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# Whether The Referrals to The ICC By Uganda and The Democratic Republic of Congo Violate the Principle of Complementarity

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# MEMORANDUM FOR THE OFFICE OF THE PROSECUTOR OF THE INTERNATIONAL CRIMINAL COURT

**ISSUE: WHETHER THE REFERRALS TO THE ICC BY UGANDA AND THE DEMOCRATIC REPUBLIC OF CONGO VIOLATE THE PRINCIPLE OF COMPLEMENTARITY**

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## I. INTRODUCTION AND SUMMARY OF CONCLUSIONS

### A. Issues

The principle of complementarity, as set forth in the Rome Statute of the International Criminal Court, provides that the International Criminal Court (ICC) may claim jurisdiction only where a State is "unwilling" or "unable" to prosecute. In its relationship to national courts, the ICC is therefore intended to be a court of last resort. The countries of Uganda and the Democratic Republic of Congo have, for political reasons, referred directly to the ICC cases over which they have primary jurisdiction. Their referrals raise the issue of whether these cases violate the principle of complementarity.

### B. Summary of Conclusions

#### 1. It Is Unlikely that the Interests of Justice would be Served if the ICC Does Not Prosecute the Cases Referred to It By Uganda and the Democratic Republic of Congo.

The interests of justice must be met in accordance with Rome Statute article 53(1), which states that, "[i]n deciding whether to initiate an investigation, the Prosecutor shall consider whether:…(c) Taking into account the gravity of the crime and the interests of victims, there are nonetheless substantial reasons to believe that an investigation would not serve the interests of justice."[1] The judicial systems of both

[1] UN Doc. A/CONF.183/9 (17 July 1998), *Rome Statute of the International Criminal Court.* Adopted by the United Nations Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court on 17 July 1998, art. 53(1) [hereinafter Rome Statute] [Reproduced in the accompanying notebook I at Tab 13]. For UN documentation, see the following: UN Doc. A/49/10, *Draft Statute for an International Criminal Court with commentaries, Report of the International Law Commission on the Work of Its Forty-sixth Session*, UN GAOR, 49th Sess., Supp. No 10 [Reproduced in the accompanying notebook I at Tab 1]; UN Doc. A/50/22, *Report of the Ad Hoc Committee on the Establishment of an International Criminal Court*, reprinted in THE STATUTE OF THE INTERNATIONAL CRIMINAL COURT: A DOCUMENTARY HISTORY 617 (M. Cherif Bassiouni, ed., 1998) [Reproduced in the accompanying notebook I at Tab 2]; UN Doc. A/51/10, *Report of the International Law Commission*, 48th Sess. 6 May to 26 July (1996) (G.A. 51st Sess. Supp. No. 10) [Reproduced in the accompanying notebook I at Tab 3]; UN Doc. A/51/22, *Report of*

Uganda and the Democratic Republic of Congo are likely unable to handle the prosecution of rebel leaders due to judicial corruption, lack of independence, poor administration, and delay. One may argue that national prosecution in these cases would undermine the interests of justice and that both cases are serious and grave enough to warrant prosecution by the International Criminal Court.

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*the Preparatory Committee on the Establishment of an International Criminal Court*, Volume I (Proceedings of the Preparatory Committee during March-April and August 1996) reprinted in THE STATUTE OF THE INTERNATIONAL CRIMINAL COURT: A DOCUMENTARY HISTORY 385 (M. Cherif Bassiouni, ed., 1998) [Reproduced in the accompanying notebook I at Tab 4]; UN Doc. A/51/22, *Report of the Preparatory Committee on the Establishment of an International Criminal Court*, Volume II (Compilation of proposals), reprinted in THE STATUTE OF THE INTERNATIONAL CRIMINAL COURT: A DOCUMENTARY HISTORY 441 (M. Cherif Bassiouni, ed., 1998) [Reproduced in the accompanying notebook II at Tab 5]; UN Doc. A/AC.249/1997/L.5, 1997 Decisions Taken by the Preparatory Committee at its Session held in New York 11 to 21 February 1997, reprinted in THE STATUTE OF THE INTERNATIONAL CRIMINAL COURT: A DOCUMENTARY HISTORY 369 (M. Cherif Bassiouni, ed., 1998) [Reproduced in the accompanying notebook II at Tab 6]; UN Doc. A/AC.249/1997/L.8/Rev.1, 1997 Decisions Taken by the Preparatory Committee at its Session held in New York 4 to 15 August 1997, reprinted in THE STATUTE OF THE INTERNATIONAL CRIMINAL COURT: A DOCUMENTARY HISTORY 349(M. Cherif Bassiouni, ed., 1998) [Reproduced in the accompanying notebook II at Tab7]; UN Doc. A/AC.249/1997/L.9/Rev.1, 1997 Decisions Taken by the Preparatory Committee at its Session held in New York 1 to 12 December 1997, reprinted in THE STATUTE OF THE INTERNATIONAL CRIMINAL COURT: A DOCUMENTARY HISTORY 313 (M. Cherif Bassiouni, ed., 1998) [Reproduced in the accompanying notebook II at Tab 8]; UN Doc. A/AC.249/1998/L.13, 1998 Report of the Inter-Sessional Meeting from 19 to 30 January 1998 held in Zutphen, The Netherlands, reprinted in THE STATUTE OF THE INTERNATIONAL CRIMINAL COURT: A DOCUMENTARY HISTORY 221 (M. Cherif Bassiouni, ed., 1998) [Reproduced in the accompanying notebook II at Tab 9]; UN Doc. A/CONF.183/2 (1998) Report of the Preparatory Committee on the Establishment of an International Criminal Court, *Introduction & Draft Organization of Work* , reprinted in THE STATUTE OF THE INTERNATIONAL CRIMINAL COURT: A DOCUMENTARY HISTORY 115 (M. Cherif Bassiouni, ed., 1998) [Reproduced in the accompanying notebook II at Tab 10]; UN Doc. A/CONF.183/2/Add.1 (14 April 1998), *Report of the Preparatory Committee on the Establishment of an International Criminal Court*, Draft Statute and Draft Final Act reprinted in THE STATUTE OF THE INTERNATIONAL CRIMINAL COURT: A DOCUMENTARY HISTORY 119 (M. Cherif Bassiouni, ed., 1998) [Reproduced in the accompanying notebook II at Tab 11]; UN Doc. A/CONF.183/2/Add.2 (1998) Report of the Preparatory Committee on the Establishment of an International Criminal Court, *Draft Rules of Procedure* , reprinted in THE STATUTE OF THE INTERNATIONAL CRIMINAL COURT: A DOCUMENTARY HISTORY 211 (M. Cherif Bassiouni, ed., 1998) [Reproduced in the accompanying notebook II at Tab 12]; UN Doc. A/CONF.183/10 (17 July 1998), *Final Act of the United Nations Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court* [Reproduced in the accompanying notebook II at Tab 14]; UN Doc. PCNICC/2000/1/Add.1 (13-31 March 2000, 12-30 June 2000), *Report of the Preparatory Commission for the International Criminal Court, Part I: Finalized draft text of the Rules of Procedure and Evidence, available at* www.un.org/law/icc/prepcomm/jun2000/5thdocs.htm [Reproduced in the accompanying notebook II at Tab 15].

**2. There is a Sound Argument that the Cases Referred to the International Criminal Court by Uganda and by the Democratic Republic of Congo Do Not Violate the Principle of Complementarity.**

Article 17 of the Rome Statute provides the essence of the principle of complementarity, stating that the ICC may not exercise its jurisdiction unless a state is unwilling or unable to do so. The Rome Statute is silent, however, on the permissibility of a State Party waiving the protections of the principle of complementarity. One may argue that the issue of waiver should therefore be decided by the Court on a case-by-case basis. With regard to Uganda and the Democratic Republic of Congo, ICC prosecution is likely the best and only option for serving the interests of international justice.

## II. FACTUAL BACKGROUND

### A. The Situation in Uganda

The situation in northern Uganda is one of armed conflict spanning 18 years and claiming thousands of civilian lives.[2] The main conflict is between the current government of Uganda, which is composed of former rebels who forcibly overthrew their predecessors in 1986, and the Lord's Resistance Army (LRA) in northern Uganda, a group of armed rebels currently (and for the past 18 years) attempting government overthrow.

Both sides in the conflict are accused of criminal wrongdoing. The state and military forces of Uganda are accused of human rights abuses such as illegal arrest and detention, torture, and unlawful death,[3] most of which are allegedly of a political nature.[4]

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[2] Amnesty International, Public Statement: *Uganda: International Criminal Court investigation an important step toward ending impunity*, 29 July 2004, News Service No: 191, AI Index: AFR 59/006/2004, *available at* http://web.amnesty.org/library/Index/ENGAFR590062004 [hereinafter AI Public Statement] [Reproduced in the accompanying notebook VI at Tab 22].

[3] Human Rights Watch, *State of Pain: Torture in Uganda*, March 2004, Vol. 16, No. 4 (A), p.6-7, *available at* http://hrw.org/reports/2004/uganda0404/uganda0304.pdf [hereinafter *Torture in*

The LRA is accused of executing a campaign of terror against civilians in northern and eastern Uganda, including the widespread abduction and abuse of children.[5]

The Ugandan government referred the situation to the ICC in January 2004, and the ICC prosecutor announced his intention to investigate. The Prosecutor's decision was met with widespread condemnation from the human rights community.[6] This seeming paradox stems from the problems of reconciling international and local jurisdictions and of balancing the interests of peace and justice.[7]

Human rights advocates and non-governmental organizations suggest that the situation in Uganda presents the ICC with an opportunity to prove itself,[8] however the appropriateness of ICC prosecution under the circumstances is questioned by groups working for peace in the region.[9] At issue is the Amnesty Law of 2000, passed by the Ugandan parliament, which represents the attempts of activists to "salvage their last, best

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*Uganda*](listing 12 factors that support the government's alleged wrongful acts, including the condition of impunity for government forces) [Reproduced in the accompanying notebook VI at Tab 32].

[4] *Torture in Uganda*, *supra* note 3, at 23 (claiming that a majority of detainees are tortured because of their actual or alleged political activities, including, often, support of the opposition presidential candidate or, sometimes, simply knowing a supporter or rebel) [Reproduced in the accompanying notebook VI at Tab 32] . For a non-statistical compilation of interviews of former and current prisoners of the Ugandan government, in both political and non-political cases, see *id*. at 22-58.

[5] *Id*., at 14. For a list of other groups targeted by the Ugandan government, see *id*. at 14-15.

[6] Adam Branch, *International Justice, Local Injustice: The International Criminal Court in Northern Uganda*, Dissent, Summer 2004, Vol. 51, Issue 3, p22, 22 at http://search.epnet.com/login.aspx?direct=true&AuthType=cookie,ip,url,uid&db=aph&an=13796694. (noting that protest of the ICC's involvement came from organizations that were working for peace in northern Uganda, including activists, lawyers, and civil-society organizations) [Reproduced in the accompanying notebook V at Tab 43].

[7] *Id*., at 22.

[8] *Id*. See also AI Public Statement, *supra* note 2 [Reproduced in the accompanying notebook VI at Tab 22]; HRW, *Investigate All Sides*, *infra* note 15 [Reproduced in the accompanying notebook VI at Tab 29].

[9] Branch, *supra* note 6, at 23 [Reproduced in the accompanying notebook V at Tab 43].

chance for peace,"[10] but which is fundamentally threatened by ICC prosecution and the government's decision to exclude only LRA members from the protection of amnesty.[11]

Human rights organizations insist that responsibility be taken for the actions of the army of the Ugandan government, the Uganda People's Defense Forces (UPDF).[12] The UPDF's activities against civilians have been of a vicious nature,[13] leading the people of Northern Uganda to cry genocide.[14] Yet, while human rights groups have called for ICC prosecution of members of both the rebel LRA and the government's UPDF,[15] some think that the attention will be one-sided, falling with particular force upon the LRA.[16]

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[10] *Torture in Uganda*, *supra* note 3, at 17-19 (describing the Amnesty Law as extending to all participants in the Ugandan conflict, on all sides and at all levels of command) [Reproduced in the accompanying notebook VI at Tab 32]; Branch, *supra* note 6, at 24 [Reproduced in the accompanying notebook V at Tab 43].

[11] Branch, *supra* note 6, at 24 (expressing the belief of some that the only way to stop LRA violence is by stopping the violence against the LRA and supporting an amnesty that protects it and stating that the government's own intention in enacting the law was to encourage rebels to disband) [Reproduced in the accompanying notebook V at Tab 43]. For a discussion of the amendment of the Amnesty Law to exclude LRA members, see *id*. at 24 (stating the intention of the president of Uganda to hold the LRA leadership accountable because they bear "the greatest responsibility for the crimes against humanity committed in Northern Uganda."); *accord* HWR, *Investigate All Sides*, *infra* note 15 (stating that the amendment does not limit the ICC's ability to prosecute individuals on all sides of the conflict) [Reproduced in the accompanying notebook VI at Tab 29].

[12] Branch, *supra* note 6, 23 [Reproduced in the accompanying notebook V at Tab 43].

[13] *Id*. (reporting that the government maintains forced displaced people's camps, or "protected villages," that are understaffed, undersupplied in violation of Geneva Conventions, and unprotected, leaving them completely vulnerable to LRA attacks)(reporting that civilians found outside the camps are killed by the UPDF); AI Public Statement, *supra* note 2 (reporting allegations that the Ugandan security forces retrain for their own ranks children who have escaped LRA captivity) [Reproduced in the accompanying notebook VI at Tab 22].

[14] Branch, *supra* note 6, at 23 [Reproduced in the accompanying notebook V at Tab 43].

[15] *Id*., at 23-24; AI Public Statement, *supra* note 2 [Reproduced in the accompanying notebook VI at Tab 22]; Human Rights Watch, *ICC: Investigate All Sides in Uganda – Chance for Impartial ICC Investigation into Serious Crimes a Welcome Step*, February 4, 2004, *available at* http://hrw.org/english/docs/2004/02/04/uganda7264_txt.htm [hereinafter HRW, *Investigate All Sides*] [Reproduced in the accompanying notebook VI at Tab 29].

[16] Branch, *supra* note 6, at 24 [Reproduced in the accompanying notebook V at Tab 43].

