.

[106] *Id.*, ¶¶ 35, 54

[107] American Convention, *supra* note 96, art. 51(1) (emphasis added) [reproduced in the accompanying notebook at Tab 4]

[108] *Id.*, ¶ 48

> 49. In a case before the Court, formal notification of the application does not occur automatically but requires a preliminary review by the President in order to determine whether the basic requirements of that action have been met. This is spelled out in Article 27 of the Rules in force, which reflects the long-standing practice of the Court…
>
> 51. In the instant case, the request for withdrawal presented by the Commission occurred before the President of the Court was able to conduct the preliminary review of the application and, consequently, before he was in a position to order the notification of same. The President had not even been apprised of the communication…by which the Commission notified the Government that the case had been referred to the Court…[109]

The Court therefore concluded that the withdrawal occurred after the Commission referred the case and before the Court accepted jurisdiction, and it ultimately recognized the withdrawal as legitimate (while upholding Peru's objections on other grounds).[110]

It is logical to conclude that States Parties may similarly withdraw a referral from the ICC before the ICC has taken any steps to exercise jurisdiction. As the current Prosecutor has noted, "neither referrals nor private communications automatically 'trigger' the powers of the Prosecutor."[111] Instead, once a case is referred to the ICC, the Prosecutor must "conduct an analysis"[112] and evaluate the information made available to him;[113] determine whether there is a reasonable basis to proceed and commence an investigation;[114] "notify all States Parties and

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[109] *Id.*, ¶¶ 48, 49, 51 (emphasis added)

[110] *Id.*, ¶¶ 51-63. The Court does not actually conclude on the withdrawal issue; it merely proceeds on the presumption that the withdrawal was not "unjustified or arbitrary." *Id.*, ¶ 51

[111] Annex to the "Paper on some policy issues before the Office of the Prosecutor": Referrals and Communications, p.1, *available at* http://www.icc-cpi.int/library/organs/otp/policy_annex_final_210404.pdf [hereinafter Annex to the Policy Paper] [reproduced in the accompanying notebook at Tab 31]

[112] *Id.*

[113] ICC Statute, *supra* note 1, art. 53(1) [reproduced in the accompanying notebook at Tab 1]

[114] *Id.*, art. 18(1)

those States which… would normally exercise jurisdiction over the crimes concerned;"[115] and, finally, initiate an investigation.[116] The Prosecutor additionally has stated that "not every situation can be immediately investigated" and that "some situations must be carefully monitored for some time."[117]

The Rome Statute and the ICC Rules of Procedure and Evidence do not state explicitly when a case has been "taken up" or when the jurisdiction of the Court is officially in effect. The natural language of Article 13 of the Rome Statute, stating that the Court *may exercise* its jurisdiction *if* a referral is made, suggests that the Court or the Prosecutor must take affirmative action to accept jurisdiction, analogous to Article 51 of the American Convention. The current Prosecutor's statements indicate his position that his response to a referral by gathering and assessing of relevant information represents the commencement of the ICC process.[118] Alternatively, the Inter-American Court, which uses initial procedures similar to those of the ICC,[119] noted that its own participation begins "with the notification of the other party."[120]

The fact is virtually indisputable, in light of the Prosecutor's statements and the Rome Statute regime, that a temporal gap exists between the referral of a case to the ICC and the actual exercise of the ICC's jurisdiction, assuming the Prosecutor does not begin his analysis the

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[115] *Id.*

[116] *Id.*, art. 53(1)

[117] Annex to the Policy Paper, *supra* note 111, pp. 3-4 [reproduced in the accompanying notebook at Tab 31]

[118] *Id.*, pp. 1-4

[119] Rules of Procedure of the Inter-American Court of Human Rights, arts. 32-35, reprinted in Basic Documents Pertaining to Human Rights in the Inter-American System, OEA/Ser.L/V/I.4 rev.9 (2003) [reproduced in the accompanying notebook at Tab 14]; ICC Statute, *supra* note 1, art. 18(1) and (2) [reproduced in the accompanying notebook at Tab 1]

[120] *Cayara Case*, *supra* note 100, ¶ 48 [reproduced in the accompanying notebook at Tab 19]

moment he opens his mail. The admitted existence of this gap sufficiently satisfies the IACHR holding and establishes the possibility that a referring party (including the Security Council) can withdraw a case within this limited window under the Rome Statute as well. The recognition of this possibility by the ICC could show flexibility and offer comfort to both States Parties and those States considering accession to the Rome Statute. This possibility also could provide political cover for those States (or the Security Council) whose referral is met with immediate or severe protestation by its own citizens, its neighbors, or the international community. While the current Prosecutor has expressed firmly that a State may not withdraw a case already well under investigation, he has shown creativity and flexibility with ICC law in his Policy Paper and might consider this accommodating, though limited, possibility.