Critics suggest that the Ugandan president referred the situation to the ICC for purely political reasons and that he "would not have initiated a prosecution he did not think he could control."[17] While the ICC prosecutor may decide to include investigation and prosecution of the UPDF, peace advocates believe that there will be no pressure from the international community to do so and that the ICC's involvement will be a one-sided attack on the LRA.[18]

**B. The Situation in the Democratic Republic of Congo**

The situation in the Democratic Republic of Congo (DRC) involves the targeting of civilians in the Ituri region for torture, execution and ethnic massacre, abduction, rape, and the forced military recruitment of children.[19] "Ituri is the battleground for the war between the governments of Uganda, Rwanda and the DRC which have provided political and military support to local armed groups despite abundant evidence of their widespread violations of international humanitarian law."[20]

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[17] Branch, *supra* note 6, at 24 [Reproduced in the accompanying notebook V at Tab 43].

[18] *Id*.

[19] Human Rights Watch, *Democratic Republic of Congo: Ituri: "Covered in Blood": Ethnically Targeted Violence in Northeastern DR Congo*, Vol. 15, No. 11 (A), July 2003, p.1, *available at* http://hrw.org/reports/2003/ituri0703/DRC0703full.pdf [hereinafter *Ituri: Covered in Blood*] [Reproduced in the accompanying notebook VI at Tab 28]; see *id*. (noting the United Nations estimation that 50,000 civilians have died in the Ituri conflict since 1999 and the further estimation that over 500,000 have been forced to flee their homes.); Amnesty International, *Democratic Republic of the Congo: "Our brothers who help kill us" – economic exploitation and human rights abuses in the east."*, 1 April 2003, AI Index: AFR 62/010/2003, *available at* http://web.amnesty.org/library/Index/ENGAFR620102003 (stating that the inter-ethnic killings in Ituri "are intimately linked to political manipulation and insecurity created by combatant forces" and that "[c]onstant shifts in political and military alliances based on economic interests have left a political vacuum and stoked ethnic conflicts.") [Reproduced in the accompanying notebook VI at Tab 18]. See generally *id*. for a discussion of the economic issues underlying the DRC's larger conflict. See *id*. at Part X for a discussion of the legal framework of the conflict.

[20] *Ituri: Covered in Blood*, *supra* note 19, at 2. See *id*. (claiming that the governments of Uganda, Rwanda and the DRC share culpability because they have failed to prevent the abuses of the armed groups they support) [Reproduced in the accompanying notebook VI at Tab 28]; *accord* Human Rights Watch, *ICC's First-Ever Probe Must be Effective – Criminal Responsibility in Congo Conflict Reaches Across Borders*,

While international leaders and the UN Security Council have regularly denounced the crimes, they have not offered effective meaningful assistance in achieving peace or justice.[21] The DRC joined the ICC, in part, because of its failure to gain international assistance to end the conflict in Ituri.[22] Although human rights advocates urged the ICC Prosecutor to initiate an investigation *proprio motu*,[23] it was a State referral from the DRC that triggered ICC involvement.

The current ability of the DRC's national judicial system to administer justice in Ituri is in serious question.[24] Human Rights Watch reports a state of breakdown and disarray, citing critical deficiencies in judicial independence, training, investigative capacity, and

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23 June 2004, *available at* http://hrw.org/english/docs/2004/06/23/congo8936_txt.htm [Reproduced in the accompanying notebook VI at Tab 30].

[21] *Ituri: Covered in Blood*, *supra* note 19, at 2 ("Until recently, the conflict in Ituri has been largely ignored by the international community. Despite information to the contrary, some UN member states and UN officials viewed Ituri as merely a 'tribal war' not related to the broader war in the DRC. Between 1999 and April 2003 the U.N. Organization Mission in the DRC (MONUC) had only a small team of fewer than ten observers covering this volatile area of some 4.2 million people. MONUC forces were urgently increased to several hundred in April 2003, but they had no capability to protect thousands of civilians who fled to them for protection when fighting against broke out between opposing militia groups in early May. The UN Security Council authorised an Interim Emergency Multinational Force with a Chapter VII mandate to protect civilians and UN staff in the town of Bunia for a short period while MONUC reinforced its presence. This decision, while helpful to residents of the town, has left tens of thousands of civilians outside Bunia unprotected and at the mercy of armed groups who continue to fight."); *accord* Amnesty International, *supra* note 19, at Conclusion (stating that "only a very strong, genuine and unequivocal political will on the part of the UN Security Council and concerted international action using a combination of measures, including approaches to corporate social responsibility, will succeed in bringing an end to the human rights and humanitarian crisis in eastern DRC") [Reproduced in the accompanying notebook VI at Tab 28]. For a discussion of the international response to the situation in Ituri, see *id*. at 50-55 (discussing the responses of the United Nations, international donors, the European Union, the United Kingdom, and the United States).

[22] Heindel, *infra* note 92, at 350 n.34 (noting that the DRC has been unsuccessful in prolonged attempts to have an ad hoc war crimes tribunal set up there by the U.N. Security Council) [Reproduced in the accompanying notebook V at Tab 6].

[23] *Ituri: Covered in Blood*, *supra* note 19, at 4 (issuing a Human Rights Watch recommendation to the office of the ICC Prosecutor) [Reproduced in the accompanying notebook VI at Tab 28].

[24] Human Rights Watch, *Democratic Republic of the Congo Confronting Impunity*, Briefing Paper January 2004, p.4, *available at* http://hrw.org/english/docs/2004/02/02/congo7230.htm [hereinafter *Confronting Impunity*] [Reproduced in the accompanying notebook VI at Tab 27].

standards for fair trial.[25] While efforts are underway to restore the judicial system in Ituri, progress is labored and slow, hindered by many obstacles.[26] Notably, Human Rights Watch blames the local court's failure to prosecute the more serious cases on a lack of political will.[27] Currently, and for the foreseeable future, the best hope for combating impunity is for cooperation between the ICC and the national judicial system of the DRC.[28]

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[25] *Id*., at 4-6. *Accord* Human Rights Watch, *Democratic Republic of Congo: Briefing to the 60th Session of the UN Committee on Human Rights*, January 2004, *available at* http://hrw.org/english/docs/2004/01/29/congo7128.htm [hereinafter HRW UN briefing](stating that the judicial system of the DRC must be rebuilt and that the process will require the investment of "enormous human and material resources") [Reproduced in the accompanying notebook VI at Tab 26].

[26] Human Rights Watch, *Making Justice Work: Restoration of the Legal System in Ituri, DRC*, A Human Rights Watch Briefing Paper, Background Briefing, 2 September 2004, *available at* http://hrw.org/backgrounder/africa/drc0904/index.htm [hereinafter *Making Justice Work*] (providing an overview of the program that has been installed to rebuild the justice system in Ituri, which is supported by the DRC, the European Commission, and the Cooperation Department of the French government) [Reproduced in the accompanying notebook VI at Tab 31]. For a discussion of the obstacles faced by the program's rebuilding effort, see id. at Parts III – VI (outlining the failure to prosecute the most serious crimes, the security fears of witnesses to testify and of authorities to arrest suspects in dangerous areas, the uncertainty as to venue, the lack of adequate financial support and resource management, and the limited capacity of the prosecutor to investigate crimes).

[27] Human Rights Watch, *D.R. Congo: Ituri Court Must Prosecute Gravest Crimes – Donors and DRC Authorities Should Increase Funding for Local Courts*, Human Rights News, 2 September 2004, *available at* http://hrw.org/english/docs/2004/09/02/congo9291.htm [Reproduced in the accompanying notebook VI at Tab 25]. For a discussion of the effects of political rivalries in the DRC, see Human Rights Watch, *The Democratic Republic of Congo: Uganda in Eastern DRC: Fueling Political and Ethnic Strife*, 26-27 (2001), *available at* http://www.hrw.org/reports/2001/drc/DRC0301.PDF [Reproduced in the accompanying notebook VI at Tab 33].

[28] *Confronting Impunity*, *supra* note 24, at 9 [Reproduced in the accompanying notebook VI at Tab 27]; see also HWR UN briefing, *supra* note 25 (asserting that "[a]n ICC prosecution could greatly assist accountability in the country and could also be a means to strengthen national capacity to bring justice for serious past crimes") [Reproduced in the accompanying notebook VI at Tab 26]. For a discussion of the DRC's implementing legislation enacted for the purpose of allowing cooperation with the ICC, see Amnesty International, *Uganda: Concerns about the International Criminal Court Bill 2004*, 27 July 2004, AI Index: AFR 59/005/2004, *available at* http://web.amnesty.org/library/Index/ENGAFR590052004 [Reproduced in the accompanying notebook VI at Tab 23].

## III. THE JURISDICTION OF THE INTERNATIONAL CRIMINAL COURT

### A. The Rome Statute's Rules of Jurisdiction and Admissibility

The Rome Statute of the International Criminal Court[29] sets out rules of jurisdiction and admissibility.[30] They are interrelated such that each case must meet the requirements of both, thus implementing the principle of complementarity.

The Rome Statute's scheme presumes that a case is admissible to the ICC where jurisdiction has been established. Thus, if ICC jurisdiction is established by State Party referral, the case is admissible and the Prosecutor may proceed, barring specific circumstances. These circumstances, articulated in Article 17 of the Rome Statute, which may render a case *inadmissible* before the ICC, are summarized as follows: if "any state (including non-party states) with jurisdiction over the matter is investigating or prosecuting or has determined not to prosecute,"[31] and, in addition, the state formally requests that the ICC defer investigation, then the case is not admissible before the ICC. This request for ICC deferral is the mechanism through with nations can bar ICC jurisdiction (i.e., this is the essential operation of the complementarity regime).

Negotiation of the Court's jurisdiction was the most challenging political hurdle

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[29] Rome Statute, *supra* note 1 [Reproduced in the accompanying notebook I at Tab 13].

[30] For a discussion of jurisdiction and admissibility with respect to the ICC, see generally WILLIAM A. SCHABAS, AN INTRODUCTION TO THE INTERNATIONAL CRIMINAL COURT 67-89 (2003) [Reproduced in the accompanying notebook IV at Tab 36]. For an overview of the scope of ICC jurisdiction, see JACKSON NYAMUYA MAOGOTO, STATE SOVEREIGNTY AND INTERNATIONAL CRIMINAL LAW: VERSAILLES TO ROME 237-45 (2003) [Reproduced in the accompanying notebook IV at Tab 30].

[31] Mark A. Summers, *A Fresh Look at the Jurisdictional Provisions of the Statute of the International Criminal Court: The Case for Scrapping the Treaty*, 20 WIS. INT'L L. J. 57, 69-70 (2001) [Reproduced in the accompanying notebook V at Tab 11]; Human Rights Watch, *Justice in the Balance: Recommendations for an Independent and Effective International Criminal Court* 75 (1998) [hereinafter *Justice in the Balance*](recommending that the burden of proof as to admissibility should be upon a state challenging the ICC) [Reproduced in the accompanying notebook VI at Tab 34].

for the delegations at Rome.[32] The principle of complementarity was crafted to be the most powerful safeguard against politically motivated prosecutions.[33] The Statute specifically provides that the ICC "shall be complementary to national jurisdictions,"[34] and the ICC's lack of primacy over national jurisdictions is largely the effect of the power of state sovereignty.[35] It represents a departure from the approach of ad hoc international tribunals in part due to its nature as a permanent court.[36]

However, critics caution that if the complementarity regime lacks either a reliable mechanism for evaluating national justice systems or a sufficient degree of freedom from jurisdictional limitations, then the ICC would not have the power to enforce international norms in the face of state sovereignty.[37] "The Court will face serious challenges that will question its independence from political institutions, its legitimacy as an authentic

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[32] Mahnoush H. Arsanjani, *Reflections on the Jurisdiction and Trigger Mechanism of the International Criminal Court*, in REFLECTIONS ON THE INTERNATIONAL CRIMINAL COURT. ESSAYS IN HONOR OF ADRIAN BOS. 57, 58 (Herman A.M. von Hebel, Johan G. Lammers and Jolien Schukking, eds, 1999)(discussing the many troublesome points encountered during the development of the ICC's jurisdiction, including for example trigger mechanisms, admissibility and challenges to jurisdiction) [Reproduced in the accompanying notebook III at Tab 24].

[33] Heindel, *infra* note 92, at 359 [Reproduced in the accompanying notebook V at Tab 6]; for a discussion of the fear of politically motivated prosecutions, see generally id. at 357-60.

[34] Rome Statute, *supra* note 1, art. 1. Article 1 states: "An International Criminal Court ("the Court") is hereby established. It shall be a permanent institution and shall have the power to exercise its jurisdiction over persons for the most serious crimes of international concern, as referred to in this Statute, and shall be complementary to national criminal jurisdictions. The jurisdiction and functioning of the Court shall be governed by the provisions of this Statute." [Reproduced in the accompanying notebook I at Tab 13].

[35] Bartram S. Brown, *Primacy or Complementarity: Reconciling the Jurisdiction of National Courts and International Criminal Tribunals*, 23 YALE J. INT'L L. 383, 386-87 (1998) ("A decline in jurisdictional priority from the primacy of the ad hoc Tribunals to the complementarity of the ICC is probably inevitable. Primacy compromises states' sovereign prerogatives by requiring them to defer to an international tribunal, and, more generally, to cooperate with the international court and to obey its orders concerning such matters as the production of evidence and the arrest and detention of persons.") [Reproduced in the accompanying notebook V at Tab 45].

[36] *Id*., at 388.

[37] *Id*., at 389.

interpreter of international norms, and its accountability to the states that created it and whose nationals face prosecution within its courtrooms."[38]

The negotiations in the Preparatory Committee resulted in a "two-track system of jurisdiction."[39] The first track would include situations referred to the Court by the Security Council.[40] It comported well with the view that ICC jurisdiction should be subject to strong limitations.

The second track would be composed of situations referred to the Court either by the Prosecutor of the ICC or by individual states.[41] It was a major focus of concern for delegations (especially the delegation from the United States) who feared an ICC with

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[38] Allison Marston Danner, *Enhancing the Legitimacy and Accountability of Prosecutorial Discretion at the International Criminal Court*, 97 AM. J. INT'L L. 510, 511 (2003). (acknowledging that the ICC will be scrutinized and attacked for its effects upon international politics) [Reproduced in the accompanying notebook V at Tab 49]. For an explanation of the consideration of this issue prior to the Rome Conference, see Brown, *supra* note 35, at 388 ("The full promise of an independent and impartial ICC, capable of ensuring that no serious international crime within its jurisdiction goes unpunished, will be realized only if states can agree on treaty language that allows effective jurisdiction and true independence from political control.") [Reproduced in the accompanying notebook V at Tab 45].