The problem, of course, from a State's perspective is that such a withdrawal could provide *temporary* cover but does not allow the State to fully escape the Court's jurisdiction. As long as a State remains Party to the Rome Statute and its acceptance of the Court's general jurisdiction remains in place, the Prosecutor may still exert his *proprio motu* power with respect to that State. If sufficient conditions exist to prompt a State to referral a situation in the first place, then the Prosecutor may well agree enough to exert that power once a case is withdrawn. The only real escape for a truly determined State would be via a withdrawal of a referral in the limited circumstances discussed here, followed immediately by the acceptance of an amendment to the Rome Statute, at which point the State could withdraw from the Statute fully "with immediate effect", pursuant to Article 121 of the Statute.[121] Even in this scenario, where a State were to successfully dodge the formal commencement of an investigation or prosecution, one ICC analyst has stated that "if there were breaches of the substantive provisions of the Rome

[121] ICC Statute, supra note 1, art. 121(6) [reproduced in the accompanying notebook at Tab 1]

Statute on a State's territory or by its nationals prior to withdrawal, those offenses would still come within the jurisdiction of the Court even if the prosecution has not been commenced before withdrawal."[122] This is perhaps one more example of the drafters' careful construction of the Statute and reinforces the idea that the drafters deliberately sought to bind a State to its statutory obligations.

2. The case law and legal analysis of the other international human rights bodies not only affirms *competence de la competence* and rejects unilateral withdrawal from treaty obligations, but also establishes a higher threshold of interpretation for human rights treaties

The case law and legal analysis of the other international human rights bodies reaffirms the prerogative of international courts to determine their own jurisdiction and rejects the ability of a State to withdraw from treaty obligations or the jurisdiction of the requisite court, just as their statutory and treaty counterparts do. The International Court of Justice in particular defined some of the basic limitations to withdrawal or modifications of obligations under an international agreement. However, this case law and analysis also establishes a higher plane of obligation and greater restrictions on the ability of a State Party to withdraw or derogate from human rights treaty. The Inter-American Court and the ICCPR Human Rights Committee have clarified and strengthened the nature of human rights treaty. This law and analysis further establish that a State Party cannot unilaterally withdraw from its obligations under a human rights treaty.

a. The International Court of Justice

[122] Roger S. Clark, 'Article 127: Withdrawal', ¶ 7, in Triffterer, ed., *supra* note 38, [reproduced in the accompanying notebook at Tab 48]

The International Court of Justice addressed the most famous (or notorious) attempt by a State to unilaterally evade its treaty obligations and sidestep a court's jurisdiction in the case of *Nicaragua v. United States*.[123] In 1984, Nicaragua announced that it was filing a case against the United States at the ICJ, pursuant to the Treaty of Friendship, Commerce and Navigation between the two countries, over U.S. support of Nicaraguan rebels. In a transparent attempt to preempt the case, the U.S. notified the ICJ three days prior to the filing that the U.S. had "modified" its declaration of recognition of the ICJ's compulsory jurisdiction, such that the declaration "shall not apply to disputes with any Central American State or arising out of or related to events in Central America," and stating that "this proviso shall take effect immediately."[124] The United States then argued at the ICJ that "States have the sovereign right o qualify an acceptance of the Court's compulsory jurisdiction."[125]

The Court laid out the fundamental precepts of jurisdiction and withdrawal (or modification) in denying the United States' contention. The Court noted that 'both Parties apparently recognize that a modification of a declaration which only takes effect after the Court has been validly seised does not affect the Court's jurisdiction;[126] that is, once the Court has exercised jurisdiction over a case, neither party can then unilaterally exert some effect over that jurisdiction. The Court then noted that the United States' attempted modification was really an attempt to exempt itself from its obligations vis-à-vis the Court's jurisdiction under the bilateral

[123] *Case Concerning Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America)(*Jurisdiction of the Court and Admissibility of the Application) ICJ Reports 1984, 392 [hereinafter *Nicaragua*] [reproduced in the accompanying notebook at Tab 17]

[124] *Id.*, ¶ 13

[125] *Id.*, ¶ 53

[126] *Id.*, ¶ 54

treaty in question.[127] While a State is free to enter into such obligations with respect to other States, it cannot then freely break legal obligations established. The Court cited the customary legal concept of *pacta sunt servanda*[128] to clarify that good faith is "one of the basic principles governing the creation and performance of legal obligations… Thus interested States may take cognizance of unilateral declarations and place confidence in them, and are entitled to require that the obligation thus created be respected."[129] The Court concluded that such a modification as attempted by the United States required a "reasonable time" of notice,[130] and it thereby famously rejected the United States' claim and defined one of the best-known rules with regard to the issue of withdrawal.

The ICJ later briefly expanded on its holding in *Nicaragua* in the case of *Cameroon v. Nigeria*.[131] Citing *Nicaragua* to address the unilateral opting *into* obligations under a treaty, the Court noted that "withdrawal ends existing consensual bonds, while deposit establishes such bonds. The effect of withdrawal is therefore purely and simply to deprive other States which have already accepted the jurisdiction of the Court of the right they had to bring proceedings before it against the withdrawing State."[132] This holding makes clear that a withdrawal from a treaty not only violates the legal obligations voluntarily entered into by a state, but it also deprives the rights of those also legally protected under the treaty.