[39] Scott W. Andreasen, *The International Criminal Court: Does the Constitution Preclude its Ratification by the United States?*, 85 IOWA L. REV. 697, 723 (2000)(citing Is a U.N. International Criminal Court in the U.S. National Interest?: Hearings on the U.N. Int'l Criminal Court Before the Subcomm. On Int'l Operations of the Senate Comm. On Foreign Relations, 105th Cong. (1998) (Statement of Professor Michael P. Scharf) (discussing the controversy over control of the ICC) [Reproduced in the accompanying accompanying notebook VI at Tab 42])) [Reproduced in the accompanying notebook V at Tab 40].

[40] Andreasen, *supra* note 39, at 723 (citing Is a U.N. International Criminal Court in the U.S. National Interest?: Hearings on the U.N. Int'l Criminal Court Before the Subcomm. On Int'l Operations of the Senate Comm. On Foreign Relations, 105th Cong. (1998) (Statement of Professor Michael P. Scharf) (discussing the controversy over control of the ICC) [Reproduced in the accompanying notebook VI at Tab 42]) [Reproduced in the accompanying notebook V at Tab 40]. For a discussion of the political implications in Security Council involvement, see Brown, *supra* note 35, at 388 (noting that "[r]eserving a direct role for the Security Council in determining the jurisdiction of the ICC would make it easier for the permanent members to protect their interests and presumably would strengthen support for the ICC within the Security Council" but cautioning that "[i]f this role is too great, however, it will compromise the ICC's integrity and credibility.") [Reproduced in the accompanying notebook V at Tab 45].

[41] Andreasen, *supra* note 39, at 723 (citing Is a U.N. International Criminal Court in the U.S. National Interest?: Hearings on the U.N. Int'l Criminal Court Before the Subcomm. On Int'l Operations of the Senate Comm. On Foreign Relations, 105th Cong. (1998) (Statement of Professor Michael P. Scharf) (discussing the controversy over control of the ICC)[Reproduced in the accompanying notebook VI at Tab 42]) [Reproduced in the accompanying notebook V at Tab 40].

unchecked power to prosecute.[42] It was this fear that prompted the incorporation of the protective mechanism of complementarity into the Rome Statute.[43]

## B. The International Criminal Court as a Court of Last Resort

At its inception, the ICC was conceived of as a court of last resort. The Rome Statute was structured to ensure that the Court not act as a substitute for national authorities.[44]

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[42] Andreasen, *supra* note 39, at 723 (citing Is a U.N. International Criminal Court in the U.S. National Interest?: Hearings on the U.N. Int'l Criminal Court Before the Subcomm. On Int'l Operations of the Senate Comm. On Foreign Relations, 105th Cong. (1998) (Statement of Professor Michael P. Scharf)[Reproduced in the accompanying notebook VI at Tab 42]); *id*. at 723 n.198 (implying that a prosecutor with too much power might abuse that power and thereby do serious damage to the reputation of nations and to the credibility of the court) [Reproduced in the accompanying notebook V at Tab 40].

[43] Andreasen, *supra* note 39, at 723. ("Because the U.S. demanded protection from the second track of the ICC's jurisdiction, a number of protective mechanisms were incorporated into the Rome Statute. First the ICC's jurisdiction under the second track is based on 'complementarity' rather than primacy. This is presented in the preamble of the Rome Statute, stating that the court 'shall be complementary to national criminal jurisdictions.' Essentially, complementarity mandates that the international tribunal cede authority to try a case if there is a national court that is willing and able to do so.") [Reproduced in the accompanying notebook V at Tab 40]. This suggests that a state must be both willing and able to prosecute, or possibly that the Court need not cede authority (i.e., may exercise authority) if there is no court meeting that definition. If a nation is able to prosecute but prefers to waive its own jurisdiction of the ICC, that nation does not meet the definition of being willing to prosecute. However, it also fails to meet the definition of unwilling to prosecute; it simply does not intend to act. The existence of a complementarity requirement presupposes that nations will desire to conduct prosecutions themselves.

[44] KRISTINA MISKOWIAK, THE INTERNATIONAL CRIMINAL COURT: CONSENT, COMPLEMENTARITY AND COOPERATION 50 (2000) [Reproduced in the accompanying notebook IV at Tab 32]; See also Bruce Broomhall, *The International Criminal Court: Overview, and Cooperation with States*, in ICC RATIFICATION AND NATIONAL IMPLEMENTING LEGISLATION, 13 NOUVELLES ETUDES PENALES 45, 66 (1999) [hereinafter *Cooperation with States*] (stating that the ICC does not supplant state legal systems and making the distinction that "[i]f the link between the Court's exercise of jurisdiction and the territorial and national jurisdiction of States Parties allows the Court to be seen as an extension of the national criminal jurisdiction of its States Parties…, the admissibility provisions make clear that the Court is not an extension of the national criminal legal *systems* of those States.") [Reproduced in the accompanying notebook V at Tab 44]; Amnesty International, *The International Criminal Court: Making the Right Choices – Part I*, London, January 1997, AI Index: IOR 40/001/1997, at 4, *available at* http://web.amnesty.org/library/index/engior400011997 [hereinafter *Making the Right Choices, Part I*] (urging the need to ensure that national courts have primary jurisdiction) [Reproduced in the accompanying notebook VI at Tab 19]. For a discussion of other jurisdictional options, see Madeline Morris, *Complementarity and Its Discontents: States, Victims, and the International Criminal Court*, in INTERNATIONAL CRIMES, PEACE, AND HUMAN RIGHTS: THE ROLE OF THE INTERNATIONAL CRIMINAL COURT (Dinah Shelton, ed., 2000) 177, 183-200 (discussing the pros and cons of two possible ICC positions: one as the sole active jurisdiction and one of active concurrent jurisdiction with national courts) [Reproduced in the accompanying notebook IV at Tab 38].

The ICC's "last resort" status is confirmed by both the limited resources of the Court and the Rome Statute's complementarity regime.[45] The budget of the ICC, like the budgets of all international criminal courts, depends on funding from states or international organizations.[46] Yet, the dangers lurking in this arrangement are political in nature. One critic suggests that "states will use their monetary leverage to influence the tribunal's work."[47] Others warn that the prosecutor's choice of whether to become involved is vulnerable to financial pressures and, possibly, manipulations.[48]

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[45] BRUCE BROOMHALL, INTERNATIONAL JUSTICE AND THE INTERNATIONAL CRIMINAL COURT: BETWEEN SOVEREIGNTY AND THE RULE OF LAW 115 (2003) (warning that the ICC will be financially capable of trying only a very few cases given that its budget is limited) [Reproduced in the accompanying notebook III at Tab 21]. For an analysis of the ICC's finances, see generally Ingadottir and Romano, *infra* note 46, at 47-110 [Reproduced in the accompanying notebook III at Tab 25].

[46] Resolution ICC-ASP/2/Res.1, *Programme budget for 2004, Working Capital Fund for 2004, scale of assessments for the apportionment of expenses of the International Criminal Court and financing of appropriation for 2004,* adopted at the 5th plenary meeting, 12 September 2003, *available at* http://www.un.org/law/icc/asp/2ndsession/report/english/part_iv_res_1_e.pdf [hereinafter 2004 Budget] (adopting the scale of assessments of the United Nations as a guide for States Parties' contributions to the ICC and setting the 2004 ICC budget at 53,071,846 EU) [Reproduced in the accompanying notebook VI at Tab 40]; Resolution ICC-ASP/3/Res.4, *Programme budget for 2005, Contingency Fund, Working Capital Fund for 2005, scale of assessments for the apportionment of expenses of the International Criminal Court and financing of appropriations for the year 2005*, adopted at the 6th plenary meeting, 10 September 2004, *available at* http://www.icc-cpi.int/library/statesparties/ICC-ASP-3-25-Part_III_English.pdf [hereinafter 2005 Budget] (setting the 2005 ICC budget at 66,784,200 EU) [Reproduced in the accompanying notebook VI at Tab 41]; Jacob Katz Cogan, International Criminal Courts and Fair Trials: Difficulties and Prospects, 17 YALE J. INT'L L. 111, 132 (2002) [Reproduced in the accompanying notebook V at Tab 47]; See also Thordis Ingadottir and Cesare Romano, The Financing of the International Criminal Court, in THE INTERNATIONAL CRIMINAL COURT: RECOMMENDATIONS ON POLICY AND PRACTICE – FINANCING, VICTIMS, JUDGES, AND IMMUNITIES 47, 100 (Thordis Ingadottir, ed.) (noting that the financial responsibility of the ICC belongs to its States Parties and that roughly 80 percent of the burden will fall on the European Union, according to a budget scale modeled on the budget of the United Nations) [Reproduced in the accompanying notebook III at Tab 25].

[47] Cogan, *supra* note 46, at 133 (giving the example that "[o]ne need only look at the recent fracas over the U.S. dues owed the United Nations, in which the United States successfully conditioned its payment on U.N. reform, to appreciate how this might work.") [Reproduced in the accompanying notebook V at Tab 47]. For conclusions recognizing the danger of relying upon individual states for funding, see Ingadottir and Romano, *supra* note 46, at 100 (urging that strict regulations be adopted with respect to the payments made by states parties) [Reproduced in the accompanying notebook III at Tab 25]; *id*. at 67 (noting the difficulties faced by the United Nations, the ICTY and the ICTR regarding non-payment or delayed payment of state contributions and pointing to the consequences generally imposed under the Rome Statute upon states delinquent in payment – suspension of voting rights in the Assembly).

[48] *Cf.* Coalition for the International Criminal Court's Budget and Finance Team, *The 2004 Programme Budget of the International Criminal Court and Report of the Committee on Budget and Finance*,

Furthermore, sovereign states have a fundamental interest in exercising national jurisdiction.[49] One argument holds that if the ICC's exercise of jurisdiction is avoided by states in good faith, who view it as a true court of last resort, then the result should be a greater consistency between the criminal laws of nations and a more universal standard of human rights.[50] Also, in cases where ICC prosecution would not be substantially different in effect from national prosecution, an overstepping or disregard of state sovereignty is probably not justified.[51] This provides a strong support that the ICC must not have primacy.[52]

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submission to the second session of the Assembly of States Parties (8-12 September 2003), para. 34, *available at* http://www.iccnow.org/documents/asp/papersonaspissues/2ndASP/Budget_ASP_Paper_2003.FINAL.pdf [hereinafter Coalition submission] (recommending that the ICC should not comply with requests that cost be a primary factor in deciding to initiate investigations, as this would undermine the independence of the ICC Prosecutor) [Reproduced in the accompanying notebook VI at Tab 24].

[49] Arsanjani, *infra* note 91, at 24-25 (explaining that "in cases of concurrent jurisdiction between national courts and the international criminal court, the former, in principle, have priority. The ICC is not intended to replace national courts, but operates only when they do not. The understanding of the majority of participating states was that *states had a vital interest in remaining responsible and accountable for prosecuting violations of their laws* [emphasis added]. The international community had a comparable interest, inasmuch as national systems are expected to maintain and enforce adherence to international standards.") [Reproduced in the accompanying notebook V at Tab 41]. For a note on the ICC's interest in promoting national prosecutions in light of the ICC budget, see Coalition submission, *supra* note 48, at para.32 [Reproduced in the accompanying notebook VI at Tab 24].

[50] Schabas, *infra* note 57, at 205 [Reproduced in the accompanying notebook IV at Tab 33].

[51] Jeffrey Bleich, *Complementarity*, 25 DENV. J. INT'L L. & POL'Y 281, 289 (1997) (discussing the preference for national jurisdiction) [Reproduced in the accompanying notebook V at Tab 42].

[52] Arsanjani, *infra* note 91, at 24-25 (explaining that "in cases of concurrent jurisdiction between national courts and the international criminal court, the former, in principle, have priority. The ICC is not intended to replace national courts, but operates only when they do not. The understanding of the majority of participating states was that *states had a vital interest in remaining responsible and accountable for prosecuting violations of their laws* [emphasis added]. The international community had a comparable interest, inasmuch as national systems are expected to maintain and enforce adherence to international standards.") [Reproduced in the accompanying notebook V at Tab 41]; *id*. at 24 n.13 (explaining that the complementarity regime is "one of the important differences between the ICC and the two ad hoc Tribunals on the former Yugoslavia and Rwanda. Under Article 9 of the Statute of the Yugoslav Tribunal and Article 8 of that of the Rwanda Tribunal, in case of concurrent jurisdiction by the Tribunals and national courts, the Tribunals have primacy over national courts."); For another explanation, see Brown, *supra* note 35, at 426 (stating that "problems with the practical enforcement of primacy by [the ICTY and the ICTR] make it

However, the ICC may be the best possible venue for cases involving internal ethnic war.[53] Also, the supposed inviolability of the concept of state sovereignty is called into question in a global society.[54] It has been argued that certain human rights have attained such a universal status that state sovereignty cannot shield violation.[55] This view supports the need for an ICC, but it also requires a universal acceptance of the legitimacy of the Court's jurisdiction.[56]

## IV. THE PRINCIPLE OF COMPLEMENTARITY

### A. Development and Definition of the Principle of Complementarity

The concept of complementarity has evolved through the many stages of the ICC's development.[57] The term first appeared in the Ad Hoc Committee as a name for the

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clear that primacy is not a viable option for the ICC.") [Reproduced in the accompanying notebook V at Tab 45].

[53] W. Michael Reisman, *Scenarios of Implementation of the Statute of the International Criminal* Court, in THE ROME STATUTE OF THE INTERNATIONAL CRIMINAL COURT: A CHALLENGE TO IMPUNITY 281, 286-87 (Mauro Politi & Giuseppe Nesi eds., 2001)(hypothesizing as to the probable positive impact of the ICC on internal ethnic wars) [Reproduced in the accompanying notebook IV at Tab 33]. Contrast with *id*. at 284 (hypothesizing as to the probable negligible or negative impact of the ICC on conventional wars).

[54] John R. Worth, *Globalization and the Myth of Absolute National Sovereignty: Reconsidering the "Un-Signing" of the Rome Statute and the Legacy of Senator Bricker*, 79 IND. L. J. 245, 260-65 (2004) (arguing that traditional notions of state sovereignty must eventually make way for a more global concept of sovereignty) [Reproduced in the accompanying notebook V at Tab 14].

[55] *Id*., at 264 (suggesting that "humanity, rather than territory, now serves as the jurisdictional link" for crimes against universal human rights"). For a discussion of the merits of a powerful universal jurisdiction, see Mohamed M. El Zeidy, *Universal Jurisdiction* In Absentia: *Is it a Legal Valid Option for Repressing Heinous Crimes?*, THE INTERNATIONAL LAWYER, vol. 37, no. 3 (Fall 2003) [Reproduced in the accompanying notebook V at Tab 17].

[56] Worth, *supra* note 54, at 265 (noting that the legitimization of institutions such as the ICC lags necessarily behind the acceptance of certain human rights as universal and claiming that the reason lies in a crucial need for acceptance of the institution's structure in and of itself)(claiming that it is necessary that "the court's institutional and procedural structure [is] itself universally recognized" and that, to achieve this, "the individual members of society, as the true sovereigns, would have to recognize the common good to be gained by the transference of institutional authority from their own domestic courts to the *supra*national ICC – a task which assuredly was not fulfilled at the Rome Conference.") [Reproduced in the accompanying notebook V at Tab 14].

[57] William A. Schabas, *Follow up to Rome: Preparing for Entry into Force of the Statute of the International Criminal Court*, in THE ROME STATUTE OF THE INTERNATIONAL CRIMINAL COURT: A

concept of limited jurisdiction set forth in the 1994 ILC Draft Statute.[58] It is currently conceived as having three components: substantive, procedural, and prudential or political.[59] Of particular note here, the prudential or political component concerns the policy choices made in determining which cases should be prosecuted by the ICC rather than by the national courts.[60]

The 1994 ILC Draft Statute was the document that provided the basis for discussion of the complementarity concept throughout most of the preparatory process.[61] It provided that ICC jurisdiction should complement national jurisdiction "in cases where such trial procedures *may not be available* or *may be ineffective*,"[62] and that "a case would only be admissible if it had *not been duly investigated by a State* or if the decision of the State not to prosecute was *not apparently well-founded* (article 35)."[63]

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CHALLENGE TO IMPUNITY 197, 204 (Mauro Politi & Giuseppe Nesi eds., 2001) [Reproduced in the accompanying notebook IV at Tab 33]; Bartram S. Brown, *The Statute of the ICC: Past, Present, and Future*, in THE UNITED STATES AND THE INTERNATIONAL CRIMINAL COURT 61 (Sarah B. Sewall & Carl Kaysen eds., 2000) [Reproduced in the accompanying notebook IV at Tab 37].

[58] MISKOWIAK, *supra* note 44, at 45 [Reproduced in the accompanying notebook IV at Tab 32].

[59] LEILA SADAT, THE INTERNATIONAL CRIMINAL COURT AND THE TRANSFORMATION OF INTERNATIONAL LAW: JUSTICE FOR THE NEW MILLENNIUM 119 (2002) (discussing the components of complementarity: substantive, procedural, and prudential or political) [Reproduced in the accompanying notebook IV at Tab 34]. For a discussion of political and prudential considerations, see Ruth Wedgwood, *National Courts and the Prosecution of War Crimes*, in SUBSTANTIVE AND PROCEDURAL ASPECTS OF INTERNATIONAL CRIMINAL LAW: THE EXPERIENCE OF INTERNATIONAL AND NATIONAL COURTS, VOLUME I, 389, 405-08 (Gabrielle Kirk McDonald, Olivia Swank-Goldman, eds., 2000) [Reproduced in the accompanying notebook IV at Tab 31].

[60] SADAT, *supra* note 59, at 119 [Reproduced in the accompanying notebook IV at Tab 34].

[61] MISKOWIAK, *supra* note 44, at 49 [Reproduced in the accompanying notebook IV at Tab 32]. UN Doc. A/49/10, Report of the International Law Commission on the Work of Its Forty-sixth Session, Draft Statute for an International Criminal Court with commentaries, 2 May – 22 July, 1994 (G.A., 49th Sess., Supp. No 10., 1994) [hereinafter 1994 ILC Draft Statute] [Reproduced in the accompanying notebook I at Tab 1].

[62] MISKOWIAK, *supra* note 44, at 48 [Reproduced in the accompanying notebook IV at Tab 32]; 1994 ILC Draft Statute, *supra* note 61, preamble [Reproduced in the accompanying notebook I at Tab 1].

[63] MISKOWIAK, *supra* note 44, at 48 [Reproduced in the accompanying notebook IV at Tab 32]; 1994 ILC Draft Statute, *supra* note 61, art. 35 [Reproduced in the accompanying notebook I at Tab 1].

Unfortunately, this provision left the complementarity concept quite unclear, and the commentary to the ILC Draft Statute did not help to clarify it. "If anything, the Commentary focused on the role of national jurisdictions at the cost of the role of the Court."[64]

Complementarity was originally thought of (by the ILC) as a rough parallel to the European principle of subsidiarity,[65] which differs mainly in that it "govern[s] the relationship between the member states of an economic, social and cultural community."[66] The comparison "can be interesting… because both principles are attempts to strike a balance between recognizing on the one hand the advantages of local (national) authority and on the other hand the need for central (international) authority to make the practice of states effective and uniform."[67] The subsidiarity principle gives national institutions the first opportunity to deal with matters.[68] It contemplates a question of concurrent jurisdictional competence rather than primacy, as EU law is considered supreme.[69]

The Preparatory Committee (PrepCom) was next to work in depth with the

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[64] MISKOWIAK, *supra* note 44, at 48 [Reproduced in the accompanying notebook IV at Tab 32].

[65] *Id*., at 45.

[66] MISKOWIAK, *supra* note 44, at 46 [Reproduced in the accompanying notebook IV at Tab 32].

[67] *Id*. For an argument that the ICC should adopt the subsidiarity principle, see John M. Czarnetsky and Ronald J. Rychlak, *An Empire or Law?: Legalism and the International Criminal Court,* 79 NOTRE DAME L. REV. 55, 122-23 (2003) [Reproduced in the accompanying notebook V at Tab 48].

[68] *Id*., at 45-46, quoting EU Treaty, Article 3b ("In areas which do not fall within its exclusive competence, the Community shall take action, in accordance with the principle of subsidiarity, only if and in so far as the objectives of the proposed action cannot be sufficiently achieved by Member States and can therefore, by reason of the scale or effects of the proposed action, be better achieved by the Community. Any action by the Community shall not go beyond what is necessary to achieve the objectives of this Treaty.").

[69] MISKOWIAK, *supra* note 44, at 45 [Reproduced in the accompanying notebook IV at Tab 32].

possibility of a complementarity regime for the ICC. Discussion focused mainly on the concept with relation to the Prosecutor's "right of initiative, inherent jurisdiction and state cooperation."[70] The PrepCom found the question of whether to clearly state the relationship between the ICC and national jurisdictions in the statute to be a fundamental issue; however, it treated this question rather gingerly. The question was "only seldomly and carefully voiced."[71] The PrepCom provided a broad picture, defining the word "superficially as an expression 'to reflect the jurisdictional relationship between the international criminal court and national authorities, including national courts.'"[72]

It may be argued that "by letting the provisions of the Statute remain slightly unresolved, one could have left room for gradual expansion of competence alongside growing political acceptance of the Court in the future, just as international or supranational courts have been seen to acquire more and more power."[73] Some states thus agreed with the concept of complementarity laid out in the preamble of the 1994 ILC Draft Statute and believed that if the concept were to be repeated in another part of the statute it should not receive much elaboration.[74]

Yet, a serious danger of leaving the principle of complementarity too unclear and

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[70] MISKOWIAK, *supra* note 44, at 45 [Reproduced in the accompanying notebook IV at Tab 32].

[71] *Id*., at 46-47.

[72] *Id*., at 45. See UN Doc. A/51/22, Report of the Preparatory Committee on the Establishment of an International Criminal Court, Volume I (*Proceedings of the Preparatory Committee during March-April and August 1996*), p. 30, paragraph 109 [Reproduced in the accompanying notebook I at Tab 4].

[73] MISKOWIAK, *supra* note 44, at 47 [Reproduced in the accompanying notebook IV at Tab 32].

[74] *Id*., at 47; See Statements in the Preparatory Committee by the representatives of Greece and Sweden, UN Press Release L/2771 of 1 April 1996. (stating "such a court is intended to be complementary to national criminal justice systems in cases where such trial procedures may not be available or may be ineffective") [Reproduced in the accompanying notebook VI at Tab 38].

unresolved was that states would, as a direct result, refuse to ratify the treaty.[75] Also, this lack of clarity might easily result in making the concept of complementarity a mere tool of manipulation for draining power from the ICC.[76] Absence of a clear rule could easily undermine the authority of the ICC, making the Court altogether ineffective.[77]

In its discussions on the operation of the complementarity principle, the PrepCom had two main alternatives. The first was to say that the ICC would have no jurisdiction where national jurisdiction is being or had been exercised.[78] The PrepCom's final report, which was submitted to the delegations at the Rome Conference, included this alternative as a possibility needing further discussion.[79] Some argued however that such a rule would virtually invite sham prosecutions and trials,[80] and ultimately this formulation was not

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[75] MISKOWIAK, *supra* note 44, at 47 [Reproduced in the accompanying notebook IV at Tab 32]; For example, see the statements in the Preparatory Committee of India and Morocco, UN Press Release L/2771 of 1 April 1996 [Reproduced in the accompanying notebook VI at Tab 38].

[76] MISKOWIAK, *supra* note 44, at 47 [Reproduced in the accompanying notebook IV at Tab 32]; see The representative of Jamaica in the Sixth Committee (Legal), UN Press Release GA/L/3046 of 23 October 1997 (stating that an unclear articulation of complementarity would, in practice, be "nothing more than coded language for an approach that results in diminishing the powers of the court.") [Reproduced in the accompanying notebook IV at Tab 37]. For comments on the jurisdictional aspect of the complementarity regime, see Summers, *supra* note 31, at 88 (warning that allowing states "to specially accept the jurisdiction of the Court, may tempt ill-meaning states to manipulate the Court to their own advantage, by asserting jurisdiction in order to sidetrack other legitimate international enforcement measures" and that "by requiring that either the state where the offense is committed or of which the accused is a national accept the jurisdiction of the Court, the Statute invites states to shield their wrongdoers from justice merely by abstaining") [Reproduced in the accompanying notebook V at Tab 11].

[77] MISKOWIAK, *supra* note 44, at 47 [Reproduced in the accompanying notebook IV at Tab 32]. See UN Doc. A/51/22, *supra* note 72, at 31, para. 113 [Reproduced in the accompanying notebook I at Tab 4].

[78] MISKOWIAK, *supra* note 44, at 47 [Reproduced in the accompanying notebook IV at Tab 32]. See UN Doc. A/AC.249/1997/WG.3/CRP.2 of 13 August 1997.

[79] MISKOWIAK, *supra* note 44, at 49 [Reproduced in the accompanying accompanying notebook IV at Tab 32]; UN Doc. A/CONF.183/2/Add.1 (14 April 1998), *Report of the Preparatory Committee on the Establishment of an International Criminal Court*, Draft Statute and Draft Final Act, reprinted in THE STATUTE OF THE INTERNATIONAL CRIMINAL COURT: A DOCUMENTARY HISTORY 211 (M. Cherif Bassiouni, ed., 1998) [Reproduced in the accompanying notebook II at Tab 11].

[80] MISKOWIAK, *supra* note 44, at 49 [Reproduced in the accompanying notebook IV at Tab 32].

incorporated in the Rome Statute.

The second alternative was ultimately adopted in the Rome Statute. It provided, in a rather detailed solution, a test requiring that "the state be 'unwilling' and 'unable genuinely' to try the person."[81] Examples of unwillingness consisted of actions that were "inconsistent with an intent to bring the person concerned to justice."[82]

Inevitably, the word complementarity has been used as a sort of smokescreen for other purposes, including "state sovereignty and the lack of interest in an effective international criminal jurisdiction."[83] It is most often employed by "restrictive states, which [find] that it should be taken into account at every possible occasion."[84] The principle may however be used by any state (including non-states parties) to challenge the ICC's jurisdiction.[85] Still, despite these concerns and possible weaknesses, the Rome Statute's complementarity regime was unanimously approved by the delegations at Rome as a support to national jurisdictions.[86]

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[81] MISKOWIAK, *supra* note 44, at 49 [Reproduced in the accompanying notebook IV at Tab 32].

[82] *Id*., quoting UN Doc. A/AC.249/1997/WG.3/CRP.2 of 13 August 1997. (giving examples of unwillingness such as undue delay, proceedings that are not impartial or independent, and other behaviors that indicate a nation's intent to shield the accused).

[83] MISKOWIAK, *supra* note 44, at 45 [Reproduced in the accompanying notebook IV at Tab 32].

[84] *Id*.

[85] Andreasen, *supra* note 39, at 724 ("Under Article 17, any state, regardless of whether it is a party to the Rome Statute, can challenge the ICC's jurisdiction either where the state is investigating the situation, or where the state declined investigation, unless the decision not to proceed was based on the state's inability or unwillingness to do so.") [Reproduced in the accompanying notebook V at Tab 40].

[86] *Cooperation with States*, *supra* note 44, 66 ("Complementarity goes to the heart of the regime of the Statute. The Diplomatic Conference was unanimous in its view that the ICC should strengthen and complement, not replace national investigation and prosecutions.") [Reproduced in the accompanying notebook V at Tab 44]. For complementarity recommendations made subsequent to the Rome Conference, see Human Rights Watch, *Making the International Criminal Court Work: A Handbook for Implementing the Rome Statute*, 14-22 (2001) *available at* http://www.hrw.org/campaigns/icc/docs/handbook_e.pdf [Reproduced in the accompanying notebook VI at Tab 35].