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[127] *Id.*, ¶ 58

[128] Rather than the VCLT, due to the bilateral treaty predating the VCLT.

[129] *Id.*, ¶ 60, citing its own jurisprudence in the *Nuclear Tests* cases

[130] *Id.*, ¶¶ 63, 65

[131] *Case Concerning the Land and Maritime Boundary between Cameroon and Nigeria (Cameroon v. Nigeria)(*Preliminary Objections) 1998 I.C.J. 275 (June 11, 1998) [hereinafter *Cameroon*] [reproduced in the accompanying notebook at Tab 18]

[132] *Id.*, ¶ 34

The ICJ simultaneously defended the power of the Court to define its own jurisdiction and rejected the prerogative of a State to unilaterally withdraw from, and therefore violate, its legal obligations under a treaty. This findings bolster the conclusions already established with respect to the Rome State. Additionally, the Court's language noting the deprivation of the rights of other parties by a withdrawal helps clarify the special protection afforded to human rights treaties, as is subsequently established by the Inter-American Court.

b. The Inter-American Court of Human Rights

In a set of cases in the 1990's, the Inter-American Court dealt simultaneously with issues of interference with the Court's *competence de la competence,* and unilateral withdrawal both from a case and from a human rights treaty. The Inter-American Commission referred two cases to the Inter-American Court in March and July of 1999 respectively, the *Ivcher Bronstein Case*[133] and the *Constitutional Court Case*.[134] The Court in turn notified Peru of each of the applications according to procedure.[135] In response first to the *Constitutional Court Case*, the Peruvian government simply returned the application to the Court and submitted a note to the Court Secretariat stating that

> On July 9, 1999, the Government of the Republic of Peru deposited with the General Secretariat of the Organization of American States the instrument wherein it declares that, pursuant to the American Convention on Human Rights, the Republic of Peru is withdrawing the declaration consenting to the optional clause concerning recognition of the contentious jurisdiction of the Inter-American Court of Human Rights… The withdrawal of recognition of the

[133] *Ivcher Bronstein Case*, (Competence), Judgment of September 24, 1999, Inter-Am. Ct. H.R. (Ser. C) No. 54 (1999) [reproduced in the accompanying notebook at Tab 21]

[134] *Constitutional Court Case*, (Competence), Judgment of September 24, 1999, Inter-Am. Ct. H.R. (Ser. C) No. 55 (1999) [reproduced in the accompanying notebook at Tab 20]

[135] *Constitutional Court Case, supra* note 135, ¶ 22 [reproduced in the accompanying notebook at Tab 20]; *Ivcher Bronstein Case, supra* note 133, ¶ 19 [reproduced in the accompanying notebook at Tab 21]

> Court's contentious jurisdiction takes immediate effect as of the date on which that instrument is deposited with the General Secretariat of the OAS, in other words, July 9, 1999, and applies to all cases in which Peru has not answered the application filed with the Court.[136]

Peru subsequently responded identically to the *Ivcher Bronstein Case*[137] and thereafter made no other response to either case.

The Court delivered its ruling on "the question Peru's purported withdrawal of its declaration recognizing the contentious jurisdiction of the Court and of its legal effects" in the two cases the following September.[138] The Court first noted that, not only does it possess the inherent authority to determine whether it has jurisdiction in a given case, "as with any court or tribunal,"[139] but also that a State Party's acceptance of the Court's jurisdiction according to the American Convention necessarily implies that the State also "accept[s] the Court's right to settle any controversy relative to its jurisdiction."[140] The Court consequently found that "recognition of the Court's binding jurisdiction is an ironclad clause to which there can be no limitations except those expressly provided for" in the Convention.[141] Using the Vienna Convention on the

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[136] *Constitutional Court Case*, *supra* note 135, ¶ 23 [reproduced in the accompanying notebook at Tab 20]

[137] *Ivcher Bronstein Case*, *supra* note 133 , ¶ 23 [reproduced in the accompanying notebook at Tab 21]

[138] *Constitutional Court Case*, *supra* note 135, at ¶ 31 [reproduced in the accompanying notebook at Tab 20]. The Court ruled on the two cases separately but delivered virtually identical holdings. From this point, the memo will refer and cite specifically to the holding of the *Constitutional Court Case*, with the understanding that the language and conclusions are nearly identical to those in the *Ivcher Bronstein Case*, that case having only minor grammatical and formatting differences as presented by the University of Minnesota Human Rights Library online. The legal holdings of both cases are reproduced in full in the accompanying notebook at Tabs 22 and 23.

[139] *Id.*, ¶ 31

[140] *Id.*, ¶ 33

[141] *Id.*, ¶ 35

Law of Treaties as a guide,[142] and noting the absence in the American Convention of any provision for withdrawing recognition of the Court's jurisdiction,[143] the Court concluded that a State Party to the American Convention "can only release itself of its obligations under the Convention by following the provisions that the treaty itself stipulates."[144] In these cases, "the only avenue the State has to disengage itself from the Court's binding contentious jurisdiction is to denounce the Convention as a whole," in accordance with the Convention provisions, which additionally require one year's notice.[145]

The Court then moved to a broader discussion of human rights treaties, noting first that to allow a State Party to defy the Convention itself would effectively be to allow that State to suppress or restrict the human rights that the Convention exists to protect.[146] The Court stated that human rights treaties "are inspired by a set of higher common values (centered around the protection of the human person)…and have a special character that sets them apart from other treaties."[147] Citing its own case law and that of several cases from the ICJ and the European Court of Human Rights in support of the rigorous enforcement of human rights treaties,[148] the Court contended that a State that accepts the Court's jurisdiction under the Convention "binds itself to the whole of the convention and is fully committed to guaranteeing the international

[142] *Id.*, ¶ 37

[143] *Id.*, ¶ 38

[144] *Id.*, ¶ 39

[145] *Id.*

[146] *Id.*, ¶ 40

[147] *Id.*, ¶ 41

[148] *Id.*, ¶¶ 42-44

protection of human rights that the Convention embodies."[149] Ultimately, given the rigorous construction of the Convention and the elevated nature of human rights treaties, "States cannot expect to have the same amount of discretion" in human rights cases as they may have in "international disputes involving purely interstate litigation."[150]

The Court concluded with the finding that

> The American Convention is very clear that denunciation is of "this Convention" (Article 78) as a whole, and not denunciation of or "release" from parts or clauses thereof, since that would undermine the integrity of the whole. Applying the criteria of the Vienna Convention (Article 56(1)), it does not appear to have been the Parties' intention to allow this type of denunciation or release; nor can denunciation or release be inferred from the character of the American Convention as a human rights treaty.[151]

In closing, the Court also cited *Nicaragua v. United States* in reiterating the broader principle that "in order for an optional clause to be unilaterally terminated, the pertinent rules of the law of treaties must be applied. Those rules clearly preclude any possibility of a termination or 'release' with 'immediate effect'."[152]

The Inter-American Court expanded its jurisprudence on human rights treaties a few years later in the case of *Caesar v. Trinidad and Tobago*[153]and affirmed the principle that "the denunciation clause under the American Convention… was surrounded by temporal limitations

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[149] *Id.*, ¶ 45

[150] *Id.*, ¶ 47

[151] *Id.*, ¶ 50

[152] *Id.*, ¶ 52

[153] *Caesar v. Trinidad and Tobago*, (Merits, Reparations and Costs), Judgment of March 11, 2005, Inter-Am Ct. H.R., (Ser. C) No. 123 (2005) [hereinafter *Caesar*] [reproduced in the accompanying notebook at Tab 22]

so as not to allow it to undermine the protection of human rights thereunder."[154] Trinidad and Tobago is one of several Caribbean nations that continues to employ "corporal punishment" as part of its penal system; for example, some crimes are still punished by flogging with a "cat-o-nine tails".[155] A number of these nations have denounced and withdrawn from the American Convention over controversy and conflict with the Convention due to such practices. Due to such controversy and in anticipation of the filing of formal cases, Trinidad and Tobago denounced the Convention in May of 1998[156] pursuant to Article 78 of the Convention, which requires one year of notice and (similar to the Rome Statute) stipulates that "such a denunciation shall not have the effect of releasing the State Party concerned from the obligations contained in this Convention with respect to any ac that may constitute a violation of those obligations and that has been taken by that state prior to the effective date of denunciation."[157] One day before the denunciation took effect in May of 1999, the Inter-American Commission filed a case against Trinidad and Tobago at the Court, followed by a succession of additional cases, all based on acts and incidents occurring prior to Trinidad's denunciation.[158] Trinidad and Tobago declined to participate in any of the subsequent proceedings before the Court. The *Caesar* ruling is the conclusion of only one of these cases, but the Court members elaborated at length on the issue of denunciation in this case especially.

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[154] *Caesar* (Separate Opinion of Judge A.A. Cançado Trinade), ¶ 57 [reproduced in the accompanying notebook at Tab 23]

[155] *Caesar, supra* note 153, ¶ 3 [reproduced in the accompanying notebook at Tab 22]

[156] *Caesar* (Separate Opinion of Judge A.A. Cançado Trinade), ¶ 54 [reproduced in the accompanying notebook at Tab 23]

[157] American Convention, *supra* note 96, art. 78 [reproduced in the accompanying notebook at Tab 4]

[158] *Caesar* (Separate Opinion of Judge A.A. Cançado Trinade), ¶ 53 [reproduced in the accompanying notebook at Tab 23]

The Court addressed the effects of denunciation in its initial establishment of jurisdiction over the case. Noting that Article 78 of the Convention prevents a State from evading its obligations prior to denunciation,[159] the Court turned to the Vienna Convention on the Law of Treaties to assess the general treaty principles:

> In interpreting the American Convention in accordance with the general rules of treaty interpretation enshrined in Article 31(1) of the Vienna Convention on the Law of Treaties, bearing in mind the object and purpose of the American Convention, this Tribunal, in the exercise of the authority conferred on it by Article 62(3) of the American Convention, must act in a manner that preserves the integrity of the provisions of Article 62(1) of the Convention. It would be unacceptable to subordinate these provisions to restrictions that would render inoperative the Court's jurisdictional role, and consequently, the human rights protection system established in the Convention.[160]

The Court thus not only affirmed the importance of the Vienna Convention in interpreting such treaties, but also made a profound statement regarding the implications of a State's attempt to withdraw from its obligations under a human rights treaty.