## B. The Rome Statute's Incorporation of the Principle of Complementarity

The Rome Statute does not explicitly define complementarity.[87] The articles on admissibility do indicate, however, that it does not mean concurrent jurisdiction, which was the meaning favored in the 1994 ILC Draft.[88] The general view of complementarity under international criminal law is that it is a jurisdictional concept denoting "a systemic relationship between different jurisdictional authorities exercising competence over international crimes, whether national or international judicial organs."[89] As it appears in the Rome Statute, the concept of complementarity may be described as a system that fully subordinates the jurisdiction of the ICC to the jurisdiction of national courts.[90] The ICC may assume jurisdiction only if nations are unable or unwilling to do so.[91]

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[87] MAOGOTO, *supra* note 30, at 247 [Reproduced in the accompanying notebook IV at Tab 30]. For an overview of the Rome Statute's complementarity regime, see Jimmy Gurule, *United States Opposition to the 1998 Rome Statute Establishing an International Criminal Court: Is the Court's Jurisdiction Truly Complementary to National Criminal Jurisdictions?*, 35 CORNELL INT'L L. J. 1, 10-19 (2002) [Reproduced in the accompanying notebook V at Tab 5].

[88] MAOGOTO, *supra* note 30, at 247 [Reproduced in the accompanying notebook IV at Tab 30]. For a discussion of the development of the principle of complementarity from the 1994 ILC Draft Statute to the Rome Statute, see Mohamed M. El Zeidy, *The Principle of Complementarity: A New Machinery to Implement International Criminal Law*, 23 MICH. J. INT'L L. 869, 890-930 (2002) [Reproduced in the accompanying notebook V at Tab 15].

[89] BASSIOUNI, INTRO. TO ICL, *infra* note 143, at 15-18 (discussing the meaning and operation of the principle of complementarity in international criminal law (ICL) as comporting with a concept of concurrent jurisdiction) [Reproduced in the accompanying notebook III at Tab 19]; see *id*. at 15 n.57 ("The term 'complementarity' entered the English language in 1911, meaning, 'a complementary relationship or situation; spec. in physics, the capacity of the wave and particle theories of light together to explain all phenomena of a certain type, although each separately accounts for only some of the phenomena.' OXFORD ENGLISH DICTIONARY")

[90] Andreasen, *supra* note 39, at 724 (noting that Rome Statute Articles 17 and 18 express the rule of simple complementarity as proposed by the United States) [Reproduced in the accompanying notebook V at Tab 40].

[91] Mahnoush H. Arsanjani, *Developments in International Criminal Law: The Rome Statute of the International Criminal Court*, 93 AM. J. INT'L L. 22, 24-25) (1999) (describing the principle of complementarity thus: "[T]he principle of complementarity, establishes that the court may assume jurisdiction only when national legal systems are unable or unwilling to exercise jurisdiction…The principle of complementarity was referred to in the preamble to the draft statute prepared by the International Law Commission; in the final Rome text, in addition to the preamble, it also found its way into Articles 1 and 17-19") [Reproduced in the accompanying notebook V at Tab 41]. For a discussion of

Complementarity is considered to be the primary safeguard against politically motivated prosecutions.[92]

The Rome Statute leaves it up to "the complementarity principle and State consent regime to sort permissible from impermissible assertions of the Court's jurisdiction (to adjudicate)."[93] The issue of complementarity is implicit in the issue of admissibility. Of importance are the subjects of: (1) "criteria for declaring a case inadmissible," (2) "the competence of the Court to determine whether the criteria are met," and (3) "the prohibition on double jeopardy."[94]

**1. Article 17**

Article 17 is the Rome Statute's main provision on complementarity. Paragraph 1 sets out four factors for finding a case inadmissible.[95] Paragraph 2 sets out factors for

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the procedures under complementarity, see John T. Holmes, *Complementarity: National Courts* versus *the ICC*, in THE ROME STATUTE OF THE INTERNATIONAL CRIMINAL COURT: A COMMENTARY, VOLUME I 667, 679-84 (Antonio Cassese, et al., eds., 2002) [Reproduced in the accompanying notebook III at Tab 23].

[92] Anne K. Heindel, *International Human Rights & U.S. Foreign Policy: The Counterproductive Bush Administration Policy Toward the International Criminal Court*, 2 SEATTLE J. SOC. JUST. 345, 359 (2004) (explaining that the complementarity regime protects against politically motivated prosecutions by requiring the ICC to defer to states that are able and genuinely willing to exercise national jurisdiction) [Reproduced in the accompanying notebook V at Tab 6].

[93] MAOGOTO, *supra* note 30, at 246 [Reproduced in the accompanying notebook IV at Tab 30].

[94] MISKOWIAK, *supra* note 44, at 47-49 [Reproduced in the accompanying notebook IV at Tab 32].

[95] Rome Statute, *supra* note 1, at art. 17(1)(a)-(d) [Reproduced in the accompanying notebook I at Tab 13]; Arsanjani, *supra* note 91, at 27-28 (identifying the grounds for inadmissibility and their limitations as follows: "[Article 17] identifies four grounds of inadmissibility: (1) the case is being investigated or prosecuted by a state that has jurisdiction over it; (2) the case has been investigated by a state that has jurisdiction over it and the state decided not to prosecute the person concerned; (3) the person concerned has already been tried for the conduct in question; and (4) the case is not of sufficient gravity to justify action by the court. The first three grounds for inadmissibility, however, are subject to specific limitations: that the state is unwilling or unable genuinely to carry out the investigation or prosecution; that the national prosecution was conducted for the purpose of shielding the person concerned from criminal responsibility for crimes within the ICC's jurisdiction; or that the national prosecution was not conducted independently or impartially in accordance with the norms of due process recognized by international law and lacked a meaningful intent to bring the person concerned to justice.") [Reproduced in the accompanying notebook V at Tab 41].

determining whether a state is unwilling to prosecute.[96] Paragraph 3 sets out factors for determining whether a state is genuinely unable to prosecute.[97] The criteria in paragraphs 2 and 3 were the result of much debate.[98]

Importantly, Article 17(1) describes the four circumstances in which a case will be *inadmissible*. Article 17's *inadmissibility* requirements, coupled with Article 19, imply the rule that "the Court has no obligation to determine the admissibility of a case before it,"[99] unless a state challenges admissibility. Thus, if a case falls under the jurisdiction of the Court according to the provisions of Article 12,[100] then the ICC may exercise jurisdiction unless a state successfully challenges the case's admissibility.

The wording of Article 17 – "the Court shall determine that a case is

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[96] Rome Statute, *supra* note 1, art. 17(2)(a)-(c) [Reproduced in the accompanying notebook I at Tab 13].

[97] *Id*., art. 17(3).

[98] Arsanjani, *supra* note 91, at 28 (noting that the criteria for determining a state's inability or unwillingness "were thorny issues that were skillfully negotiated by Canada during the negotiations in the Preparatory Committee.") [Reproduced in the accompanying notebook V at Tab 41].

[99] Arsanjani, *supra* note 32, at 74 (implying, based on the language of Articles 17 and 19 of the Rome Statute, that the Court need not determine the admissibility of a case unless the admissibility is validly challenged) [Reproduced in the accompanying notebook III at Tab 24].

[100] Rome Statute, *supra* note 1, art. 12.
Article 12 provides:

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

inadmissible"[101] – gives the ICC itself the authority to determine whether or not it has jurisdiction. The Court's competence to decide when it may assert its jurisdiction over national jurisdiction is thus assumed.[102] The concern addressed by the Article is thus not that the ICC will assume jurisdiction in inappropriate cases, but is rather that governments will wish to shield certain people from "genuine and effective prosecution."[103]

"[T]he 'unwillingness' and 'inability' determinations are fraught with political peril, both for the Prosecutor and for the Court."[104] The determinations require the ICC to evaluate and pass judgment upon a state's judicial system, and the risk, therefore, is of the ICC's power to impose a public and political shame upon a sovereign nation.[105] It

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[101] Rome Statute, *supra* note 1, art. 17 [Reproduced in the accompanying notebook I at Tab 13].

[102] KIM, *infra* note 108, at 259 (noting that the most important aspect of Article 17 is that it gives the ICC the ultimate power to decide whether or not a case is admissible) [Reproduced in the accompanying notebook IV at Tab 26].

[103] MISKOWIAK, *supra* note 44, at 50 (stressing that if the ICC is to effectively guard against impunity, it is crucial that the Court be found competent to decide whether a nation's prosecution or trial is genuine) [Reproduced in the accompanying notebook IV at Tab 32].

[104] Danner, *supra* note 38, at 517 [Reproduced in the accompanying notebook V at Tab 49].

[105] *Id*., at 518 (pointing to Justice Arbour's comment that "the admissibility regime essentially requires the Prosecutor to put a domestic system of criminal justice on trial.") ("The Prosecutor will have to prove either that a state's criminal justice system is incompetent or that it is being manipulated by the state's government. These questions have far-ranging political overtones, and will pose a significant challenge for the ICC's Prosecutor.") [Reproduced in the accompanying notebook V at Tab 49]; *Justice in the Balance*, *supra* note 31, at 70 (recommending that the ICC should prosecute where national proceedings are "ineffective" or "unavailable," as opposed to the established "unwilling" or "unable" rule that has been adopted, giving the reason that the latter requires a determination of intent) [Reproduced in the accompanying notebook VI at Tab 34]. For a discussion of the dangers of politicized prosecution, see generally David Luban, *A Theory of Crimes Against Humanity*, 29 YALE J. INT'L L. 85 (2004) [Reproduced in the accompanying notebook V at Tab 8]; *id*. at 92 (stating that "the possibility of politicized prosecution may undermine the requirement of national justice"); See also Jeremy Rabkin, *The Politics of the Geneva Conventions: Disturbing Background to the ICC Debate*, 44 VA. J. INT'L L. 169 (2003) [Reproduced in the accompanying notebook V at Tab 10]; Tikkun A. S. Gottschalk, *The Realpolitik of Empire*, 13 J. TRANSNAT'L L. & POL'Y 281, 299-300 (2003) (giving the example of the proposed investigation of NATO by the ICTY, which was said to be little more than a threat of political embarrassment) [Reproduced in the accompanying notebook V at Tab 4]; see also Summers, *supra* note 31, at 88 (implying that the NATO situation was a deliberate manipulation of the court) [Reproduced in the accompanying notebook V at Tab 11].

follows also that a nation, in recognition of this power, might attempt to direct it to their own political advantage.[106] Yet, with regard to a State's preference of ICC jurisdiction, these determinations do not technically apply. The test of "unwillingness" or "inability" applies to cases in which national proceedings have taken place[107] and the ICC seeks to substitute its jurisdiction.

Referrals by States present another issue of concern. "[S]ome states are afraid that the State referral procedure could be abused by politically-motivated and frivolous referrals. However, the possibility of this situation seems rare considering the reluctance of states to refer and the rigorous admissibility test under the principle of complementarity."[108] The political reason behind State preference for ICC involvement may only have an effect on the inadmissibility determination in 17(1)(d), which removes a case from ICC jurisdiction where it is "not of sufficient gravity to justify further action by the Court."[109]

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[106] The political overtones here are especially far-ranging and raise a number of crucial questions. For example, what if a country consents to jurisdiction for no reason other than to escape a judgment that its government or judicial system cannot be relied upon to administer justice under the circumstances? What if the sole reasons for consent are a desire to draw international attention to a situation or to shift the responsibility of prosecution away from the state? Conceivably, consent might be used as a way to lift the burden and expense of prosecution – at the expense of the international community – so that a calmer political climate can be achieved within a state (so that supporters of the accused blame the international community rather than the current national government). See, for example, Danner, *supra* note 38, at 519 n.72. ("Some observers speculate that states will lobby the Prosecutor to initiate investigations proprio motu, even if the state could have referred the case to the Prosecutor itself. 'The result will be the same, but they will save the diplomatic discomforts that accompany public denunciation.' WILLIAM A. SCHABAS, AN INTRODUCTION TO THE INTERNATIONAL CRIMINAL COURT 100 (2001).") [Reproduced in the accompanying notebook V at Tab 49].

[107] Rome Statute, *supra* note 1, art. 17(1)(a)-(b) [Reproduced in the accompanying notebook I at Tab 13].

[108] YOUNG SOK KIM, THE INTERNATIONAL CRIMINAL COURT: A COMMENTARY TO THE ROME STATUTE 243 (2003) (providing a commentary on Article 14's provision allowing states to refer situations to the ICC) [Reproduced in the accompanying notebook IV at Tab 26].

[109] Rome Statute, *supra* note 1, art. 17(1)(d) [Reproduced in the accompanying notebook I at Tab 13].

## C. Violation of the Principle of Complementarity

### 1. Contemplated Violations of the Principle of Complementarity

When delegates at Rome, drafters, and legal scholars considered the possibility that complementarity may be violated, the anticipated perpetrator was the ICC itself. Past and current contemplation of safeguards involves an almost exclusive discussion of limiting the reach of the ICC, not of protecting against State preference for ICC involvement. Complementarity's key feature is the power it vests in states to curtail the powers of the ICC Prosecutor and to bar ICC prosecution.[110] Waiver of this right is not contemplated by the statute.

The general complementarity challenge scenario is one in which a state wishes to bar the ICC from prosecuting a case over which the state has jurisdiction. The expectation is both that the ICC Prosecutor will have to decide whether to challenge a state's *willingness* to administer justice and also that the state will defend its right to exercise national jurisdiction.[111] Because a challenge to a state's willingness "pit[s] the credibility of the Court against a state,"[112] the ICC's credibility is arguably increased by a state's preference for ICC jurisdiction.

Notably, the Rome Statute does not give the Court the power to compel States to

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[110] Danner, *supra* note 38, at 526-27 [Reproduced in the accompanying notebook V at Tab 49].

[111] *Id*., 522 (predicting that where states face a challenge to their willingness to prosecute, they will defend against the challenge – and against ICC jurisdiction – with considerable indignation), at 527-28 (predicting that where the ICC indicates an intention to investigate, states will exhibit resistance instead of the cooperativeness which is crucial to obtaining convictions), and at 527 (noting that the ICC will depend on states "in order to perform all of its primary functions" because it has "no associated police and no direct coercive powers over individuals"); BROOMHALL, *supra* note 45, at 139 (claiming that "[b]ecause of its complementarity to national jurisdictions…, the Rome Statute gives States a real incentive to exercise jurisdiction over their own officials if they wish to avoid the Court doing so") [Reproduced in the accompanying notebook III at Tab 21].