The concurring judges took the opportunity in *Caesar* to expound further on the principles of human rights treaties. In a short concurrence, Judge Oliver Jackman invoked the principle of *pacta sunt servanda,* noting that "the principle that states should abide in good faith by the terms of treaties into which they voluntarily enter is the bedrock of international comity and international law."[161] He also pointed out the enshrinement of this principle in the Vienna Convention.[162] Judge Jackman then expanded this concept with regard to human rights treaties

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[159] *Caesar*, *supra* note 153, ¶ 6 [reproduced in the accompanying notebook at Tab 22]

[160] *Id.*, ¶ 9

[161] *Caesar* (Concurring Judgment of Judge Jackman), p. 1 [reproduced in the accompanying notebook at Tab 24]

[162] *Id.*, p. 2

(echoing the Court in the *Ivcher Bronstein* and *Constitutional Court* cases), stating "it ought to be obvious that good faith compliance is of even greater importance in the area of international human rights law, where what is at stake is not the impersonal interests of states but the protection of the fundamental rights of the individual."[163] He proclaimed that Trinidad's "contumelious" refusal to abide by the obligations of a treaty which, by definition, extended a State's obligations beyond withdrawal "represents a gratuitous attack on the Rule of Law."[164]

Judge A.A. Cançado Trinade, in his own concurrence, addressed at great length the special nature of human rights treaties and the consequent mandate that denunciations or limitations under such treaties cannot be used to detract from the protection of human rights. He cites the Vienna Convention as establishing that "in practice… in the international law of human rights, somewhat distinctly, there has been a clear and special emphasis on the element of the object and purpose of the treaty, so as to ensure an effective protection… of the guaranteed rights."[165] He later reaffirms that the Vienna Convention "open[s] the way to the taking into account of the nature or specificity of certain treaties."[166] He also cites to the "converging case-law" of the Inter-American Court and the European Court of Human Rights, in consideration of the Vienna Convention, as furthering the establishment of a special nature for human rights treaties which, in turn, requires special protections.[167]

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[163] *Id.*

[164] *Id.*

[165] *Caesar* (Separate Opinion of Judge A.A. Cançado Trinade), ¶ 4 [reproduced in the accompanying notebook at Tab 23]

[166] *Id.*, ¶ 47

[167] *Id.*, ¶¶ 7, 63

In light of the Vienna Conventions and the case law of the human rights courts, Judge Trinade concludes that "permissible restrictions (limitations and derogations)" in human rights treaties must be "restrictively interpreted"[168] and that "certain limits have been established with regard to the denunciation of such treaties."[169] Specifically with respect to the American Convention, he highlights again that the denunciation clause in Article 78 is "surrounded by temporal limitations" that underscores the lasting protection of human rights and the requisite prohibition on a State's unilaterally undermining those rights. He summarized his points by stating

> Thus, not even the institution of denunciation of treaties is so absolute in effects as one might prima facie tend to assume. Despite its openness to manifestations of State voluntarism, denunciation has, notwithstanding, been permeated with basic considerations of humanity as well, insofar as treaties of a humanitarian character are concerned. Ultimately, one is here faced with the fundamental, overriding and inescapable principle of good faith (bona fides), and one ought to act accordingly.[170]

c. The International Covenant on Civil and Political Rights

The Human Rights Committee established by the International Covenant on Civil and Political Rights has provided an important and relevant piece of legal analysis regarding withdrawal of a party from a human rights treaty. In October of 1997, North Korea announced its intention to withdraw from the ICCPR, in response to the resolution of a U.N. sub-

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[168] *Id.*, ¶ 7

[169] *Id.*, ¶ 47

[170] *Id.*, ¶ 56

commission criticizing North Korea's human rights practices.[171] In response, the Human Rights Committee adopted "General Comment No. 26" shortly thereafter during its general session deliberations.[172] Without specifically mentioning North Korea, the General Comment outlined the case against unilateral withdrawal from the ICCPR under customary international law.

The Committee first noted that in the absence of express provision in a treaty for withdrawal or denunciation, the possibility of such must be evaluated according to the Vienna Convention on the Law of Treaties, which establishes that the treaty is not subject to denunciation or withdrawal "unless it is established that the parties intended to admit the possibility of denunciation or withdrawal or a right to do so is implied from the nature of the treaty."[173] The Committee then stated that the existence of clear reference within the same treaty to withdrawal in other respects (referring to Article 41(2) of the ICCPR allowing for withdrawal of a declaration of recognition of the competence of the Committee[174]) indicates the awareness and deliberate rejection of the possibility by the parties drafting the treaty.[175] More broadly speaking, the Committee found that a treaty that codifies and protects "universal human rights... does not have a temporary character typical of treaties where a right of denunciation is deemed to be admitted, notwithstanding the absence of a specific provision to that effect."[176] Furthermore,

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[171] *N. Korea withdraws from U.N. Human Rights treaty*, Kyodo News Service, 27 August 1997 [reproduced in the accompanying notebook at Tab 61]

[172] U.N. Human Rights Com., 53d Sess., General Comments under article 40, paragraph 4, of the International Covenant on Civil and Political Rights, General Comment No. 26(61), adopted 29 October 1997 at 102 PP 1-5, U.N. Doc. A/53/40 (1998) [hereinafter HRC General Comment 26] [reproduced in the accompanying notebook at Tab 29]

[173] *Id.*, ¶ 1

[174] ICCPR, *supra* note 94, art. 41(2) [reproduced in the accompanying notebook at Tab 9]

[175] HRC General Comment 26, *supra* note 172, ¶ 2 [reproduced in the accompanying notebook at Tab 29]

[176] *Id.*, ¶ 3

similar to arguments made at the Inter-American Court, the Committee reiterated its view "as evidenced by its long-standing practice" that the human rights enshrined in the ICCPR "belong to the people living in the territory of the State party" and that the protection of those rights "continues to belong to them" and not to any State Party or government.[177] The Committee concluded that international law does not allow a State Party to denounce or withdraw from the ICCPR.[178]

The Committee's brief response to North Korea's attempt to pull out of the ICCPR appropriately wraps up the discussion of withdrawal and obligations under a human rights treaty. The Committee affirms the use of the VCLT in analyzing human rights treaties, and it echoes the Inter-American Court in reiterating the particular bias against a State withdrawing from its obligations under a human rights treaty. These same principles apply to the ICC, given that possibility for withdrawal simply cannot be found in the Rome Statute.

d. The unilateral withdrawal of a referral would violate the Rome Statute according to the Vienna Convention on the Law of Treaties

The unilateral withdrawal of a State Party referral from the ICC would appear to violate the Rome Statute according to the Vienna Convention on the Law of Treaties (VCLT).[179] The VCLT naturally qualifies as an "applicable treaty" for interpretation of the Rome Statute, pursuant to Article 21 of the Statute.[180] Gerhard Hafner, one of the drafters of the Rome Statute

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[177] *Id.*, ¶ 4

[178] *Id.*, ¶ 5

[179] VCLT, *supra* note 96 [reproduced in the accompanying notebook at Tab 16]

[180] ICC Statute, *supra* note 1, art. 21(1)(b) [reproduced in the accompanying notebook at Tab 1]

and a former member of the International Law Commission, has stated that "since the Statute constitutes a treaty concluded among States after the entry into force of the VCLT, the latter is applicable to the Statute in relation to States parties which are also Parties to the VCLT whereas the other States Parties to the Statute have to resort to customary international law which nevertheless has conformed to the regime of the VCLT."[181] Additionally, given the frequent use of the VCLT by the other human rights bodies for addressing issues of withdrawal and jurisdiction, the VCLT provides an appropriate means for analyzing this issue and complements the preceding case law.

First and foremost, a withdrawal would contradict the VCLT's provision requiring that a treaty be interpreted with "the ordinary meaning" of its terms and "in the light of its object and purpose."[182] The ordinary meaning of the terms of the Rome Statute appears to reject the possibility of withdrawal of a referral. A withdrawal would only interfere with the functioning of the Court, in contradiction with the object and purpose of the Statute, which is the prosecution of "the most serious crimes of concern to the international community" through cooperation between national jurisdictions and the Court.[183] The preceding case law of the other human rights bodies has elevated the meaning of this provision with respect to human rights treaties. Applying the Inter-American Court's ruling in *Caesar*, such a withdrawal "would render inoperative the Court's jurisdictional role, and consequently, the human rights protection system

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[181] Gerhard Hafner, 'Article 120: Reservations,' ¶ 22, in Triffterer, ed., *supra* note 38, [reproduced in the accompanying notebook at Tab 47]

[182] VCLT, *supra* note 96, art. 31(1) [reproduced in the accompanying notebook at Tab 16]

[183] ICC Statute, *supra* note 1, preamble [reproduced in the accompanying notebook at Tab 1]

established" in the Rome Statute.[184] Even if a State sought to withdraw a referral for the sake of exercising its own criminal jurisdiction, the Statute provides a multitude of cooperative procedural options that negate the need for unilateral action.