[112] Danner, *supra* note 38, at 522 [Reproduced in the accompanying notebook V at Tab 49].

comply with its orders or to sanction States directly for non-compliance.[113] Furthermore, the personnel of the Court will generally be subject to national law when acting in State territory.[114] "The future of the ICC depends on all States Parties adopting requisite laws that will enable each country to cooperate with the Court. The duty to cooperate with the ICC imposed on States Parties by the *Rome Statute* is twofold: a general commitment to cooperate, and an obligation to amend their domestic laws to permit cooperation with the Court."[115]

The subject of national grants of immunity presents an interesting parallel to the issue of waiver of the complementarity regime.[116] Governments generally seek to avoid the political problems associated with the prosecution of high officials in two ways. First,

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[113] MAOGOTO, *supra* note 30, at 252 [Reproduced in the accompanying notebook IV at Tab 30].

[114] *Id*., at 252-53.

[115] *Id*., at 253.

[116] The issue of national grants of immunity is important because it arguably frustrates the goal of ending impunity for criminal acts. The problems posed by immunity are briefly defined by BROOMHALL, *supra* note 45, at 139 ("National laws and constitutions, which frequently provide conditional or unconditional exemption from criminal proceedings for those who hold current offices, may sometimes stand in the way either of *domestic proceedings pursuant to the complementarity principle* [emphasis added] or of surrender to the ICC, and as such will call for attention in a number of States.") [Reproduced in the accompanying notebook III at Tab 21]. For a discussion on waiver of immunities see Duffy, *infra* note 117, at 32 (claiming that there is "no inherent contradiction between immunity and the Statute" and noting that if the ICC were to request the surrender of an individual then the state would have to waive the immunity) [Reproduced in the accompanying notebook V at Tab 50]; see also Kenneth S. Gallant, *Jurisdiction to Adjudicate and Jurisdiction to Prescribe in International Criminal Courts*, 48 VILL. L. REV. 763, 802-09 (2003) [Reproduced in the accompanying notebook V at Tab 2]; M. Cherif Bassiouni, *Accountability for Violations of International Humanitarian Law and Other Serious Violations of Human Rights*, in POST CONFLICT JUSTICE 3-54 (M. Cherif Bassiouni, ed.)(2002) [Reproduced in the accompanying notebook III at Tab 20]. Compare Madeline Morris, *Lacking a Leviathan: The Quandaries of Peace and Accountability*, in POST CONFLICT JUSTICE 135, 135-53 (M. Cherif Bassiouni, ed.)(2002) (discussing the peace-versus-accountability problem in light of the relationship between national and international jurisdictions) [Reproduced in the accompanying notebook III at Tab 20]; Zeidy, *supra* note 88, at 940-57 (discussing the threat to the Rome Statute's validity posed by state amnesties and pardons) [Reproduced in the accompanying notebook V at Tab 15]; Amnesty International, *The International Criminal Court: Making the Right Choices – Part III*, London, November 1997, AI Index: IOR 40/013/1997, *available at* http: //web.amnesty.org/library/index/engior400131997 (recommending that amnesties and pardons not be a bar to ICC jurisdiction of serious violations of humanitarian law) [Reproduced in the accompanying notebook VI at Tab 20].

some governments "mak[e] amendments only to allow surrender to the ICC, without removing the immunities that will prevent their authorities from investigating themselves."[117] Second, other governments "[interpret] national immunities in a manner that allows both domestic proceedings and surrender to the ICC."[118]

Both methods are an indirect way of preferring ICC jurisdiction over national jurisdiction, and both are more contrary, arguably, to the essential purpose of the Court than the referrals made by Uganda and DRC.[119] For under the circumstances, these

[117] BROOMHALL, *supra* note 45, at 139 [Reproduced in the accompanying notebook III at Tab 21]. For an example of this approach involving the nation of France, see *id*. at 139-40 ("As a preliminary step to ratification, the government of France referred the Rome Statute to its constitutional court on 24 December 1998. The Conseil Constitutionnel recognized that Article 27 was potentially incompatible with the provisions of the French Constitution that establish immunities and special procedures for France's head of State and for members of government and parliament. In response, the French government amended its constitution to indicate that the Republic of France 'may recognize the jurisdiction of the ICC in the conditions set out in the treaty signed 18 July 1998. This would appear to allow France to surrender individuals to the ICC, thus opening a path towards fulfillment of its obligation to cooperate with the Court under Article 86. Yet because France has not amended its constitutional immunities *per se*, the new provision does nothing to increase the power of French authorities to meet the full requirements of the complementarity test with respect to proceedings before their own courts. The ICC is therefore the only venue for trying a limited set of high French officials (barring the exercise of universal jurisdiction). Such an approach allows governments to avoid many of the political difficulties involved in changing their laws or constitution or in initiating proceedings, and may prove attractive for others.") This description of France's approach indicates that it may be viewed as a workable and acceptable solution. For further support of this approach, see *id*. at 100 (noting that "the structure of the admissibility provisions raises the possibility that cases will be admissible before the Court when an amnesty bars prosecution at the national level."). See also Darryl Robinson, *The Rome Statute and Its Impact on National Laws*, in THE ROME STATUTE OF THE INTERNATIONAL CRIMINAL COURT: A COMMENTARY, VOLUME II 1849, 1855-56 (Antonio Cassese, et al., eds., 2002) [Reproduced in the accompanying notebook III at Tab 23]; See also Helen Duffy, *National Constitutional Compatibility and the International Criminal Court*, 11 DUKE J. COMP. & INT'L L. 5, 9-13 (2001) (describing the approach of the French government and outlining the approaches of other nations) [Reproduced in the accompanying notebook V at Tab 50]. For a discussion of the adjustment of national jurisdictions to the ICC, see generally Lieutenant Colonel Michael A. Newton, *Comparative Complementarity: Domestic Jurisdiction Consistent with the Rome Statute of the International Criminal Court*, 167 MIL. L. REV. 20 (2001) [Reproduced in the accompanying notebook V at Tab 9].

[118] BROOMHALL, *supra* note 45, at 139 [Reproduced in the accompanying notebook III at Tab 21].

[119] The fundamental purpose of the ICC is to end impunity. For a succinct statement of the ICC's purpose in light of the complementarity principle see Bos, *infra* note 131, at 26 [Reproduced in the accompanying notebook IV at Tab 33]. For a more general statement, see Schabas, *supra* note 57, at 204 (stating that "the Court was created precisely because States do not assume their responsibilities [of prosecution]") [Reproduced in the accompanying notebook IV at Tab 33]. For an overview of comments made to the Preparatory Committee by states representatives, see UN Press Release L/2779 of 8 April 1996, *available at* http://www.un.org/News/Press/docs/1996/19960408.l2779.html [Reproduced in the accompanying notebook VI at Tab 39].

governments virtually ensure that if the ICC does not prosecute then there will be no prosecution at all. If these results are acceptable, then they lend support to the practice of preferring ICC jurisdiction by waiving rights under the complementarity regime by casting it in a much better light. There is, after all, a strong showing by Uganda and DRC of an intent to deliver criminals to justice – not to grant them immunity.

**2. Concerns of States Parties**

States delegations' discussions on the subjects of complementarity and admissibility have been labored and unclear.[120] However, it is well established that the desire underlying negotiations has been to create an effective court. If the Court is to be effective, it must have the ability to address crimes of concern to the international community where national jurisdictions have failed appropriately do so.[121]

Concerning the ICC's jurisdiction, some states favored the model of the ad hoc tribunals, which have a general primary jurisdiction over national courts.[122] Small states, especially, felt that a strong international tribunal could successfully prosecute where the judicial systems of small nations were easily overwhelmed or intimidated.[123]

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[120] MISKOWIAK, *supra* note 44, at 50 [Reproduced in the accompanying notebook IV at Tab 32]. For an examination into the lack of clarity concerning the meaning of complementarity and its implications, see generally Madeline Morris, *Complementarity and Conflict: States, Victims, and the ICC*, in THE UNITED STATES AND THE INTERNATIONAL CRIMINAL COURT 195 (Sarah B. Sewall & Carl Kaysen, eds., 2000) [Reproduced in the accompanying notebook IV at Tab 37].

[121] *Id*. See also, Amnesty International, *The International Criminal Court: Making the Right Choices – Part V: Recommendations to the diplomatic conference*, May 1998, AI Index: IOR 40/010/1998, *available at* http://web.amnesty.org/library/index/engior400101998, at 23 (urging that national amnesties must not impede or block the power of the ICC to bring people to justice) [Reproduced in the accompanying notebook VI at Tab 21].

[122] MISKOWIAK, *supra* note 44, at 41 [Reproduced in the accompanying notebook IV at Tab 32].

[123] Arsanjani, *supra* note 91, at 24 n.13 ("In the original request for the establishment of an international criminal court, Trinidad and Tobago's concern was the inadequacy of national criminal laws and jurisdiction to deal with drug trafficking. See Letter from the Permanent Representative of Trinidad and Tobago, *supra* note 1. Some of the concerns of smaller states were that in relation to certain crimes such as

Other states opposed primary jurisdiction, believing that the ICC should have no part in situations where States were prosecuting in good faith.[124] Yet, the strengthened complementarity regime, reflected in the Article 18 safeguards, provides a number of procedural obstacles that a State may seek to use in bad faith.[125] Furthermore, "there is a risk that the actions of a State which is genuinely pursuing justice may be misunderstood by the Prosecutor or otherwise not found sufficient by him or her.[126]

"Opponents of the ICC argue that the greatest danger of the ICC lies in its broad jurisdiction and the possible expansion and abuse of that jurisdiction."[127] However, at the

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drug trafficking and terrorism, the fragile national courts could not withstand the power and terror that those involved in such activities could bring about, which could destabilize even governments themselves. An international criminal court could replace national courts on such prosecutions and remove the pressure from those courts. This idea was not acceptable to the great majority of the states negotiating the statute.") [Reproduced in the accompanying notebook V at Tab 41]. Contrast with the cautionary comments of Justice Louise Arbour as presented in SCHABAS, *supra* note 30, at 86-87 (discussing the imbalance perceived in the prospective function of the complementarity regime, arguing that "the regime would work in favor of rich, developed countries and against poor countries," and stating that "[c]ertainly, there is a danger that the provisions of Article 17 will become a tool for overly harsh assessments of the judicial machinery in developing countries.") [Reproduced in the accompanying notebook IV at Tab 36].

[124] MISKOWIAK, *supra* note 44, at 42 [Reproduced in the accompanying notebook V at Tab 32].

[125] Kaul, *infra* note 132, at 60 (noting that the "so-called" safeguard provisions of Article 18 were "forcefully pushed into the Statute" by the United States delegation and actually served only to weaken the Court and to create more potential problems) [Reproduced in the accompanying notebook IV at Tab 33].

[126] John T. Holmes, *Jurisdiction and Admissibility*, in ROY S. LEE, ET AL., EDS., THE INTERNATIONAL CRIMINAL COURT: ELEMENTS OF CRIMES AND RULES OF PROCEDURE AND EVIDENCE 321, 337 (2001) [Reproduced in the accompanying notebook IV at Tab 28]. For a general discussion of the issues implied by Article 17, see *id*. at 334-37.

[127] MAOGOTO, *supra* note 30, at 241. (noting that "the ICC can exercise jurisdiction over any national of any State-Party even when in the territory of a non-State Party, as well as over any individuals, regardless of nationality.") [Reproduced in the accompanying notebook IV at Tab 30]; *id*. at 242 (noting that the Rome Statute "may violate national sovereignty by indirectly allowing jurisdiction over the nationals of States that choose not to become State Parties.") When viewed in this light, the principle of complementarity appears even more so to be a protection of national sovereignty, a right to be exercised by a state to recover jurisdiction at its own discretion. For a discussion of the extent to which an international tribunal with primacy may weaken state sovereignty, see Maogoto's analysis of the ICTY's Blaskic case, MAOGOTO, *supra* note 30, at 192-96 [Reproduced in the accompanying notebook IV at Tab 30]. Contrast with Louise Arbour and Morten Bergsmo, *Conspicuous Absence of Jurisdictional Overreach*, in REFLECTIONS ON THE INTERNATIONAL CRIMINAL COURT. ESSAYS IN HONOR OF ADRIAN BOS. 129, 129-140 (Herman A.M. von Hebel, Johan G. Lammers and Jolien Schukking, eds)(1999) (arguing that fears of

Rome Conference, about 80 percent of the delegations supported a broader form of jurisdiction than was eventually adopted.[128]

In the Preparatory Committee, states made proposals on the breadth and definition of the Court's jurisdiction. France's proposal, which did not meet with much approval, suggested a more detailed delineation of the Court's reach.[129] France's proposal "would have made it quite hard for the Court to prove jurisdiction, as it would have had to satisfy itself that an investigation was '*manifestly* intended to relieve the person concerned of criminal responsibility,' or that a conviction or acquittal was the result of national authorities 'evading the rule of international law for the *manifest* purpose' of relieving the persons concerned of criminal responsibility (emphasis added). This would have been too high a threshold."[130]

The main argument of states promoting a narrowly defined complementarity regime is that of protecting state sovereignty. When they speak of the primacy of national jurisdictions, they do so in terms of protecting a State's *right* to prosecute (rather than its *duty* to prosecute).[131] Limitations were placed upon the power of the ICC in a large part

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jurisdictional overreach of the ICC are simply unfounded with regard to the Statute's jurisdictional regime) [Reproduced in the accompanying notebook III at Tab 24].

[128] Kaul, *infra* note 132, at 61 (explaining that the South Korean proposal allowing broader ICC jurisdiction would have made the Court more effective, allowing prosecution of crimes committed in the civil wars of non-Party States) [Reproduced in the accompanying notebook IV at Tab 33].

[129] MISKOWIAK, *supra* note 44, at 48 [Reproduced in the accompanying notebook IV at Tab 32]. See UN Doc. A/AC.249/L.3, *Draft Statute on the International Criminal Court: Working paper submitted by France*.

[130] MISKOWIAK, *supra* note 44, at 48-49 [Reproduced in the accompanying notebook IV at Tab 32].