The VCLT also calls for the performance of treaty obligations in good faith;[185] a unilateral withdrawal directly violates this provision, as a withdrawal is a means of avoidance of the obligations imposed by the Rome Statute. As Judge Jackman noted in *Caesar,* and the ICCPR Human Rights Committee affirmed, "good faith compliance is of even greater importance in the area of international human rights law, where what is at stake is not the impersonal interests of states but the protection of the fundamental rights of the individual."[186]

This attempt to avoid certain obligations under the Statute also implicates Article 44 of the VCLT, which concerns "separability of treaty provisions."[187] Whether withdrawal of a referral is seen as a State Party's violation of the basic referral procedure, the admissibility or jurisdiction procedural requirements, or the other obligations to cooperate with the Court, in any sense withdrawal would be a State Party's attempt to selectively apply the rules of the Rome Statute. According to Article 44 of the VCLT, however, *if* a treaty provides a party the right to "denounce, withdraw from or suspend the operation of the treaty" (as the Rome Statute does in Articles 121 and 127), a party may take such action only vis-à-vis the whole treaty and not with

[184] *Caesar, supra* note 153, ¶ 9 [reproduced in the accompanying notebook at Tab 22]

[185] VCLT, *supra* note 96, art. 26 [reproduced in the accompanying notebook at Tab 16]

[186] *Caesar* (Concurring Judgment of Judge Jackman), p. 2 [reproduced in the accompanying notebook at Tab 24]; HRC General Comment 26, *supra* note , ¶ 4 [reproduced in the accompanying notebook at Tab 29]

[187] *Id.*, art. 44

respect "solely to particular clauses."[188] Withdrawal does not meet the exceptions to Article 44: State Party referral and cooperation is integral to the treaty as a whole,[189] as such they are essential bases to other States Parties consenting to participate in the Court,[190] and continued performance of the remainder of the remainder of the treaty would be manifestly unjust and effectively impossible,[191] at least with respect to that State Party. There is no justification under this article for a State Party to the Rome Statute to suspend part of its obligations by withdrawing its referral.

Finally, the VCLT allows for recourse to "the preparatory work of the treaty and the circumstances of its conclusion" as a supplemental means of interpretation where the treaty leaves the meaning of any terms "ambiguous or obscure." The ordinary meaning of the Rome Statute is fairly clear for the purposes of this discussion, but an examination of the draft history together with the finished Statute overwhelmingly conveys that the drafters intended to preserve the strong jurisdiction of the Court once exercised and bind States Parties to their obligations.

IV. Conclusion

International legal practice has overwhelmingly established that States may not withdraw unilaterally withdraw from their treaty obligations. International human rights practice has similarly established that human rights treaties are deliberately designed to protect human rights and hold States accountable even after a State has withdrawn from the relevant treaty. The Vienna Convention on the Law of Treaties bolsters this practice and affirms that customary

[188] *Id.*, art. 44(1) and (3)

[189] *Id.*, art. 44(3)(a)

[190] *Id.*, art. 44(3)(b)

[191] *Id.*, art. 44(3)(c)

international law forbids States from abusing the absence of explicit provisions in a treaty prohibiting withdrawal. This translates directly to the circumstances of the ICC, which was set up to protect human rights and punish the most egregious abusers of those rights, but which also lacks a clear prohibition of withdrawal of a referral once the Court has taken full jurisdiction. The Rome Statute and its draft history together, together with international legal and human rights practice, clearly forbid a State Party's withdrawal of a referral to the International Criminal Court, with one very limited exception.

a. The role of the ICC does not change in the face of an attempted withdrawal

Ultimately, the role of the ICC does not change in the face of an attempted withdrawal. The same issues of sovereignty, complementarity, and peace vs. justice exist; the individual circumstances of a given situation must still be delicately considered; the universal obligation to prosecute certain crimes remains; and the Court ultimately remains unable to truly enforce violations of, or non-compliance with, the Rome Statute. The Statute "does not provide the Assembly of States Parties with any power to sanction uncooperative state parties."[192]

More importantly, an attempted withdrawal does not unavoidably truncate a case, foreclose all other options, or immediately require an abandonment of cooperation. Current and former members of the OTP have privately expressed that they would regard an attempted withdrawal simply as a challenge to admissibility, which is a reasonable alternative interpretation of a given State's desire to withdraw a referral. A State may not desire to withdraw a referral necessarily to interfere with a case in progress; rather, that State may simply overlook the alternative procedural options. There is every reason to apply the other procedural provisions of the Rome

[192] Matthew Happold, *The International Criminal Court and the Lord's Resistance Army*, MELBOURNE JOURNAL OF INTERNATIONAL LAW, p. 159(26) Vol. 8 No. 1 ISSN: 1444-8602 [reproduced in the accompanying notebook at Tab 57]

Statute, rather than abandon the non-adversarial "cooperative division of labor" adopted by the current Prosecutor. In any case, the OTP will not likely otherwise recognize a withdrawal of a referral.

b. Uganda is unlikely to actually withdraw its referral

The Ugandan government appears highly unlikely to actually attempt to withdraw its referral to the ICC, based on numerous statements made by various government officials over the past two years. Uganda appears to be fully aware that it cannot simply withdraw a referral from the ICC, and that it must make some bona fide attempt at national prosecution in order to challenge the continued admissibility of the pending cases at the ICC. Since President Museveni first caused the international human rights uproar by suggesting that Uganda might withdraw its referral:

- the Ugandan chief peace negotiator has stated that "it's only when we are armed with a peace agreement and the LRA has gone through the (traditional Ugandan reconciliation) mato-oput process that the ICC can be asked to review the indictments."[193]

- the government peace team publicist has acknowledged that the ICC will not drop arrest warrants until it is convinced that peace and justice has been delivered to northern Uganda[194]

- the government peace team spokesman has said that "the Ugandan government can do nothing against the ICC indictments. There is a process to be followed if the indictments are to be lifted."[195]

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[193] *Rugunda Explains Government Line on ICC*, *supra* note 14 [reproduced in the accompanying notebook at Tab 64]

[194] *LRA's Otti Vows to Kill ICC Captors*, *supra* note 14 [reproduced in the accompanying notebook at Tab 65]

[195] *Rebel Leader Vows War over Indictments*, *supra* note 14 [reproduced in the accompanying notebook at Tab 67]

- President Museveni himself stated that Uganda will not ask the ICC to lift the arrest warrants "before a final peace deal is completed" (implicitly conceding that the ICC must be asked, not told)[196]

- and one of the Ugandan interior ministers and negotiators has admitted that the ICC indictments have made the LRA more cooperative, not less, and said that the indictments cannot be withdrawn until the LRA abandons rebellion, signs a peace agreement, and accepts to be integrated into the community[197]

These sentiments show that the Ugandan government is well aware that withdrawal of the referral is not really an option, and that it must have grounds to challenge the admissibility of the cases before the ICC if it truly wants the Court to relinquish the referral back to Uganda's jurisdiction. If nothing else, the ICC's investigation and prosecution of the Ugandan cases have facilitated the negotiation process and helped suspend the civil war; Museveni may even drive the LRA criminals to seek protection at the ICC from the Ugandan government, as opposed to the status quo. Regardless, the Court must proceed for the time being with the knowledge that the crimes in question there are gruesome, widespread, and well-known, and that those with the "greatest responsibility" are clearly identifiable.

c. A recommendation: limited withdrawal and 2009 amendments

While it is clear that withdrawal of a referral is not currently a viable option under the Rome Statute, there is at least one good reason to favor establishing a limited withdrawal option. The Democratic Republic of Congo (DAR) and the Central African Republic (CAR) made

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[196] *Museveni Wants LRA Warrants - For Now, supra* note 13 [reproduced in the accompanying notebook at Tab 68]. Museveni also slyly suggested that the LRA leaders might be better off in the hands of the ICC, stating that "Even if the ICC was to lift [the arrest warrants], we shall hunt them down and our punishment is much harsher than that of the ICC. You know ICC doesn't sentence you to death. But here, *you know how things move.*" (emphasis added!)

[197] *Gov't Rules Out Blanket Amnesty for LRA, supra* note 14 [reproduced in the accompanying notebook at Tab 69]

nearly identical referrals to the ICC. Rather than referring a specific situation that "specif[ies] the relevant circumstances" and is accompanied by "supporting documentation,"[198] both states referred to the Prosecutor "the situation of crimes within the jurisdiction of the Court…committed anywhere in the territory [of the referring State] since…entry into force of the Rome Statute."[199] Both states have therefore relinquished broad, open-ended, unrestricted jurisdiction to the ICC, from now until eternity.

The DRC and CAR presumably do not want the ICC's jurisdiction "triggered" forever; this would be an affront to notions of complementarity and sovereignty. Given that the Prosecutor has worked closely and successfully with States Parties to create the self-referral phenomenon, he should similarly work with States to negotiate the termination or withdrawal of referrals, where appropriate. This is consistent with the Prosecutor's cooperative, non-adversarial approach to policy at the ICC. Even States that make well-defined, limited self-referrals may eventually want to re-exert control and jurisdiction over the situation, at the conclusion of wars or conflicts, after succession of governments, etc. Similarly, the Rome Statute does not define how or when a non-state party's Article 12(3) declaration terminates. Does the "rebuttable presumption" of Article 56 of the VCLT apply, or is the non-state party bound to the same withdrawal procedure as States Parties under Article 127 of the Rome Statute? The Ivory Coast made its declaration to the Court using very similar language as the DRC and CAR State Party referrals. Presumably, the Ivory Coast wants its jurisdiction back eventually also.

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[198] ICC Statute, *supra* note 1, art. 14(2) [reproduced in the accompanying notebook at Tab 1] (Arsanjani and Reisman would find these referrals even less admissible, no doubt)

[199] ICC Press Release, DRC, *supra* note 15 [reproduced in the accompanying notebook at Tab 35]; and ICC Press Release, CAR, *supra* note 16 [reproduced in the accompanying notebook at Tab 36]

With seven years from the Statute's entry into force set to expire in the near future, the Prosecutor should work with the Assembly of States Parties and the United Nations to define these confusing concepts. The issues surrounding withdrawal of referrals affect all States Parties, the basic functioning of the International Criminal Court, and ultimately, therefore, the protection of human rights and the prosecution of the most serious crimes of concern to the international community.