[131] Adrian Bos, *The Experience of the Preparatory Committee*, in THE ROME STATUTE OF THE INTERNATIONAL CRIMINAL COURT: A CHALLENGE TO IMPUNITY 17, 25 (Mauro Politi & Giuseppe Nesi eds., 2001) (noting the paper submitted for discussion by the United Kingdom, "in which was emphasized the primary *right* [emphasis added] of states to bring criminals to justice, the need for integrating the concept of complementarity in all aspects of state cooperation and an exceptional and very restricted role for the ICC.") [Reproduced in the accompanying notebook IV at Tab 33]; MISKOWIAK, *supra* note 44, at 50

to satisfy the sovereignty concerns of the United States, which ultimately voted against the statute and continues to oppose the Court in its present form.[132] Nevertheless, state sovereignty concerns are legitimate, especially where the integrity of national criminal justice systems is at issue.[133]

### 3. Purpose of the Principle of Complementarity

The ILC's commentary to the 1994 ILC Draft Statute shows the purpose of the ICC to be fundamentally linked to the concept of complementarity.[134] The commentary explains that the purpose of the Court is to provide for a fair trial where action by another jurisdiction would be "unavailable" or "ineffective."[135] The corresponding purpose of complementarity is to give states the power to limit the Court's jurisdiction to those

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[Reproduced in the accompanying notebook IV at Tab 32]; See also Lee, *infra* note 137, at 758 (acknowledging the reality that most states wish to preserve their traditional jurisdiction) [Reproduced in the accompanying notebook V at Tab 7]. Contrast with *Making the Right Choices, Part I*, *supra* note 44, at 4 (stating that the emphasis of a state's right to prosecute over its duty to do so is a "fundamental mischaracterization of the concept of complementarity") [Reproduced in the accompanying notebook VI at Tab 19].

[132] Summers, *supra* note 31, at 88 [Reproduced in the accompanying notebook V at Tab 11]; See also Hans-Peter Kaul, *The International Criminal Court: Jurisdiction, Trigger Mechanism and Relationship to National Jurisdictions*, in THE ROME STATUTE OF THE INTERNATIONAL CRIMINAL COURT: A CHALLENGE TO IMPUNITY 121, 62 (Mauro Politi & Giuseppe Nesi eds., 2001) (noting that the delegation of the United States won a great number of important concessions at the Rome Conference that had a limiting effect upon the ICC and claiming that the reason other delegations, specifically Germany, accepted a weaker ICC was solely for the purpose of ensuring that the United States would ratify the treaty) [Reproduced in the accompanying notebook IV at Tab 33].

[133] Leila Sadat Wexler, *Committee Report on Jurisdiction, Definition of Crimes, and Complementarity*, 25 DENV. J INT'L L. & POL'Y 221, 232 (1997) (considering the concerns of state sovereignty in light of the predicted inevitability of a *supra*national character for the ICC) [Reproduced in the accompanying notebook V at Tab 13].

[134] MISKOWIAK, *supra* note 44, at 40 [Reproduced in the accompanying notebook IV at Tab 32].

[135] ILC Commentary to Article 1, UN Doc. A/49/10, *Draft Statute for an International Criminal Court with commentaries, Report of the International Law Commission on the Work of Its Forty-sixth Session*, UN GAOR, 49th Sess., Supp. No 10, p. 45 [Reproduced in the accompanying notebook I at Tab 1]; SADAT, *supra* note 59, at 119 (noting that the goal of the framers was to find a "neutral and principled manner to determine what kind of cases [the ICC] should hear" and that the goal was realized in the determination that the ICC should hear those cases in which states were either unwilling or unable to exercise jurisdiction) [Reproduced in the accompanying notebook IV at Tab 34].

circumstances, thus weakening the Court[136] and preventing political manipulations in the process.[137] The concept has become a foundation of the Rome Statute,[138] and it has arguably created a "complementary transnational legal order for the prosecution of international crimes."[139]

## V. THE CONCEPT OF WAIVER BY A STATE PARTY OF THE REQUIREMENTS OF COMPLEMENTARITY.

### A. The Rome Statute's Silence on the Use of Waiver by States Parties

The Rome Statute does not address the issue of waiver of the complementarity regime by States Parties.[140] The delegates generally agreed that the issue should be left out of the Statute itself and resolved later in the Rules of Procedure and Evidence.[141] As

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[136] Kaul, *supra* note 132, at 60 ("'Strengthened complementarity' sounds positive – in reality it means a considerable weakening of the Court.") [Reproduced in the accompanying notebook IV at Tab 33].

[137] Roy S. Lee, *An Assessment of the ICC Statute*, 25 FORDHAM INT'L L. J. 750, 757 (2002) (explaining that limits on the Court's jurisdiction are there, in part, to prevent political maneuvering) [Reproduced in the accompanying notebook V at Tab 7]; see also Duffy, *supra* note 117, at 31 (discussing the Rome Statute's opportunities to challenge admissibility as a safeguard against unwarranted prosecution) [Reproduced in the accompanying notebook V at Tab 50]. For a discussion of the framing process of the Rules of Procedure and Evidence regarding challenges to jurisdiction or admissibility, see Holmes, *supra* note 126, at 344-47 [Reproduced in the accompanying notebook IV at Tab 28].

[138] *Cooperation with States*, *supra* note 44, 66 ("Complementarity goes to the heart of the regime of the Statute. The Diplomatic Conference was unanimous in its view that the ICC should strengthen and complement, not replace national investigation and prosecutions") [Reproduced in the accompanying notebook V at Tab 44].

[139] For an overview, see James Crawford, *The Drafting of the Rome Statute*, in FROM NUREMBERG TO THE HAGUE: THE FUTURE OF INTERNATIONAL CRIMINAL JUSTICE 109, 109-56 (Philippe Sands ed., 2003) (discussing the drafting of the Rome Statute, with a focus on the underlying issues of institutional structure, legitimacy, and political acceptance) [Reproduced in the accompanying notebook IV at Tab 35]. For an outline of the historical background of the ICC's development, see KIM, *supra* note 108, at 6-16 [Reproduced in the accompanying notebook IV at Tab 26].

[140] KIM, *supra* note 108, at 260 ([T]he Statute including Article 17 does not address the question of the waiver of the requirements of complementarity. The question of the waiver of the requirements of complementarity relates to such questions as "if a State chooses not to proceed and prefers that the Court investigates a case, can it waive the requirements of complementarity?") [Reproduced in the accompanying notebook IV at Tab 26]; John T. Holmes, *The Principle of Complementarity*, in ROY S. LEE, ED., THE INTERNATIONAL CRIMINAL COURT: THE MAKING OF THE ROME STATUTE, ISSUES NEGOTIATIONS RESULTS 41, 78 (1999) [Reproduced in the accompanying notebook IV at Tab 29].

[141] See note 165.

yet, the Rules of Procedure and Evidence do not address the issue of waiver.

### B. The Duty of Nations to Prosecute under International Law

There is a general agreement that nations have the primary obligation to prosecute international crimes.[142] The principle of *aut dedere aut judicare* is contained in many treaties, requiring a State "which has hold of someone who has committed a crime of international concern either to extradite the offender to another State which is prepared to try him or else to take steps to have him prosecuted before its own courts."[143] Notably, if

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[142] MISKOWIAK, *supra* note 44, at 40 [Reproduced in the accompanying notebook IV at Tab 32]; compare Michael P. Scharf and Nigel Rodley, *International Law Principles on Accountability*, in POST CONFLICT JUSTICE 89, 91 (M. Cherif Bassiouni, ed.)(2002) (stating that there may be a legal obligation to prosecute regardless of the politics of the situation) [Reproduced in the accompanying notebook III at Tab 20]. Compare the concept of complicity in Andrew Clapham, *Issues of Complexity, Complicity and Complementarity*, in FROM NUREMBERG TO THE HAGUE: THE FUTURE OF INTERNATIONAL CRIMINAL JUSTICE 30, 59-60 (Philippe Sands ed., 2003) (acknowledging a general expectation "on all authorities that they should take up human rights cases with the authorities" and that "there is something culpable about failing to exercise influence in such circumstances.")(claiming that states have an unwritten duty to all members of the international community to protect against violent attacks on human rights) [Reproduced in the accompanying notebook IV at Tab 35]. Compare concepts of state responsibility and failure to act in M. CHERIF BASSIOUNI, A DRAFT INTERNATIONAL CRIMINAL CODE AND DRAFT STATUTE FOR AN INTERNATIONAL CRIMINAL TRIBUNAL 95-99 (1987) [Reproduced in the accompanying notebook III at Tab 18]; Abram Chayes and Anne-Marie Slaughter, *The ICC and the Future of the Global Legal System*, in THE UNITED STATES AND THE INTERNATIONAL CRIMINAL COURT 237, 240 (Sarah B. Sewall & Carl Kaysen eds., 2000)("The existence of exclusive domestic jurisdiction is now increasingly conditional on conformity with international rules and principles, especially human rights norms") [Reproduced in the accompanying notebook IV at Tab 37]; CASSESE, *infra* note 162, at 302 ("[I]t cannot be denied that at least with regard to the most odious international crimes such as genocide and crimes against humanity, there exists a general obligation of international *co-operation* for their prevention and punishment.") [Reproduced in the accompanying notebook III at Tab 22].

[143] M. CHERIF BASSIOUNI AND EDWARD M. WISE, AUT DEDERE AUT JUDICARE: THE DUTY TO EXTRADITE OR PROSECUTE IN INTERNATIONAL LAW 3 (1995) [hereinafter referred to as Aut Dedere Aut Judicare] [Reproduced in the accompanying notebook III at Tab 17]. See also CASSESE, *infra* note 162, at 302 ("[O]ne could argue that in those areas where *treaties* provide for such an obligation, a corresponding customary rule may have emerged or be in the process of evolving. Clearly, as soon as it may be proved that customary rules have formed, they will reinforce for all the contracting parties the obligations to the same effect laid down in the aforementioned Conventions.") [Reproduced in the accompanying notebook III at Tab 22]; MAOGOTO, *supra* note 30, at 187 [Reproduced in the accompanying notebook IV at 30]. For an historical overview, see KIM, *supra* note 108, at 6-16 (tracing the development of international tribunals in the context of world events) [Reproduced in the accompanying notebook IV at Tab 26]. For a general discussion of the principle of *aut dedere aut judicare* see M. CHERIF BASSIOUNI, INTRODUCTION TO INTERNATIONAL CRIMINAL LAW 334-46 (2003) [hereinafter BASSIOUNI, INTRO. TO ICL](outlining the origin and rationale of the principle of *aut dedere aut judicare* as well as the nature and content of the obligation of States to prosecute or to extradite) [Reproduced in the accompanying notebook III at Tab 19]; M. CHERIF BASSIOUNI, A DRAFT INTERNATIONAL CRIMINAL CODE AND DRAFT STATUTE FOR AN INTERNATIONAL

a state would shield a person accused of a political offense, there is growing international pressure on that state to prosecute.[144]

The ICC is presented as a court that should not serve as a substitute "for procedures that national courts are legally obliged to undertake on their own."[145] The Rome Statute anticipates, as evidenced by the complementarity regime, that national courts will bear the larger part of the burden of combating impunity and that the ICC will become involved only where states are unwilling or genuinely unable to act themselves, remembering that "it cannot be expected that the ICC will have the resources to try more than a very limited number of cases."[146]

Because effective prosecution is a key goal, states wishing to exercise their right to prosecute international crimes under the principle of complementarity must have legislation in place to that effect.[147] Nevertheless, it should be noted that the principle of complementarity, as contemplated in general international criminal law, does not directly

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CRIMINAL TRIBUNAL 190 (1987) (providing commentary to Draft International Criminal Code Part III Article IV: Aut Dedere Aut Judicare) [Reproduced in the accompanying notebook III at Tab 18]. See generally, Colleen Enache-Brown, *Universal Crime, Jurisdiction and Duty: The Obligation of Aut Dedere Aut Judicare in International Law* 43 MCGILL L.J. 613 (1998) [Reproduced in the accompanying notebook V at Tab 1].

[144] GEERT-JAN ALEXANDER KNOOPS, SURRENDERING TO INTERNATIONAL CRIMINAL COURTS: CONTEMPORARY PRACTICE AND PROCEDURES (2002) 312-47 ("there is a growing trend in international law to give effect to the maxim *aut dedere aut judicare*, implying that if a State wishes to shield someone from extradition on the basis of the political offense exception, it should, as Bassiouni notes, assume the duty to prosecute.") [Reproduced in the accompanying notebook IV at Tab 27]. However, this principle is not established as a mandatory rule. See note 165.

[145] MISKOWIAK, *supra* note 44, at 40 [Reproduced in the accompanying notebook IV at Tab 32].

[146] BROOMHALL, *supra* note 45, 115 [Reproduced in the accompanying notebook III at Tab 21].

[147] Danner, *supra* note 38, at 527 n. 129 ("In order to take advantage of the complementarity regime, however, states must enact domestic legislation allowing them to investigate and prosecute the crimes within the ICC's jurisdiction. States must also enact legislation that allows them to cooperate with the Court on investigative and evidentiary matters.") [Reproduced in the accompanying notebook V at Tab 49]. This wording emphasizes the general assumption that states will feel it is to their advantage to bar ICC jurisdiction.

presuppose a state's duty to prosecute international crimes.[148]

The Rome Statute itself "does not require States to prosecute individuals suspected of committing crimes within the Court's jurisdiction."[149] This is true even though the preamble calls this a duty.[150] The incentive for States themselves to prosecute is largely to maintain their integrity, for "[i]t is to be hoped that States will be embarrassed when the Court attempts to exercise jurisdiction under the principle of complementarity."[151]

State responsibility is urged as a general rule. For example, when the ICTY was established in 1993, the national courts of the region were urged by the U.N. Secretary-General to prosecute the alleged perpetrators despite the primacy of the tribunal.[152] Furthermore, the president of the ICTY, Antonio Cassese, has stressed an obligation of nations, under customary law, to prosecute serious offenses or to extradite the accused persons to a country that will exercise jurisdiction.[153] Cassese pointed out that the ICTY (which does have primary jurisdiction) is simply incapable of trying every crime and thus that national prosecutions should provide much needed assistance by shouldering part of

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[148] BASSIOUNI, INTRO. TO ICL, *supra* note 143, at 17 ("If complementarity is to be understood as an outcome of a *civitas maxima* which places upon states certain international obligations, such as the duty to prosecute or to extradite, because its goal is accountability, then surely the substantive and procedural norms of ICL, as well as its enforcement techniques must become, at least, more harmonized.") [Reproduced in the accompanying notebook III at Tab 19].

[149] Schabas, *infra* note 57, at 204 [Reproduced in the accompanying notebook IV at Tab 33].

[150] *Id.*

[151] Schabas, *infra* note 57, at 204 [Reproduced in the accompanying notebook IV at Tab 33]. *Accord* SUNGA, *infra* note 162, at 256 (acknowledging that "a State typically shows interest in prosecuting a crime only where the crime poses a direct threat to that State, in which case other domestic jurisdictional bases are usually available") [Reproduced in the accompanying notebook IV at Tab 39]

[152] MISKOWIAK, *supra* note 44, at 41 [Reproduced in the accompanying notebook IV at Tab 32].

[153] *Id.*

the case load.[154] Likewise, if not more so, the ICC it subject to substantial budget constraints.[155]

Representatives of many nations have given their opinions on the matter. Some intend that the ICC, in principle, should not be involved until there is no other option.[156] There are a number of reasons why the primacy of national jurisdiction and a narrowly defined complementarity regime are favorable. First, it is important that States recognize their duty to prosecute crimes under international law.[157] Second, national trials are less expensive, less complicated due to familiarity with local rules and spoken languages, and less traumatizing for the accused.[158] Third, it is likely that the availability of witnesses and evidence will be better for national courts.[159] Fourth, national prosecution may have a greater deterrent effect due to local media coverage and the closer proximity of the case

[154] MISKOWIAK, *supra* note 44, at 41, (proposing that the leaders and commanders be tried before the ICTY and that the others be tried by national courts). Contrast with the ICTY Statute, art. 9 and the ICTR Statute, art. 8 (providing for international tribunals with primacy over national jurisdictions and intending for concurrent jurisdiction between the two) [Reproduced in the accompanying notebook IV at Tab 32].

[155] See generally, Ingadottir and Romano, *supra* note 46, at 47-110 [Reproduced in the accompanying notebook III at Tab 25]. In addition, see SUNGA, *infra* note 162, at 289-307 ("discussing issues about the ICC in light of the ICTY and the ICTR") [Reproduced in the accompanying notebook IV at Tab 39]. See also 2004 Budget, *supra* note 46 [Reproduced in the accompanying notebook VI at Tab 40]; 2005 Budget, *supra* note 46 [Reproduced in the accompanying notebook VI at Tab 41].

[156] MISKOWIAK, *supra* note 44, at 40 [Reproduced in the accompanying notebook IV at Tab 32]. See also UN Press Release GA/L/3011 of 31 October 1996 (representative of Poland states: "What we are trying to do is to assist national systems and complement them if necessary, and only if necessary.") [Reproduced in the accompanying notebook VI at Tab 36]. Statement of the government of Uganda, excerpted in THE INTERNATIONAL CRIMINAL COURT: THE MAKING OF THE ROME STATUTE 630-31 (Roy S. Lee, ed., 1999) (placing great emphasis on the importance of the complementarity principle) [Reproduced in the accompanying notebook IV at Tab 29]; Statement of the government of the Democratic Republic of Congo, excerpted in THE INTERNATIONAL CRIMINAL COURT: THE MAKING OF THE ROME STATUTE 589-90 (Roy S. Lee, ed., 1999) [Reproduced in the accompanying notebook IV at Tab 29].

[157] MISKOWIAK, *supra* note 44, at 42 [Reproduced in the accompanying notebook IV at Tab 32].

[158] *Id.*

[159] *Id.*

to the public.[160]

However, there are a number of counterarguments supporting ICC involvement. The existence of a strong international court will strike a crucial blow to impunity.[161] Also, it will be a large incentive for States to meet their duty to prosecute international crimes;[162] thus, where a state decides not to prosecute, it is unlikely to be the result of an underdeveloped or lax sense of duty.[163] Furthermore, it is possible that an international body might better assure the humane treatment of the accused[164] and better protect against sham prosecutions.[165]

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[160] MISKOWIAK, *supra* note 44, at 42. (noting the argument that an international prosecution will not be as squarely in the public eye and will, thus, have a weaker deterrent effect) [Reproduced in the accompanying notebook IV at Tab 32]. This view conflicts somewhat with one of the reasons Uganda and DRC want the ICC to be involved – they would like to raise the level of international attention to their crises. Such a political goal may be said to actually lessen the crucial deterrent effect for criminals in these nations.

[161] *Accord*, Statement of the government of Poland excerpted in THE INTERNATIONAL CRIMINAL COURT: THE MAKING OF THE ROME STATUTE 614-15 (Roy S. Lee, ed., 1999) (stating that while states should have primary jurisdiction, the existence of the ICC means that "a lack of political will or inability to react to gross violations of international law would no longer mean impunity for the perpetrators of the most egregious crimes) [Reproduced in the accompanying notebook IV at Tab 29].

[162] The customary international duty to prosecute stands to gain strength from the support of ICC. Compare LYAL S. SUNGA, THE EMERGING SYSTEM OF INTERNATIONAL CRIMINAL LAW: DEVELOPMENTS IN CODIFICATION AND IMPLEMENTATION 255 (1997) (stating "it is doubtful that the principle '*aut dedere, aut judicare'* reflects a mandatory obligation of international customary law.")[Reproduced in the accompanying notebook IV at Tab 39]; ANTONIO CASSESE, INTERNATIONAL CRIMINAL LAW 302 (2003) ("Besides there being no customary rule with a general content, no general international principle can be found that might be relied upon to indicate that an obligation to prosecute international crimes has crystallized in the international community.") [Reproduced in the accompanying notebook III at Tab 22].

[163] MISKOWIAK, *supra* note 44, at 42 [Reproduced in the accompanying notebook IV at Tab 32].

[164] *Id.*

[165] *Id.*, at 43 (pointing out also that "to avoid new disturbances in a divided country, it could in some cases be an advantage if an international court (with the impartiality it would ideally be trusted to have) could deal with cases concerning leaders, who might still be popular with some parts of the population. In such cases, justice would not only be done but would also appear to be done, which might make the result more readily acceptable," *Id* at 43), (noting further the example of the Leipzig trials, which is a prime example of the failure of a national jurisdiction to handle a situation impartially; at Leipzig, Germany promised to turn over 896 alleged war criminals, yet failed to do so; of the 901 cases held, there were only 13 convictions, and when the convicted prisoners escaped, the prison wardens were publicly congratulated, *Id*. at 44) [Reproduced in the accompanying notebook IV at Tab 32]..

## C. The Acceptability of Waiver

The concept of waiver received passing attention in the 1994 ILC Draft Statute and was disregarded entirely at the Rome Conference.[166] It was generally believed that the issue should be addressed not in the Rome Statute itself but in the Rules of Procedure and Evidence.[167] It follows, arguably, that the acceptability of waiver was therefore favorable as a general principle, although the details were to be worked out procedurally and approved by the Assembly of States Parties at a later date.[168] Although the Rules of Procedure and Evidence do not as yet address the issue, there has been no official rejection of waiver, and the rules of jurisdiction and admissibility impliedly allow it.

Bruce Broomhall notes that the ICC may find a case admissible where a State prefers that the ICC exercise its jurisdiction,[169] in line with the *inadmissibility* requirements of Article 17. Furthermore, international criminal law recognizes the transfer of criminal proceedings based on a theory that the transferee represents the best

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[166] KIM, *supra* note 108, at 260 ("Even though this question was raised during the Preparatory Committee and was included as a footnote in the Draft Statute, it was not considered at the Conference, as many delegations believed that it should be addressed in the Rules of Procedure and Evidence.") [Reproduced in the accompanying notebook IV at Tab 26]; Holmes, *supra* note 140, at 78 (1999) [Reproduced in the accompanying notebook IV at Tab 29].

[167] See note 166.

[168] Philippe Kirsch, Q.C., *The Work of the Preparatory Commission*, in ROY S. LEE, ET AL., EDS., THE INTERNATIONAL CRIMINAL COURT: ELEMENTS OF CRIMES AND RULES OF PROCEDURE AND EVIDENCE xlv, l (2001) (explaining that the Rules of Procedure and Evidence were seen by the delegations at the Rome Conference as a follow up, to cover the issues that need not be included in the Statute for the purposes of its adoption and stating that the intention was to "relegate certain detailed procedures to the Rules…but to require that the Rules be adopted by the Assembly of States Parties [by a 2/3 majority] in order to give States Parties the opportunity to give their views on both the content and the scope of the Rules") [Reproduced in the accompanying notebook IV at Tab 28].

[169] *Cooperation with States*, *supra* note 44, at 66 ("Only where a State is unwilling or unable genuinely to proceed, or where it prefers that the Court act or is otherwise inactive, would the ICC be able to rule a case admissible") [Reproduced in the accompanying notebook V at Tab 44].

chance for the administration of justice.[170]

In the present circumstances regarding Uganda and DRC, the ICC may be vulnerable to accusations of politicized prosecution.[171] The situations in Uganda and DRC should thus be carefully examined. The local political situation should be a factor taken into account.[172] Commentators urge that all criminal prosecutions be conducted with an acute sensitivity to the conditions within a state; otherwise, the overall effect of judicial intervention may be to incite more violence.[173]

Because political implications are present in any prosecution, it is possible that political reasons for prosecution should be evaluated with regard to whether or not they are "inconsistent with an intent to bring the person concerned to justice."[174]

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[170] BASSIOUNI, INTRO. TO ICL, *supra* note 143, at 358 (recognizing that a state may waive its jurisdiction of another state for public policy reasons if the purpose is to best serve the interests of justice); *id*. at 359 (recognizing acceptability under international law where "the state relinquishing of jurisdiction is based on facts which render that forum not only less convenient, but less conducive to the best interests of justice in that particular case, whereas the state assuming jurisdiction does so on the basis of a nexus *to the case* [emphasis added] and / or to the parties") [Reproduced in the accompanying notebook III at Tab 19].

[171] See Zeidy, *infra* note 177, at 43 (presenting the possibility that Sudan might challenge the admissibility of the Ugandan situation before the ICC because the Sudanese government, allegedly, gave support to the rebel Ugandan group) [Reproduced in the accompanying notebook V at Tab 16]; compare Danner, *supra* note 38, at 538-39 (discussing the ICTY's possible investigation of NATO, which raised questions of politicized prosecution) [Reproduced in the accompanying notebook V at Tab 49]. For a discussion of the politics of international criminal tribunals, see William W. Burke-White, *A Community of Courts: Toward a System of International Criminal Law Enforcement*, 24 MICH. J. INT'L L. 1, 25-29 (2002) (suggesting that international criminal tribunals are vulnerable to being used for political reasons) [Reproduced in the accompanying notebook V at Tab 46]; GARY JONATHAN BASS, STAY THE HAND OF VENGEANCE: THE POLITICS OF WAR CRIMES TRIBUNALS 28-33 (2000) (discussing five common themes in the politics of war crimes tribunals) [Reproduced in the accompanying notebook III at Tab 19]; Andrew J. Walker, *When a Good Idea is Poorly Implemented: How the International Court Fails to be Insulated from International Politics and to Protect Basic Due Process Guarantees*, 106 W. VA. L. REV. 245, 274-76 (2004) (suggesting that the present complementarity regime is not narrowly defined enough to guard against a politicized ICC) [Reproduced in the accompanying notebook V at Tab 12].

[172] *Cf.* Ekkehart Muller-Rappard, *International Cooperation in Prosecution and Punishment*, in POST CONFLICT JUSTICE 913, 919 (M. Cherif Bassiouni, ed.)(2002) (stating that, with regard to prosecutorial cooperation between states, due consideration must be given to "the 'local realities,' if not the prevailing political situation) [Reproduced in the accompanying notebook III at Tab 20].

[173] Danner, *supra* note 38, at 531 [Reproduced in the accompanying notebook V at Tab 49].

[174] Rome Statute, *supra* note 1, art. 17(2) [Reproduced in the accompanying notebook I at Tab 13].

Commentators suggest that the fact that "the ICC allows various points of entry for politics may actually facilitate the attainment of even the most sacred of the ICC's mandates – the promotion of retribution and reconciliation in ways that preserve order and stability in the international community."[175]

### D. The Consequences of Waiver

The first possible consequence of waiver is a total bypass of the complementarity mechanism,[176] resulting in a lack of state challenge to ICC jurisdiction. Thus, the credibility of the Court is arguably heightened by a state's willingness to waive the complementarity requirements. This assumption might be undercut, however, if it becomes obvious that the Court is in fact swamped with complaints and will obviously not be able to attend to the case for some time, if at all. Waiver must not be a means by which a nation delays prosecution or seeks to deny it completely. An objection by an individual who stands accused thus hinges on the legitimacy of the ICC's establishment of jurisdiction, focusing on the legitimacy of the state referral itself and the state's questionable ability to fully and fairly prosecute.

## VI. CONCLUSION

The final delineation of the principle of complementarity is set forth in the Rome Statute as an assurance that the International Criminal Court will be a court of last resort. The original concept, allowing for a broader, more concurrent form of jurisdiction for the

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[175] Giulio M. Gallarotti & Arik Y. Preis., *Politics, International Justice, and the United States: Toward a Permanent International Criminal Court*, 4 ULCA J. INT'L L. & FOREIGN AFF. 1, 31 (1999) [Reproduced in the accompanying notebook V at Tab 3].

[176] Bleich, *supra* note 51, at 281 (asserting that "complementarity questions can arise only in cases where both the Court and a State have not only the capacity, but the *intent* to prosecute the same crime") [Reproduced in the accompanying notebook V at Tab 42]. The operation of complementarity requirements depends upon states with jurisdiction having the *intent* to prosecute.

Court, was narrowed mainly as a result of the fears of negotiators at Rome that the ICC might pose a threat to state sovereignty and that the ICC might be an easy way for states to assault each other politically. The principle of complementarity, in its present form, is therefore intended to protect the primacy of national jurisdictions over ICC jurisdiction.

Waiver of the right to prosecute by Uganda and DRC does not appear to violate the principle of complementarity. The situations presented by both states are of a serious nature, warranting prosecution. The situations were referred directly by states having both territorial and national jurisdiction, giving the ICC jurisdiction without the express need to further determine admissibility. Furthermore, the Rome Statute does not impose a duty to prosecute upon Uganda and DRC. Neither state's referral is an action that is inconsistent with a desire to bring about justice, and both states' judicial systems are seriously impaired. Given such factors, waiver of the right to prosecute is most likely acceptable.[177] Exercise of ICC jurisdiction would not be likely to have such consequences as would impair the purpose of the ICC or its principle of complementarity.

[177] For a detailed discussion of the acceptability of waiver, see generally 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*, 5 INTERNATIONAL CRIMINAL LAW REVIEW (forthcoming Feb. 2005) [Reproduced in the accompanying notebook V at Tab 16].